

City of South Lyon
Regular City Council Meeting
March 11, 2019

Mayor Pelchat called the meeting to order at 7:30 p.m.
Mayor Pelchat led those present in the Pledge of Allegiance.

Present: Mayor Pelchat, Councilmembers Kennedy, Kivell, Kurtzweil, Parisien, Richards and Walton
Also Present: City Manager Zelenak, Chief Sovik, Attorney Wilhelm, Chief Vogel and Clerk/Treasurer Deaton

MINUTES

Councilmember Kennedy stated on page 3 it should state he had spent some time with Ron Beason and Evelyn regarding the research on that.

CM 3-1-19 MOTION TO APPROVE MINUTES

Motion by Kivell, supported by Parisien
Motion to approve the minutes as amended

VOTE: MOTION CARRIED UNANIMOUSLY

BILLS

CM 3-2-19 MOTION TO APPROVE THE BILLS

Motion by Kennedy, supported by Kivell
Motion to approve the bills as presented

VOTE: MOTION CARRIED UNANIMOUSLY

ATTORNEY BILLS

CM 3-3-19 MOTION TO APPROVE THE ATTORNEY BILLS AS PRESENTED

Motion by Parisien, supported by Walton
Motion to approve the attorney bills as presented

VOTE: MOTION CARRIED UNANIMOUSLY

AGENDA

CM 3-4-19 MOTION TO APPROVE THE AGENDA

Motion by Parisien, supported by Kivell
Motion to approve the agenda as presented

VOTE: MOTION CARRIED UNANIMOUSLY

CONSENT AGENDA

Councilmember Walton stated the Pint-Sized Marathon is sponsored by Footprint Fitness, where she is a member at large, therefore she would like that removed from the consent agenda and added to the regular agenda under new business so she doesn't have to partake in the conversation.

3-11-19

CM 3-5-19 MOTION TO REMOVE THE PINT-SIZED MARATHON FROM THE CONSENT AGENDA

Motion by Walton, supported by Parisien

Motion to remove the Pint-Sized Marathon and add to New Business

VOTE: MOTION CARRIED UNANIMOUSLY

PUBLIC COMMENT

Josie Kearns of 329 Lyon Blvd and from the Cultural Arts Commission stated the opening reception for the Quilt and Fiber Art Show is this Friday from 7:00 p.m. to 9:00 p.m. There is needlepoint, children's work, cross stitching and many other things. It is going to be an amazing event, there are 55 pieces, and there are 26 applicants this time. It will be fabulous and she hopes everyone will attend.

DOWNTOWN

Mr. Donohue stated he was in Washington last week meeting with all 14 Michigan reps and their strategy was to keep the tools we need for economic development and other programs that are very important. Mr. Donohue stated they had great discussions and they have fact sheets and supporting information representing the programs we would like to use here in South Lyon. The 4 days he was there all expenses was paid for by the Michigan Downtown Association. As a public employee, he couldn't do any lobbying, but for the private organization, they can push strongly.

Mr. Donohue stated he spoke with the owner of 125/127/131 E Lake, Mr. Rowe and he is signing the contract to get the painting job done by the end of May. We want to congratulate him. Mr. Donohue stated the Spring Ladies Night Out will be in May, details will follow soon. He further stated there is a new City-wide event schedule promotional piece that will debut at the end of April. He further stated there will be a new brochure piece by himself and the City Manager.

Councilmember Parisien asked if he had an update on 110 Detroit. Mr. Donohue stated there were conversations the last 2 weeks. Attorney Wilhelm stated someone requested a viewing of it but he doesn't have any details. Councilmember Parisien stated it is in a beautiful location and she asked if they could keep her updated. Mr. Donohue stated the owner would like some closure and he will keep Council up to date. Councilmember Kivell asked who would like closure, the owner, is there a clock running for us to impose ourselves on them. Mr. Donohue stated of the 5 buildings, that seems to be the most active. The owner seems interested in closure. He further stated they have a fairly good offer on the table, but they are currently waiting but he isn't aware of why. Councilmember Kivell stated we hope someone is interested in the value of the architecture but he hopes we aren't having this same conversation a year from now.

NEW BUSINESS

1. Budget Amendments

Councilmember Kivell stated he isn't seeing an explanation why the changes are taking place. He would like to see where the numbers were pulled from. Bookkeeper Lori Mosier stated the numbers were the audited numbers. We are amending the revenues to match the audit. She stated Councilmember Kurtzweil mentioned that in Water and Sewer we went with net position, but Paul requested we go back to fund balance, which is why it shows a large number and what that is spendable cash that doesn't include restricted assets. If the net position is all the cash balances, restricted and otherwise, including

infrastructure and otherwise, we don't want people to think the larger number is our cash balance. Councilmember Kivell stated it is good to know what cash we can use freely, but it is also good to know where our restricted position is so we know how much money is sitting there. Councilmember Richards asked if the figures are written in stone going into our budget meetings. Ms. Mosier stated these are for the current fiscal year, and it will give us a better estimate by doing the adjustments this year. Ms. Mosier gives us a more accurate number to go with for our fund balance, it will show us where we are at the beginning of the new year. Councilmember Kivell asked what was the reason for going back to the fund balance. City Manager Zelenak stated he thinks it is important for people to see the net cash position instead of looking at all assets including infrastructure. We want to show what is available to purchase or make improvements, but it is important to show restricted funds and we can do that in the future. Councilmember Kurtzweil stated an additional reason and wisdom in what Paul did is because when you calculate the numbers based on net assets, the value of the assets can vary in the period they are evaluated, the assets themselves can increase or decrease themselves depending on if it is good or bad economic times. Whereas the cash balance is what you have available at the time, so the cash balance is more stable when you reflect it as a cash value rather than a net asset.

CM 3-6-19 MOTION TO APPROVE BUDGET AMENDMENTS

Motion to approve by Kivell, supported by Kennedy
Motion to approve budget amendments as amended

VOTE: MOTION CARRIED UNANIMOUSLY

2. Board of Ethics Recommendation on Councilmember Richards

Mayor Pelchat stated the Board of Ethics has met to discuss the October 31, 2018 incident involving Councilmember Richards and the Board of Ethics has issued a list of facts and findings that is included within your packet along with other items pertaining to the issues.

Councilmember Parisien stated she wanted to read into the record the report the Board of Ethics provided. It will be public information in the next couple of weeks and she wanted to read some of the key facts. She stated she wants everyone to know that the Board of Ethics is the second neutral party that met and analyzed that Councilmember Richards behavior was inappropriate. The Board met on February 19th and found that based on the foregoing the Board recommends that Councilmember Richards violated Section 2-73 of the Ethics Ordinance and express their disapproval for his conduct toward Councilmember Parisien and censure him for such conduct that undermines the respect for all Councilmembers, City Council and the City's administration and the City as a local governmental body and discourage him from such behavior in the future. The Board further said with this being said, they don't have the power to make the disciplinary recommendation, but the Board needs to send a message to the Council that they believe this was an egregious violation of the ethics ordinance and Council needs to take into consideration the time and effort they put into this conclusion.

Councilmember Kivell stated he has prepared a resolution that accomplishes that.

Councilmember Kennedy stated to begin, he would like to recognize the efforts of the South Lyon Board of Ethics and its Chair Members Suzanne Muscat and Angela Baker and Chairman Don Beagle. He appreciates the diligence and professionalism they displayed in their review of this issue; in establishing their findings; and in formulating their recommendation. Thank you for your help.

Councilmember Kennedy then read a prewritten statement to Councilmember Richards.

Since becoming a City Council member, your behavior, both in words and actions, has brought disgrace to this council and tarnished the reputation of this city and its residents. He believes the Board of Ethics accurately described the most recent event when they said your behavior has been an “egregious violation of the ethics ordinance.” He further stated to date it has cost the City well over \$12,000 to address the consequences of your actions here as well as those from January of 2018. To put that in perspective, \$12,000 is one-half of the estimated cost to repair the parking area at the historical village. If, for some reason, the City lacks the funds to address that item in next year’s budget, he will ask that you explain to Larry, Linda and the other members of the Historical Society that the City had to spend the money addressing the issues you have caused instead of fixing the parking lot. Your behavior has consequences. For someone who claims to want to help this city, your actions have certainly not done that. Sitting on this side of the table requires that you behave in a professional and responsible manner and it is far different than just addressing the council from the microphone out in the audience. He stated he hopes you will learn the difference, because the city cannot afford to continue paying to address your mistakes. The city, and its residents, deserve far better from you than they have received to date.

Councilmember Kurtzweil stated she wants to thank everyone that chatted with her on this matter. Ms. Kurtzweil spent the last 3-1/2 months examining all the information provided on this situation and found errors in the facts and findings and questions the credibility of the complaining witness. In her examination of the court proceedings, she found no reference to the layout of Ms. Parisien’s home. According to the to the South Lyon police report there was no evidence of weapons, which Ms. Parisien stated in her report. Ms. Kurtzweil stated that Ms. Parisien outright lied on the police report about evidence of a weapon at Councilmember Richards’ home. Ms. Kurtzweil also stated that the stories about Ryan Lare were untrue. Ms. Kurtzweil brought up a specific case from Oakland County about charges that were dismissed due to lies on the PPO application. She will enter this document into the record. Councilmember Parisien replied to Councilmember Kurtzweil’s comments. Ms. Parisien stated she is deeply offended by Councilmember Kurtzweil’s comments regarding her character and what was said about her by Councilmember Richards.

Councilmember Parisien expressed her thanks to the Board of Ethics members for all the time and effort they put into this issue.

Councilmember Kivell read the language for the censure which will be included with these minutes.

Councilmember Kurtzweil asked if Councilmember Parisien will get a vote. Mayor Pelchat asked the City Attorney, Tim Wilhelm, for his opinion. Attorney Wilhelm stated an issue of bias has been brought up but it is not specifically called out under conflict of interest in the Charter, rather the process and procedure and does not feel that it disqualifies Ms. Parisien. The Charter (Section 4.6) does indicate the Councilmember may not vote on an issue relating to their conduct. Ms. Parisien did offer to recuse herself. In this situation, Councilmember Richards would not be able to vote. Councilmember Kurtzweil feels there is a conflict of interest and would prefer her not to vote. Councilmember Parisien feels it is her duty as a council member to vote on this issue. City Attorney Wilhelm sees no direct conflict of interest and it would be the discretion of Councilmember Parisien to vote or not vote, as she sees fit.

CM 3-7-19 MOTION TO CENSURE COUNCILMEMBER RICHARDS

Motion to approve by Parisien, supported by Kivell

Motion to follow the recommendation by the Board of Ethics and censure Councilmember Richards

ROLL CALL VOTE:

Kurtzweil - Yes

Walton - Yes

Kennedy - Yes

Kivell - Yes

Parisien – Recuse

Pelchat – Yes

VOTE: MOTION PASSED

3. Road Closure - Pint Sized Marathon

Stephanie Rife, director of the Pint-Sized Marathon, said the race will follow the same route as the past three years. Councilmember Parisien said she has run this race with her family in the past and will do so this year and the group should keep up the good work. City Manager Zelenak said while the city cannot prevent others from being in the park during the race day the city can keep others from using the facility while the event is going on. Police Chief Sovik believes there is no conflict for this year's race day.

Motion by Parisien, supported by Kivell

Motion to approve road closure of Dorothy Street between Pontiac Trail and McMunn, McMunn between Dorothy and McHattie, McHattie between McMunn and Washington, Washington between McHattie and the Rail Trail on May 4, 2019 between 11:30 a.m. and 2:00 p.m.; and to approve the use of the Witch's Hat Depot, McHattie Park, and Rail Trails for the Pint-Sized Marathon.

CM 3-8-19 MOTION TO APPROVE THE PINT-SIZED MARATHON

VOTE: MOTION PASSED

Councilmember Walton abstained due to conflict of interest.

BUDGET

City Manager Zelenak confirmed that there will be a City Council Budget Workshop on Thursday, April 4, 2019 starting at 6 pm.

MANAGER'S REPORT

City Manager Zelenak said final budget numbers, revenues and expenditures will be provided to City Council the week before the meeting. The agenda will include all departments and council members will be able to ask questions. If there are questions before the meeting, people can be prepared to answer during the meeting. Budget and Agenda should be distributed the week before the meeting. March Board of Review has convened to hear appeals to 2019 Property Tax Values. The inflation rate for this year was 2.4%. Meetings will take place March 5, 11, 13. Councilmember Walton questioned the date of the Budget Workshop. She has a conflict with April 4. Councilmember Parisien said she is unable to attend the April 4 Budget Workshop.

Councilmember Walton questioned the City-Wide Garage Sales being the first weekend in May. Previously, she had asked for them to be the third weekend in May due to previous bad weather at the beginning of May. City Clerk Deaton said it is difficult to choose a weekend in May due to conflicts and there is no way to predict the weather.

PUBLIC COMMENT

Ryan Lare 716 Grand Court says he supports the censure against Councilmember Richards based on his behavior, but he also called Councilmember Parisien a liar based on statements she made on her police report.

COUNCIL COMMENTS

Councilmember Richards commented on the censure he received. He accepts the decision and he apologized to the city council and the public for the mess he has put everyone through. He admitted to the three main counts of the charges and admits that what he did was wrong. He would like everyone to move on with a fair and open mind.

Councilmember Richards commented that service workers are concentrating on five blocks around the city working on the new cable service, the housing units on McHattie Street are coming along, and both sides of Dixboro Road have construction barrels in preparation for the widening and paving of Dixboro. Councilmember Richards also commented on the new swimming pools that are going into Brookdale Plaza. A British Recreation firm is handling this construction.

Councilmember Kennedy stated he wants to let everyone know that Active Faith will have their Strike Out Hunger Event at the Pinz Bowling Center on Sunday, March 24 from 1-3 pm. So, get your team together and come on down for some fun, food and prizes and support Active Faith's Food Pantry and programs! You can get the all the details on their website or their Facebook Page "*Active Faith Community Services of South Lyon.*"

He stated he would also like to recognize those businesses from our community that have made donations to help make this event a success. This includes Perfect Floors, Martin's Hardware, Cook Automotive, Grande Trunke Home, the Lyon Book Den and Peter's True Value just to name a few.

He then recognized Fire Chief Vogel and members of the South Lyon Fire Department for their efforts in successfully obtaining two different grants. The first grant came from the Michigan Municipal Risk Management Authority to purchase a new Thermal Imaging Camera to aid in identifying the location of the fire and finding individuals in a building. He further stated the second grant was awarded by the State of Michigan and Home Depot for 216 Smoke Detectors and 36 Carbon Monoxide Alarms. The SLFD will have a Smoke Detector Blitz in the near future. If you are in need of a Smoke Detector please contact the South Lyon Fire Department at 248.437.2616. A detector will be provided to you at no charge. The units will be delivered by members of the South Lyon Fire Department who will also install and test the units. If you have a fresh 9v Alkaline Battery available, please provide it to the firefighter... otherwise one will be provided for you.

Also, if your Smoke Detectors / Carbon Monoxide Alarms are in working order, now is a good time to replace the batteries and check their operation. Make a note to do this each year when Daylight Saving Time begins and also when it ends. And finally, as a reminder, all smoke detectors that are over 10 years old should be replaced.

Councilmember Walton thanked the DPW workers for getting us through this horrible winter—they did a fantastic job.

Councilmember Parisien reminded Councilmember Richards that there is still a PPO in place and he must abide by ruling of the court. We are moving on but Councilmember Richards needs to be cognizant of his

behavior. Councilmember Parisien gave her thanks to the City Council, the Board of Ethics, and the citizens of South Lyon who supported her through this ordeal.

Councilmember Kurtzweil commented that Ms. Parisien does not have a lot of support in the community and she is the victim of trash talk, not a sexual assault, and other members of the council have been subject to trash talk.

Councilmember Kurtzweil encouraged everyone to attend the Cultural Arts Quilt Show on Friday. Many quilts will be on display. Thank you to Fire Chief Vogel for getting the grants for fire safety devices. Please support Active Faith and their upcoming Strike Out Hunger event on March 24.

Councilmember Kivell stated he is happy we are at the conclusion of this situation and hopes that we can move forward and get out of this negative light and build the community that we want here in South Lyon.

Mayor Dan Pelchat thanked students at Kent Lake and Sayre Elementary who sent thank you notes after his recent talk on Social Studies at their schools. Also, congratulations to the South Lyon Unified Hockey team who went on to win the Lakes Valley Conference Championship this year.

ADJOURNMENT

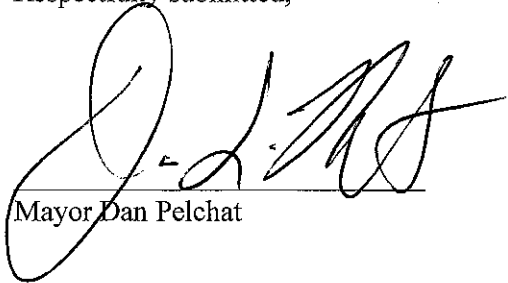
CM 3-9-19 MOTION TO ADJOURN

Motion by Kurtzweil, supported by Walton

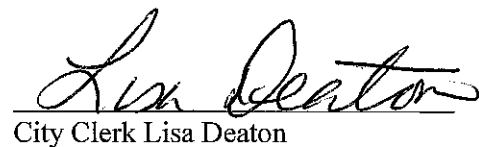
Motion to adjourn meeting at 8:40 pm.

VOTE: MOTION CARRIED UNANIMOUSLY

Respectfully submitted,



Mayor Dan Pelchat



City Clerk Lisa Deaton

Resolution For Council Censure

At a regular meeting of the City of South Lyon, Michigan, held at the City Hall on Monday March 11, 2019;

The following resolution was offered by member Parisien, and supported by member Kivell.

Whereas the City of South Lyon is governed by the City Charter adopted October 5, 1970, as amended and;

Whereas the Charter, as amended, provides for 6 City Council members to be elected for four year terms and the Mayor to be elected for two year terms and;

Whereas city elections take place in odd numbered years for half the council and the Mayor and;

Whereas at the election held November 7, 2017 Carl Richards won election to City Council, and on November 13, 2017 took the oath of office and was seated as a member of the South Lyon City Council and;

Whereas the City Council, at their November 26, 2018 meeting, requested the City's Board of Ethics to conduct an investigation to determine if a violation of the City's Ethics Ordinance by Councilman Carl Richards had occurred during an incident that took place on October 31, 2018 at a local business and;

Whereas the City's Board of Ethics unanimously voted a violation of Sec. 2-73 (a) had occurred by conduct in Councilman Richards private life that was unbecoming of an elected official and not above reproach and;

Whereas the City's Board of Ethics unanimously voted a violation of Sec. 2-73 (b) had occurred by Councilman Richards' conduct which has undermined respect for city officials and employees and for the city as a public body and;

Whereas the City Council agrees with the conclusions drawn by the Board of Ethics and agrees with their recommendation;

NOW, THEREFORE, BE IT RESOLVED, that the City Council of the City of South Lyon proclaims censure on Councilman Carl Richards.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

RENEE SWAIN,

Plaintiff,

Case No. 17-158765-CZ
Hon. Phyllis C. McMillen

v

MICHAEL MORSE, et al.,

Defendants.

OPINION AND ORDER

At a session of Court
Held in Pontiac, Michigan
On

DEC 05 2018

This matter is before the Court on Defendant Michael Morse's "Second Corrected Motion to Dismiss Plaintiff's Verified Complaint or, in the Alternative to Hold Plaintiff and Her Counsel in Contempt of Court and for Sanctions".

I. FACTS AND PROCEEDINGS

Plaintiff alleges that on April 6, 2017, while she and Defendant Morse ("Defendant") were in the process of taking a "selfie" photo together, Defendant grabbed her left breast and asked, "is this better?" Plaintiff filed the instant lawsuit on May 15, 2017. The claims against Defendant are battery and sexual assault; negligent and intentional infliction of emotional distress; civil conspiracy; and negligence/gross negligence/wanton and willful misconduct. Previously, the Court granted Defendant's

EXHIBIT B

motion for summary disposition as to the claims for negligent and intentional infliction of emotional distress, civil conspiracy, and negligence.

Defendant moves for dismissal and other sanctions on the grounds that Plaintiff and her counsel included false allegations in the Verified Complaint and that Plaintiff gave false testimony during her deposition. Defendant argues that Plaintiff's Verified Complaint is full of falsehoods, as revealed during her deposition when Plaintiff admitted she had no evidence to support many of the allegations and in some cases, admitted the allegations were untrue. Defendant also argues that Plaintiff committed perjury during her deposition when asked about her financial situation, specifically when she denied that her friend "Ken" deposited money into her checking account on a regular basis.

Plaintiff testified that in approximately 2014 she became a "new friend" of a man, "Ken". In late 2014, Plaintiff began receiving money from Ken, which she described as a "gift". She testified that Ken "help[ed]" her, would "buy [her] things", and would "give [her] extra money", but she denied that there was regular income from him. She testified the small amount of income she had received ended in 2016.

Specifically, during her deposition on January 5, 2018 Plaintiff gave the following testimony in response to questioning by defense counsel:

- Q. Am I correct that he was providing you with \$10,000 a month regular income, beginning February/March 2015?
- A. No. No.
- Q. Are you sure about that?
- A. I'm positive.
- Q. Uh-huh. He didn't—
- A. He might have spent that on the things he bought me.

Q. No. Did he – do you have a bank account at Dearborn Federal Credit?

A. I do.

Q. Okay. Did he transfer funds in the amount of \$10,000 a month into that bank account?

A. No. No, he did not. He did – he might have done that in the beginning for the furniture that I have, but that wasn't a regular basis thing, no.

Q. Well, for how many months did he deposit money into your –

A. I think maybe three.

Q. So, you're denying that Ken [] deposited \$10,000 a month into a bank account of yours beginning in March or February 2015?

A. I'm not denying that he did it maybe for three months, but after that, I – yes, I am denying that. That's not correct. I don't know what he – he did not – [Plaintiff's dep., pp. 82-83].

Defendant obtained Plaintiff's bank records pursuant to a subpoena. The records reveal that Plaintiff received \$10,000 per month from Ken from February 2, 2015 through May of 2016. She also received several additional payments in 2015 – in the amounts of \$20,000; \$4,000; \$22,000; and \$15,000. Beginning in May of 2016, the payments were reduced; with Plaintiff receiving \$5,000 per month. Plaintiff testified that the last deposit Ken made into her bank account was “the end of 2016.” (Plaintiff's dep., p. 86). In reality, her bank records reveal that the monthly payments did not stop in 2016, they stopped in May of 2017. Further, there was a \$3,500 deposit from Ken in November of 2017, just a few weeks before her deposition. In total, the deposits from Ken amounted to \$291,500.00.¹

¹ Defendant also asserts that Ken paid for the lease on Plaintiff's Cadillac CTS in 2015 (which lease ended in March of 2018) and paid her rent in 2015, as well as \$20,000 in medical bills.

II. ANALYSIS

It is well-established that a trial court has inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 639; 607 NW2d 100 (1999). Sanctions may include dismissal of the lawsuit. *Cummings v Wayne Co*, 210 Mich App 249, 252-253; 533 NW2d 13 (1995). The Court explained:

The authority to dismiss a lawsuit for misconduct is a creature of the “clean hands doctrine”... rooted in a court’s fundamental interest in protecting its own integrity and that of the judicial process...

The “clean hands doctrine” applies not only for the protection of the parties but also for the protection of the court. Tampering with the administration of justice ... is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. [*Id.* at 252 (citations omitted)].

Severe sanctions such as default have been upheld on appeal where “[t]he record revealed “defendant’s deliberate noncompliance with court rules and a discovery order in addition to what the trial court evidently viewed as an attempt to mislead the court and disrupt the progression of the lawsuit. The trial court recognized that such manipulation of the legal process is deserving of severe sanction.” *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 89; 618 NW2d 66 (2000).

Sanctions are also permitted under the Court rules. MCR 2.302 (“General Rules Governing Discovery”) provides the following:

(E) Supplementation of Responses.

(1) Duty to Supplement. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information acquired later, *except as follows*:

...

(b) A party is under a duty seasonably to amend a prior response if the party obtains information on the basis of which the party knows that

- (i) *the response was incorrect when made; or*
- (ii) *the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.*

(c) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time before trial through new requests for supplementation of prior responses.

(2) Failure to Supplement. If the court finds, by way of motion or otherwise, that a party has not seasonably supplemented responses as required by this subrule the court may enter an order as is just, including an order providing the sanctions stated in MCR 2.313(B), and, in particular, MCR 2.313(B)(2)(b). [emphasis added]

MCR 2.313(B)(2) in turn provides:

Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party, or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party, fails to obey an order to provide or permit discovery, including an order entered under subrule (A) of this rule or under MCR 2.311, the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:

- (a) an order that the matters regarding which the order was entered or other designated facts may be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;
- (c) *an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party....* [emphasis added]

In *Traxler v Ford Motor Co*, 227 Mich App 276; 576 NW2d 398 (1998), the Court of Appeals affirmed the trial court's imposition of sanctions pursuant to MCR 2.302(E). In that case, the plaintiffs filed a products liability lawsuit against Ford after their two-month old daughter was injured when the driver's seat of their car moved rearward during a rear-end collision and struck the child's head. Ford objected to

plaintiffs' discovery requests for more than two years, and after numerous motions to compel, the trial court ordered Ford to respond. Ford produced 62 boxes of documents. Based on their contents, the court found that Ford had "blatantly lied about those documents and about the information in them". The trial court entered a default judgment against the defendant for discovery abuses, finding that Ford had "lied" and was guilty of "an outrageous fraud". Even though Ford had not violated a discovery order or refused to respond, sanctions were appropriate under MCR 2.302(E), which imposes a duty to amend a prior response. Because Ford's discovery responses had consisted of lies or fraud, it had a duty to seasonably supplement its responses. *Id.* at 281. Also see *LaCourse v Gupta*, 181 Mich App 293; 448 NW2d 827 (1989) (affirming trial court's decision to strike plaintiff's expert pursuant to MCR 2.302(E)(2) for failure to supplement discovery responses).

The court rules allow a court to impose sanctions without first issuing an order to compel. MCR 2.504(B)(1) states, "If a party fails to comply with these rules or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims." In *Bellok v Koths*, 163 Mich App 780; 415 NW2d 18 (1987), the Court of Appeals affirmed the trial court's dismissal of the lawsuit as a sanction for "obstruction of discovery" including "lengthy, protracted delays and denials of discovery". The Court noted that even if dismissal was not allowed under MCR 2.313(B)(2) because there was no failure to comply with a court order, the trial court had authority to dismiss the case under other rules, including MCR 2.504(B)(1). Also see *LaCourse*, 181 Mich App at 296

(noting that a court has authority to impose sanctions under MCR 2.504(B)(1) without first having to issue an order to compel).

Here, Plaintiff made false statements in her deposition, which is far more egregious than simply delaying discovery or failing to answer interrogatories. As stated by another judge in this circuit:

The failure to pursue blatant perjury rapidly leads to the deterioration of the rule of law and the administration of justice and undermines our form of self-government. To assume that perjury is a fact of life that cannot or should not be vindicated in the courts of law only exacerbates the situation and leads to the disillusionment of those who do not engage in such conduct. If litigants understand that they can blatantly lie under oath (even when extrinsic evidence clearly proves the falsity of the statements), we only degrade the rule of law – a First Principle of our republic.

Lies under oath lead to violating court orders; broken court orders lead to more serious crimes. Contemnors are simply emboldened to lie with impunity and to violate the orders of the court without consequence.

Moreover, the courts are the people's instruments of justice. To make a mockery of the sacred role of the court is to undermine the very core of our system of republican self-government. [Opinion Editorial by Judge Michael Warren, Oakland County Circuit Court, February 7, 2008].

Faced with the facts presented, the Court concludes that Plaintiff lied under oath. There is no indication that her answers were mere mistakes or that she misunderstood the questions. She apparently just wanted to hide the truth, which was detrimental to her case and potentially embarrassing. Even giving Plaintiff the benefit of the doubt, she was informed months ago (as early as February 2018 when Defendant filed the motion to dismiss) that the statements she gave were "incorrect". Thus, she had a duty to amend or supplement her responses, and her failure to do so violated the court rules.

The false statements were material to the case. Evidence "showing that a person is experiencing a shortage of funds that appears to be novel or contrary to what one would

expect is typically felt by such a person” is admissible to show motive. *Smith v Mich Basic Prop Ins Ass’n*, 441 Mich 181, 194; 490 NW2d 864 (1992). Defendant has argued from the beginning that Plaintiff and her counsel fabricated the story in order to file this “sham” lawsuit. According to Defendant, Plaintiff’s counsel filed this lawsuit to seek publicity and to harass Defendant. The questions about Plaintiff’s finances were aimed at discovering an improper motive for her to pursue this lawsuit. Plaintiff was asked about monthly deposits to her bank account which were being reduced or stopped altogether shortly before this lawsuit was filed.² At her deposition, Plaintiff hid the fact that for 27 months she had been receiving monthly deposits into her bank account from Ken, and that these payments were being reduced and about to end.³ It is clear that Plaintiff’s responses were “incorrect” and she had a duty to amend or supplement them. MCR 2.302(E)(1)(b).

Given the seriousness of Plaintiff’s misconduct, the Court finds that the appropriate sanction is dismissal of the action. The Court acknowledges the harshness of the sanction, but when balanced against the gravity of Plaintiff’s misconduct, it is appropriate. Here, like the offending party in *Traxler*, Plaintiff “blatantly lied”, and any lesser sanction would be insufficient to remedy the damage. See *Traxler*, 227 Mich App at 286-287. Plaintiff’s lies were an attempt to manipulate the legal process, *Kalamazoo Oil*, 242 Mich App at 89, and tamper with the administration of justice, *Cummings*, 210

² The payments stopped the same month this lawsuit was filed - May of 2017.

³ Defendant also points out that Plaintiff *knew* the payments were being reduced and about to end, although she denied that in her deposition. Ken testified Plaintiff was well aware that the payments would be reduced from \$10,000 to \$5,000 and that they would end in May of 2017. (Ken dep., p. 21). Also, Plaintiff’s testimony that she worked over 300 hours for Enzo’s Catering in 2017 was contradicted by the owner of Enzo’s, who submitted an affidavit stating she worked for a total of about 25 hours.

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Mich App at 252. This Court has a “fundamental interest in protecting its own integrity and that of the judicial process”. 210 Mich App at 252.

The Court also notes that Plaintiff was afforded due process. *Cummings*, 210 Mich App at 253. She had notice, as this motion was filed in February of 2018 – more than nine months ago. She also had an opportunity to be heard, as the parties have briefed the issues extensively and presented oral argument to the Court.

WHEREFORE, IT IS HEREBY ORDERED that the motion to dismiss is GRANTED. The Verified Complaint is dismissed in its entirety.

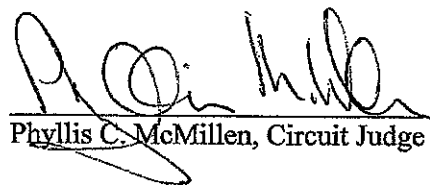
IT IS FURTHER ORDERED that Defendant’s other pending motions for sanctions are denied. Having dismissed the case as a sanction, the Court finds it unnecessary to assess additional sanctions against Plaintiff or her counsel.

IT IS FURTHER ORDERED that Plaintiff’s motion to compel is denied as moot.

IT IS FURTHER ORDERED that Plaintiff’s emergency motion for sanctions is DENIED, because the Court finds that sanctions against Defendant and his counsel are not warranted.

This Order resolves the last pending claim and closes the case.

IT IS SO ORDERED.


Phyllis C. McMillen, Circuit Judge

MEMORANDUM

TO: CITY COUNCIL
FROM: MAGGIE KURTZWEIL, MAYOR PRO TEM
SUBJECT: FIRST AMENDMENT
DATE: 2/19/19
BC:

In order to better understand protected speech, to avoid serious hurdles in prohibiting First Amendment speech, and to prevent overreaching by the City of South Lyon in chilling otherwise lawful speech, this memorandum is provided as a supplement to those materials that may be provided for review and consideration as to First Amendment analysis.

A. Issue

Whether a governmental entity can prohibit the speech of a private citizen where the speech is not a category of unprotected speech, the speech is not obscene, the speech did not incite violence nor was the speech a "fighting word," and the speech was spoken with no children present.

B. Facts

In this matter, a male person was visiting South Lyon Cycle for the purpose of paying on his account for repairs/maintenance to his bicycle. The man engaged in conversation with one of the business owners at the counter. The business person asked the man, who was also a city councilman, "about the state of the City of South Lyon." (Written Statement of Mark Childs, dated 11/1/18) (the terms "man" and "councilman" are used interchangeably). The man, on the other hand, asked the business owner, how "things were on the DDA?" (Police Interview with Carl Richards, created on 11/2/18, pg 5 of 7). The two appeared to be conversing about "things" including city council. (Austin White, PPO Transcript, pgs 6-7.) At some point in the conversation, the man began talking about a female councilperson. (Austin White, PPO Transcript, pg 8.) Austin White, an employee of South Lyon Cycle, admits that he was "half listening" to the conversation (PPO Transcript, pg 8).

The employee perked up and continued listening to the conversation including some "opinions" expressed by the man as to certain features of the councilwomen's home. (PPO Transcript, pg 9). Next, the employee heard the man state in part: "she says she's an attorney for Duggan downtown, but really I think she's a topless dancer at a gay bar." (PPO Transcript, pg 9). This statement was also confirmed by the testimony of the man. (PPO Transcript, pg 79). The PPO and supporting documents prior to the hearing were based, in part, on the words: "topless dancer at a gay bar." It is noted that another sexual reference appears to have been made regarding the councilwoman between the man and a friend but never communicated to the councilwoman until the PPO hearing. That additional reference was not the basis of the criminal complaint nor the filing of the PPO because the councilwoman was unaware that the comment had been made.

There is no issue of fact that the man was not participating in any official function with the City of South Lyon at the time the remarks were made, but rather he was a customer in a commercial business paying on an account. Further, there are no allegations that the councilman spoke uncomplimentary about the councilwoman around any city employees or on city property. Although the councilman made the unpleasant remarks in a public setting, he was clearly on private property and not city property. Further, there were no children present when the remarks were made. At no time were any of the remarks made face-to-face with the councilwomen and they were relayed to her by the employee of the business.

C. The First Amendment

Originally, the First Amendment applied only to laws passed by Congress. However, in *Gitlow v. New York*, 268 U.S. 652 (1925), the Court extended First Amendment protection to the states. Through the due process clause of the Fourteenth Amendment the Court broadened First Amendment protection to the states. The First Amendment applies to political subdivisions of the state. *Santa Fe Independent School Dist v Doe*, 530 US 290, 301 (2000). The Michigan courts may consider federal case law when ruling on the protections of the First Amendment under the state's constitution. *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 256 (2013). The City of South Lyon and its political governing entities, such as its various commissions, are subject to First Amendment scrutiny.

a. Protected and Unprotected Speech

Some speech is not afforded First Amendment protection. Examples of speech that are unprotected by the First Amendment include perjury; public employee speech made while performing an *official duty* is not protected by the First Amendment with an exception for those who speak the truth while testifying and whistleblowers; obscenity is not protected; threats to incite violence or imminent lawless action are generally not protected; child pornography is unprotected; restrictions are permitted on the limits of free speech in public schools; and the publishing or collecting national security information is protected speech, however, the government abandoned its efforts to prohibit publication of nuclear information in *The Progressive* in 1979 (see *United States of America v. Progressive, Inc., et al*, 467 F Supp. 990 (W.D. Wis. 1979)).

To begin, a good analysis of First Amendment speech should include a discussion as to whether the speech is unprotected speech. For example, profanity can be regulated by government if the speech is fighting words or a "true threat." In *Watts v United States*, 394 US 705 (1969) Mr. Watts (Watts) stated during a public gathering that if he was inducted into the Army and made to carry a rifle "the first man I want to get in my sights is L. B. J." Watts was charged and convicted of knowingly and willfully making a threat against the President of the US under 18 USC 871(a). On appeal to the Washington DC District the court affirmed Watt's conviction and the Supreme Court reversed. (See attached exhibit 1). The Supreme Court stated in part: "For we must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be *uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials... The language in the political arena, like the language in the labor disputes, see Linn v United Plant Guard Workers of America*, 383 US 53, 58 (1966), is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was a 'kind of very crude offensive method of stating a political opposition to the President.'" Id at 708 (citations

omitted) (emphasis supplied). Even though Watts appeared to make a threat to injure or kill a sitting president, the *context* in which his words were spoken were not deemed to be a “threat” which would require suppression of speech. “What is a threat must be distinguished from what is constitutionally protected speech.” *Id* at 707.

On the other hand, in *People v Lenio*, unpublished per curiam decision of the Court of Appeals, issued on February 14, 2019 (Docket No: 339945), the Court affirmed the jury conviction of the defendant of malicious use of service provided by a telecommunications service provider, MCL 750e. The defendant sent Twitter communications to a person which stated in part:

1. My religion says it's cool to shoot jewish people in the head with guns;
2. Lets just say I am more full of #hate and #rage than I have ever been....;
3. ...its okay to go on shooting sprees so long as one only targets sub human jewish filth....;
4. ...I want a job operating #gasChambers.....

“A state can also regulate speech that constitutes a ‘true threat.’” *Id* at pg 4 (relying on *Virginia v Black*, 538 US 343, 359 (2003). “‘True threats’ are statements ‘where the speaker means to communicate a serious expression of an *intent to commit an act of unlawful violence* to a particular individual or group of individuals.’” *Id* (quoting *Black* at 359) (emphasis supplied).

In the present matter, Austin White testified that the man came into South Lyon Cycle to pay on an account and converse about a number of things, including city council, as he always did. (PPO Transcript pgs 7-8). No doubt the comments made by the man were related to political speech as he was expressing his obvious opinions of the councilwomen in a “vituperative, abusive, and inexact” manner. There are no facts to support any conclusion that the unpleasant words spoken about the councilwoman were made in any other capacity other than as a private citizen expressing possible dislike for an elected official, as we all do from time to time.

There is no evidence in the transcripts or the underlying documents that the speech spoken by the man contained any “threat” or were “fighting words.” The *Watts* opinion sufficiently details a good discussion as to whether words spoken rise to a “threat.” In this present matter, they do not. The man’s remark “a topless dancer at a gay bar” is an unflattering statement about a possible employment choice. Nothing in the man’s statement relates to any comment about her sexuality but rather is a tasteless remark about what she may do for a living other than be a lawyer for Duggan. There is nothing in the comment that rises to a “true threat” as the man made no expression at all of any intent to “commit an act of unlawful violence” towards her. *Lenio*, supra.

b. **George Carlin, Indecent and Obscene**

Broadcasting has some of the most limited First Amendment protections because this communication invades the privacy of the home and the broadcast may be accessible to children. See *FCC v Pacifica Foundation*, 438 US 726 (1978). *Pacifica* is illustrative in this case for several reasons. The FCC entered an order of admonishment to a radio station for a certain broadcast that published George Carlin’s “Filthy Words” monologue which dealt with sex and filthy words. Like Carlin’s remarks, the remarks made by the present man are “unquestionably ‘speech’ within the First Amendment,” and the councilwoman’s objections to the speech are based on the content of the speech. The councilman potentially could be disciplined, in part, for the content of his speech.

The *Pacifica* Court ruled that the FCC did have authority to regulate otherwise protected free speech because the seven dirty words and Carlin's ensuing 12-minute monologue was made in the middle of the afternoon on a broadcast that was heard by a child. A parent filed a complaint with the FCC complaining of the content of the broadcast. The *Pacifica* Court did state that the Carlin monologue “would be protected in other contexts.” Id at 746 (emphasis supplied). “Some uses of even the most offensive words are unquestionably protected.” Id (relying on *Hess v Indiana*, 414 US 105 (1973)). In this present matter, the objectionable words were not made in front of any children and South Lyon Cycle was “wide open” except for the man and the two adult employees when the remarks were made. (Austin White, PPO Transcript, pg 7). Parenthetically, the *Pacifica* case does include in an appendix to the opinion the text of the Carlin monologue and its contents are not even close to anything said by the man. As to the monologue, the Court in *Pacifica* did acknowledge that the matter to regulate the radio broadcast was related to its content being indecent not obscene. Id at 729. Note that the six words spoken by the councilman (topless dancer at a gay bar) do not appear as any of Carlin's filthy words in his indecent monologue. The appendix containing the monologue has not been attached to this memorandum in order to save paper.

Michigan too has provided some guidance on insulting language and First Amendment protection. Michigan had a criminal statute that read: “Any person who shall use any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any *woman* or child shall be guilty of a misdemeanor.” This statute was ruled unconstitutionally vague. In *People v. Boomer*, 250 Mich App 534 (2002) a canoeist fell into the water and uttered profanities. A county sheriff heard the commotion and cited the man for violation of the statute. The Michigan Court of Appeals reversed mostly on grounds that the statute was void for vagueness.

The Court stated in part:

Here, it would be difficult to conceive of a statute that would be more vague than MCL 750.337. There is no restrictive language whatsoever contained in the statute that would limit or guide a prosecution for indecent, immoral, obscene, vulgar or insulting language. Allowing a prosecution where one utters “insulting” language could possibly subject a vast percentage of the populace to a misdemeanor conviction.

Id. at 540 (attached as exhibit 2) (emphasis supplied).

The *Boomer* Court concluded that the criminal statute reached constitutionally protected speech and the court voided the statute on grounds that it violated the due process protections of the Fourteenth Amendment.

Similarly, in *People in Barton*, 253 Mich App 601 (2002), the Court ruled that a local ordinance was unconstitutional and it reversed defendant's conviction. In *Barton*, the defendant was “overheard” calling restaurant patrons as “spics.” The defendant was charged with violating a local ordinance which provided that “no person shall engage in any indecent, insulting, immoral or obscene conduct in *any public place.*” Id at 602 (emphasis supplied). The defendant argued, in part, that the ordinance did not provide proper notice of the meaning of the term “insulting” and thus enforcement under the ordinance was arbitrary and inconsistent. Id at 605. The Court ruled that the ordinance was unconstitutionally vague as applied to the defendant. As stated by the Court:

The term “insulting” with regard to prohibited conduct did not give adequate forewarning that the challenged conduct—referencing a person by a racial slur—may rise to the level of “fighting words” that can be proscribed constitutionally.

Id at 607.

Likewise, the city’s Ethic Ordinance could also face similar challenges.

Nor do the comments of the man meet the standard of obscenity as that term has been defined by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973). Furthermore, it is noted that being a topless dancer or a stripper, thus “in a state of nudity” which is nonobscene nude dancing, may be a form of expression falling within the outer limits of protection by the First Amendment. *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513 (1997). As stated by the Court in *Jott* at 526:

Nonobscene, erotic entertainment, such as topless dancing, is a form of protected expression under the First Amendment, but enjoys less protection than other forms of First Amendment expression, such as political speech. *Barnes v Glen Theatre, Inc*, 501 US 560, 565-566; 111 S Ct 2456; 115 L Ed 2d 504 (1991); *Woodall v El Paso*, 49 F3d 1120, 1122 (CA 5, 1995); *Christy v Ann Arbor*, 824 F2d 489, 492 (CA 6, 1987).

Thus, it is difficult to understand how the man can be held liable for *speech* regarding topless dancers when the very nature of the profession “is a form of protected expression” itself

c. Parody

Parodies are protected by the First Amendment. In *Hustler Magazine v Falwell*, 484 US 46 (1988) Jerry Falwell, a minister and political commentator, filed suit against the magazine in an attempt to recover damages arising from the publication of a “parody” which portrayed the minister as having engaged in a “drunken incestuous rendezvous with his mother in an outhouse.” Id at 46. “The freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.” Id at 50-51 (citation omitted). Quoting *Baumgartner v United States*, 322 US 665, 322 (1944) the *Falwell* Court stated: “[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures.” Additionally, “[s]uch criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to ‘vehement, caustic, and sometimes unpleasantly sharp attacks.’” Id at 51 (citation omitted).

Even false statements can at times be protected by the First Amendment. It may be argued by the councilwomen that she is not a “topless dancer,” or “a stripper,” (Written Statement of Mark Childs dated 11/1/18) and that the statements of the man are false and not complimentary to her reputation. However, false statements are “inevitable in free debate.” *Falwell* at 52 (citation omitted). Even when a speaker or a writer have feelings of hatred in their speech as to a public figure, their expression may be protected by the First Amendment, although their motives may come into play for purposes of defamation, libel or slander, i.e., tort liability. Id at 53.

Although the councilman did testify that his remarks were akin to a Rodney Dangerfield joke in that they were so preposterous that no-one would believe them (PPO Transcript, pgs 78-79) (see also *Falwell*, at 46 where the lower court found that the parody “was not reasonably believable”) his comments do not rise to the level of a parody. However, the *Falwell* case provides a good discussion

on First Amendment issues (attached as exhibit 3). Further, any determination that the councilman's speech was outrageous has an "inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Id* at 55. "Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action... And, as we stated in *FCC v Pacifica Foundation*, 438 US 726 (1978):

The fact that society may find speech offensive is not a sufficient reason for suppressing it. *Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitution protection.*

Supra, *Falwell* at 55-56 (citations omitted) (emphasis supplied).

d. "F*** the Draft"

One of the most cited cases on First Amendment protected speech is *Cohen v California*, 403 US 15 (1971). Paul Cohen was convicted in Los Angeles Municipal Court of violating a California criminal statute because he was wearing in the courthouse a jacket that bore the words: F*** the Draft. He was convicted because it was deemed that wearing a jacket with the questionable words might "disturb the peace" or provoke others into acts of violence. The Supreme Court reversed.

The Court stated in part:

How is one to distinguish this from any other offensive word? *Surely, the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.* Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. *For, while the particular four-letter work being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric.* Indeed, we think it is largely because governmental officials cannot make principle distinctions in this area that the Constitution leaves matter of taste and style so largely to the individual.

Id at 25 (attached as exhibit 4) (emphasis supplied).

In the present matter, there are no facts to conclude that the words spoken by the man incited any violence, provoked others into acts of violence or entered into the privacy of the councilwoman's home. In fact, the PPO hearing clearly indicated that the councilwoman learned of the remarks, not from a text from the man, but from an eavesdropping employee at South Lyon Cycle.

e. Thoughts

A clear protection of First Amendment rights was Madonna's comments at the women's march in Washington DC 2017. **"I have thought an awful lot about blowing up the White House" although highly offensive and repulsive, was not seen as a threat or call for violence.** The issue related to whether in the context in which the words were spoken, did a threat to peace or security appear to be present. As stated in *Watts*, supra, a focus on the contexts in which the comments were made is required before determining that the speech is prohibited. Moreover, it is highly unlikely that "thoughts" without any express intention to follow up on those "thoughts" can

be censored by government. "Whatever label is given to the evidence presented, however, we conclude that Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's *abstract beliefs*." *Dawson v Delaware*, 503 U.S. 159, 167 (1992). (emphasis supplied). "[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U. S. 397, 414 (1989).

In the present matter, the councilwoman testified that she was uncomfortable about the fact that the man was "thinking" about her in a "sexual manner." (PPO Transcript, pg 53). First, there was no testimony at the PPO hearing that the man was "thinking" about the councilwoman; it is doubtful that the councilwoman is telepathic. "Freedom of speech, freedom of the press, and freedom of religion all have a double aspect -- freedom of thought and freedom of action. *Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind.*" *Jones v Opelika*, 316 US 584, 618 (1942) (emphasis supplied) (Justice Murphy, dissenting). Second, it is difficult to believe that the man can be held liable for "thoughts" the councilwoman allegedly believes that he had of her.

f. Defamation

It appears that a remedy the councilwoman may have against the man is a civil complaint for slander. However, she is an elected official and the standard is high for elected officials and public figures. Also, the man's testimony that his comments amounted to a "bad joke" clearly indicated that he had no actual malice towards her. *Falwell*, supra.

There is no doubt that the councilman was expressing his opinion of the councilwoman when he made his insulting remarks. Opinions are protected by the First Amendment.

g. Illinois state legislator 2018

Just after Thanksgiving 2018, Illinois state legislator, Stephanie Kifowit was debating a bill that would increase monetary awards to families of veterans who died during an outbreak of Legionnaires' disease in the state. Kifowit verbally attacked state representative Peter Breen and said the following:

I would like to make him a broth of Legionella and pump it into the water system of his loved ones so that they can be infected they can be mistreated they can sit and suffer by getting aspirin instead of being properly treated and ultimately die.

(see attached exhibit 5) (emphasis supplied)

Representative Breen has 2 adopted sons; one is 2 years old and the other is 2 months old. This death wish for an infant was deemed protected by the First Amendment and Ms. Kifowit was not brought before the state board of ethics. The context in which the words were spoken did not give rise to a belief that Kifowit had the ability to carry out her death wish, and she did apologize.

D. Conclusion

This discussion highlights some of the more prominent First Amendment cases and an analysis of the case law to some of the facts of this matter. Hopefully, the reader will gain greater

appreciation for our constitutional rights and the limits on the sovereign state from restricting, prohibiting, or chilling speech under both the state and federal constitutions. First Amendment issues are highly factual and must be analyzed within the **context** of which the speech was made. Further, any fact finder must be sure not to import their own subjective opinions into First Amendment issues because they have “no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.” *Cohen*, supra at 25. First Amendment analysis is not easy and most people get it wrong because they are tied to the emotions the spoken words have elicited, or the hate that the spoken words have spawned. However, the First Amendment does not protect speech that we find pleasing, complimentary or even slightly challenging. The First Amendment protects speech we do find insulting, offensive, derogatory, or hateful.

Rules and regulations that chill free speech unsettles First Amendment speakers. Whenever government interposes itself into the market place of speech and begins to determine what speech is permitted and what speech is not, even arguably lawful speech can be deterred because of the unwelcome challenge of violation of a statute or an ordinance. Once government begins to censor discourse as to its elected officials it becomes an untrustworthy defender of the rights of its citizens.

As Supreme Court Justice Louis Brandeis stated in his famous concurrence in *Whitney v. California*, 274 US 357, 376-377 (1927) (emphasis supplied):

To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one... If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, *the remedy to be applied is more speech, not enforced silence.*...Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

President Obama also was quoted as saying that more speech is the remedy for hateful speech. In this matter, Brandeis’ statement that the remedy to speech that is false and evil is “more speech” not less speech. The public has come forth in this discussion with their opinions and they have rightfully applied more speech in expressing their discontent with the remarks of the man, rather than enforcing his silence. The wisdom of Brandeis is clearly at play today in our community as people speak out, both good and bad, with respect to the councilwomen and the councilman.

More speech, not enforced silence.

This memorandum was not solicited by any party to this matter and has been provided solely as an academic analysis of a First Amendment issue. I am a very strong, strong advocate of the First Amendment. This memorandum expresses my interpretation of the law regarding the First Amendment and the speech in question. My conclusions are my opinions and my opinions only.

The End