

**IN THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT
STATE OF MISSOURI**

STATE ex rel. THOMAS DIEHL,)	
)	
Relator,)	
)	No. ED84905
v.)	
)	
HONORABLE JOHN F. KINTZ)	
)	
Respondent.)	

BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI
IN SUPPORT OF RELATOR’S PETITION FOR WRIT OF PROHIBITION

IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 400,000 members dedicated to defending the principles embodied in the Bill of Rights. The ACLU of Eastern Missouri is an affiliate of the ACLU with 3,000 members in Eastern Missouri. As part of its mission, the ACLU has participated, either as counsel or *amicus*, in numerous cases supporting individuals’ First Amendment rights, including the right to the freedoms of speech and press. The ACLU files this *amicus* brief in support of individuals who have been the target of lawsuits, Strategic Lawsuits Against Public Participation, or SLAPPs, aimed at chilling public participation in debate on the administration of law and public governance, for the purpose of providing insight to the Court on the First Amendment issues in this lawsuit.

STATEMENT OF FACTS

Plaintiff below, Fred Weber, Inc. (“FWI”), pursuant to applicable provisions of the Missouri State Code and the St. Louis County Waste Management Code, filed permit applications with the St. Louis County Department of Health (“DOH”) to construct and operate a solid waste transfer station on property owned by FWI in south St. Louis County. First Amended Petition, ¶¶10, 12 (“Petition”). Thereafter, on or about December 11, 2003, the DOH, pursuant to the application process as provided by the Waste Management Code, held a public hearing concerning FWI’s application for the proposed transfer station. *Id.* at ¶ 14. At, before, and after this hearing, relator and defendant below, Thomas Diehl (“Diehl”) distributed copies of a flyer (“the flyer”) to attendees of the hearing and members of the public. The flyer was headlined by the statement: “STOP FRED WEBER, INC.: THREE THINGS YOU CAN DO TO FIGHT THE TRASH TERRORISTS.” Plaintiff FWI alleges in its petition that the use of the epithet “trash terrorists” in the flyer is defamatory. A copy of the flyer is attached to this brief. The fact that defendant below published the flyer in connection with the proposed trash transfer station and the DOH hearing on that proposal, and that the flyer referred to plaintiffs as “trash terrorists,” are admitted as facts not in dispute.

SUMMARY OF THE ARGUMENT

The trial court erred in refusing to grant relator’s motion to dismiss because plaintiff’s complaint failed to state a claim upon which the trial court had jurisdiction to grant any relief, in that plaintiff’s defamation claims fail as a matter of law to make an allegation that defendant/relator made a false statement. The defamation complaint

below is based upon a statement which as a matter of law is not capable of being objectively determined true or false, in that the complained of statement is not sufficiently factual to be susceptible to verification, nor does the complained of statement have any objective meaning or common understanding. The statement is one of opinion, not fact, and opinion can not be false. Falsity is a necessary element of a defamation claim; a plaintiff's failure to plead that the defendant made a provably false statement is a jurisdictional defect which has only one proper result: dismissal of the plaintiff's claims with prejudice. Plaintiff's conspiracy claim is void without the defamation claims: plainly, there can be no conspiracy to commit a tort without a tort to commit. The respondent's failure to dismiss plaintiff's claims below requires this court to grant relator's motion for a permanent writ of prohibition ordering that dismissal, with prejudice, of plaintiff's claims below be entered.

Relator's rights to free speech and press under the First Amendment to the United States Constitution and Article I, Section 8 of the Missouri Constitution are so gravely harmed by allowing plaintiff's defective claims to proceed that the extraordinary relief of prohibition sought from this court is absolutely necessary. Plaintiff's lawsuit is amounts to a Strategic Lawsuit Against Public Participation ("SLAPP"), intended to convey a message of intimidation towards defendant and other citizens who wish to publicly express their opposition to plaintiff's plans to acquire the necessary permits to construct and operate a solid waste transfer station in the Oakville area of South St. Louis County. Such suits are intended to put a "chill" on these citizens' exercise of their constitutional rights to free speech and free press and their rights to assembly and association.

Allowing plaintiff's defective defamation claims to proceed reinforces the "chill" of this message and puts a judicial stamp of approval on SLAPP actions as a legal tactic for public debate. The conspiracy claim against "unknown John Does" serves to cast a net over citizens engaged in similar speech. Allowing the case to proceed reinforces the intimidation and keeps the defendant tied up in protracted and expensive litigation. Respondent Kintz's failure to dismiss plaintiff's complaint is thus a direct infringement on relator's civil liberties. This injury is only reparable by the extraordinary relief of a writ of prohibition.

ARGUMENT

I. The Action Below is a SLAPP Intended to Retaliate Against Citizens Who Expressed Disapproved Viewpoints and to Impede Constitutionally Protected Rights to Free Speech, Assembly and Petition.

FWI's libel and conspiracy claims against Relator Diehl represent a trend of litigation known as a Strategic Lawsuit Against Public Participation – or SLAPP. *See* George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 *Env'tl. L. Rev.* 3 (1989); *See also e.g., Entertainment Partners Group Inc. v. Davis*, 590 N.Y.S.2d 979 (N.Y. Sup. Ct. 1992). Such suits threaten citizens who have exercised their constitutional right "to petition the Government for a redress of grievances." U.S. Const. Amend. I. Disguised as common tort claims, varying from business torts to defamation and libel suits, SLAPPs use the judicial process as a tool of intimidation and retaliation. *See* David J. Abell, *Exercise of Constitutional Privileges: Deterring Abuse of the First Amendment-- "Strategic Lawsuits Against Political Participation,"* 47 *SMU L. Rev.* 95 (1993). The SLAPP plaintiff files a lawsuit to retaliate against individuals who have

petitioned or engaged in speech activities against them, and to intimidate other individuals from exercising their First Amendment rights. “The message sent by SLAPP suits is that if you participate in legitimate . . . public discussion, you should be prepared to litigate.” *Id.* at 96. A SLAPP suit not only deters the defendants in the particular suit from further exercising their First Amendment rights, but also has a “chilling effect” on society:

The ripple effect of such suits in our society is enormous . . . Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to the First Amendment expression can scarcely be imagined.

Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992). SLAPP plaintiffs often do not expect to prevail on the lawsuit; their goal is achieved simply by dragging defendants through litigation. The “chilling” effect on free speech and petition is clear, as the defendant burdened with litigation regrets having ever entered into the political arena. *Abell, supra.*, 47 SMU L. Rev. at 99. A SLAPP suit intimidates those few citizens willing to engage in local politics. *Id.* The longer a SLAPP suit continues, the more a plaintiff satisfies the goal of burdening the defendant and chilling speech. *Id.* SLAPP plaintiffs often use the discovery process to impose costly and time-consuming depositions and interrogatories upon a defendant.¹ See Jennifer Silles, *SLAPPs: How Can the Legal System Eliminate their Appeal?* 25 Conn. L. Rev. 547, 566 (1993). For this reason, it is

¹ In response to SLAPPs, many states have enacted anti-SLAPP statutes, which grant a special motion to strike a cause of action arising under a defendant’s exercise of his/her right to free speech or petition, unless the plaintiff establishes that there is a probability that he/she will prevail. In 2004, the Missouri legislature recognized the need for such protection for citizens and passed SB807, which provides for expedited and early dismissal of such cases in Missouri. The suit below was filed prior to the effective date of this new law.

important that courts recognize SLAPPs and dismiss these suits in a timely manner to protect the First Amendment rights of citizens.

The First Amendment protects the right of citizens to engage in free speech on matters of public concern and prohibits actions designed to have a chilling effect on the exercise of these rights. Recognizing this protection the Eight Circuit explained, “The First Amendment provides . . . the guarantee that protected speech may not be inhibited, or ‘chilled,’ because of the acts or threatened acts of another.” *Thompson v. Adams*, 268 F.3d 609, 614 (8th Cir. 2001).

The instant suit is a SLAPP because it is a lawsuit filed in direct response to citizens’ exercise of their First Amendment right to engage in free speech and petition regarding matters of public concern. This lawsuit has a chilling effect on the community; discouraging citizens from engaging in the public debate at hand for fear that they too may become the target of a similar lawsuit. Such a suit warrants dismissal as a matter of law and a permanent writ should lie.

II. Plaintiff’s Complaint Below Fails to State a Claim Upon Which Relief Can Be Granted by Respondent

In Missouri, a defamation must state and prove the following elements:

1. **Publication** by defendant of the complained of statement;
2. **Falsity** of the complained of statement;
3. **Fault** on the part of defendant such that defendant made the statement either with
 - a. **Knowledge** that it was false, or with

- b. **Reckless disregard** for whether it was true or false, at a time when defendant had **serious doubt as to whether it was true;**
4. **The defamatory nature** of the statement such that it tended to expose plaintiff to contempt, ridicule, or hatred, or deprived the plaintiff of public confidence;
5. **Public knowledge** of the statement such that specified members of the public read the statement; and
6. **Injury** to the plaintiff such that plaintiff's public reputation was thereby damaged.

MAI 23.06(2), *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 313 (Mo. 1993, en banc). Plaintiff's defamation claim fails to properly state the element of falsity as a matter of law. For that reason, a permanent writ of prohibition ordering Respondent Kintz to dismiss the complaint should be granted. The statement is incapable of falsity because it is not sufficiently factual to be susceptible of being proven true or false. Plaintiff's defamation claim thus fails to state a claim upon which relief can be granted by the trial court. Respondent Kintz therefore exceeded the jurisdiction of the trial court by refusing to grant Diehl's motion to dismiss the complaint.

A. The Statement is Not Capable of Being False

The Missouri Supreme Court has held that statements which are incapable of being proved false are absolutely privileged from suit in defamation. *Henry v. Halliburton*, 690 S.W.2d 775, 789 (Mo. 1985). The U.S. Supreme Court has similarly held that statements relating to a matter of public concern that cannot be objectively verified fall within the First Amendment's protections and absolutely cannot provide the

basis of a claim actionable in defamation. *Milkovich v. Lorain Journal*, 497 U.S. 1, 20-22 (1990). This privilege includes “protection for statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual,” *Id.* at 20, quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988). This has been termed the “opinion” privilege by Missouri courts. *See Nazeri, supra*, at 314 (“The First Amendment’s guarantee of freedom of speech makes expressions of opinion *absolutely privileged*.” (emphasis added)). Nevertheless, this privilege does not constitute “a wholesale defamation exemption for anything that might be labeled ‘opinion,’” but only an exemption from suit in defamation for “opinions” that do not “imply an assertion of objective fact.” *Milkovich*, 497 U.S. at 18. Thus, “opinion” in the law of defamation becomes a legal term d’art, defined as a statement which cannot be labeled true or false.

Whether a statement is sufficiently factual to be susceptible of being proven true or false is a question of law to be decided by the trial court. *Nazeri*, 860 S.W.2d at 314. The court must decide the question on the basis of the words of the statement itself and the contexts in which they appear. The court should look to the “totality of the circumstances” and “determine whether an ordinary reader would have treated the statement as an opinion.” *Halliburton*, 690 S.W. 2d at 788; *see also Sterling v. Rust Communications*, 113 S.W.3d 279, 281-282 (Mo. Ct. App. 2003). As this court has previously stated, “a statement must be verifiable at the time it is issued in order to be one of fact.” *Pape v. Reither*, 918 S.W.2d 376, 381 (Mo.Ct.App. 1996). A statement that is not verifiable is one of opinion, which is incapable of providing the basis of a claim in defamation.

“The test to be applied to an ostensible ‘opinion’ is whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact.” *Nazeri*, S.W.2d at 314, citing *Milkovich, supra*, 497 U.S. at 21. The dispositive question in the present case thus becomes whether a reasonable factfinder could conclude that the epithet “trash terrorist,” as used in the complained of flyer, consists only of a privileged opinion or whether it goes further and implies any objective facts that would be defamatory. More specifically, the question is whether the statement implies that FWI is a “fanatic who hates the United States,” and that FWI for that reason “has killed and injured people or that the proposed South Transfer Station would kill and injure people.” See Petition at ¶¶ 24-25. Examining the meaning of the term “trash terrorist” in the context it was used, under the analyses outlined by the Supreme Courts of Missouri and the United States, exposes the lack of cause in plaintiff’s complaint. No reasonable factfinder could ascribe an assertion of objective defamatory fact to defendant’s use of the term “trash terrorists” in the flyer. Lacking an allegation that the statement is an objectively false statement, plaintiffs’ complaint fails to enable the jurisdiction of the trial court below. Based on the facts of this case, which are not in material dispute—the words published and the context of the publication itself—plaintiff’s petition fails to state a claim on which the trial court could grant relief.

1. Interpreting the Statement Under the Law of Defamation Reveals that Plaintiff’s Complaint is Not Actionable in Missouri (Or, “Trash Terrorist” Does Not a “9/11 Terrorist” Make)

In *Nazeri* the Missouri Supreme Court set out the standards for analyzing the meanings of statements alleged to be defamatory. “[T]he alleged defamatory words must

be considered in context, giving them their plain and ordinarily understood meaning.” *Nazeri*, 860 S.W.2d at 311. “[T]he words must be stripped of any pleaded innuendo, and construed in their most innocent sense.” *Id.* Furthermore, “the words alleged are to be taken in the sense which is most obvious and natural and according to [the] ideas they are calculated to convey to those to whom they are addressed.” *Id.* These standards, the court said, “should be read together.” *Id.*, see also *Sterling v. Rust Communications*, *supra* (“totality of the circumstances” approach). Examining the “plain and ordinarily understood meaning” of the phrase, “trash terrorists,” taking it “in the sense which is most obvious and natural according to [the] idea [it was] calculated to convey” to the intended audience, and “stripp[ing] [it] of any pleaded innuendo [and] constru[ing] [it] in [its] most innocent sense,” *Nazeri*, *supra*, leaves no doubt that the complained of statement that appeared in relator’s flyer cannot provide the basis of a claim in defamation. Examining the statement as it appeared in the flyer under all of the standards set out in *Nazeri* and followed by this court in *Sterling v. Rust Communications*, *supra*, shows that plaintiff’s complaint fails to properly allege that the statement is false. As such, plaintiff’s complaint fails to state a claim in defamation; respondent’s failure to dismiss the complaint requires this court to provide the appropriate relief by granting the writ of prohibition sought by relator.

i. The “Plain and Ordinarily Understood Meaning” of “Trash Terrorist”?

The state of being a “trash terrorist” is not a status or event which is “objectively verifiable”—first of all because there is no “plain and ordinarily understood meaning” of the term “trash terrorists,” or what types of individuals or entities are “properly” or

“accurately” (not falsely) classified as such. In fact, the use of the phrase is rare. A Google™ search of the term (entering both “trash terrorist” and “trash terrorists” because different results were shown), as of August 29, 2004, uncovered only *five* other usages of the term on the entire World Wide Web (not counting various re-publications of the publication at issue here).² Compare those results to a Google™ search of *just* the term “terrorist,” which produces approximately 6,490,000 results, or to a search for the term “terrorists,” which produces approximately 4,100,000 results. It’s clear that use of the term “trash terrorists” is quite uncommon. Examining the other discovered usages is nonetheless helpful in ascertaining how to consider one's meaning when using the term “trash terrorists,” and whether it’s an expression which generally is used to assert objective facts, or whether its common usage is more of the hyperbolic, vituperative type.

One of the other usages, found on a site dedicated to organized crime gossip, provides an excellent case to distinguish relator’s usage as one which implies no assertion of objective fact. This gossip site’s usage is employed to creatively describe a family-run garbage hauling business in New York that has been accused of murder and arson in a conspiracy to eliminate competition in the garbage hauling trade on Long Island. The author of the webpage says, “you could call these guys trash terrorists or garbage gangsters or just plain criminals.” It then lists an accounting of some of the alleged crimes of the Avellino family on Long Island, including setting competitor’s garbage trucks on fire, burning down competitor’s buildings, and even having competitors killed.

² See <http://www.union-square.us/us-trash.html> and <http://www.union-square.us/trash-text04.pdf>; see also <http://www.ganglandnews.com/column136.htm>; see also <http://www.amazon.com/exec/obidos/tg/feature/-/10306/104-0494406-3966359>; see also <http://www.utahatvtrails.com/ATVFiveMileCleanup.html>; see also <http://www.drunkenbastards.org/hob/xxxjoel/firsttime.html>.

This usage appears in a sentence which plainly implies defamatory facts about the subjects. The context thus perhaps allows a defamatory meaning (assuming falsity for our purposes). The piece calls them outright “trash terrorists,” “garbage gangsters” and “plain *criminals*,” followed by paragraphs alleging objective facts ascribing to the Avellinos *specific* crimes—murder and arson. A “totality of the circumstances” approach here leads to a reasonable conclusion that the authors of this webpage, by using the terms “trash terrorists” and “garbage gangsters,” imply allegations of objective facts—commissions of violent crimes—which, if false, might be actionable in a defamation claim. This is a stark contrast to the instant case. Relator’s use of the term “trash terrorists” is not elaborated upon with specific factual allegations as in the Gangland News example.

Another usage, posted on a community bulletin-board type website, warns residents of the City of Baltimore not to be “Trash Terrorist[s].” That usage seems to imply that a person befitting of the title “Trash Terrorist” is someone who contributes to degrading the appearance of the neighborhood by improperly storing and/or setting out their disposables for collection so that scattered garbage attracts “stray dogs, cats, rats, or vermin.” The site urges residents to do the “right thing” and help keep the city a clean and attractive place to live. It asserts that trash needs to be handled carefully—once it is mishandled it creates mounting problems that make “the whole area look bad” and decrease the quality of life for everyone in the community—a prospect quite “terrorizing” to many residents. This usage implies, if anything, that a “trash terrorist” is someone the authors would consider not a “good neighbor”—evidenced by their admonition to “Be a

good neighbor—Don't be a trash terrorist.” See <http://www.union-square.us/trash-text04.pdf>. This does nothing more than use vituperative language to convey the authors' opinion that they disagree with the acts of those who improperly handle their garbage.

In the instant case, the use of the “trash terrorists” epithet in defendant’s flyer is plainly more akin to the usage from the Baltimore Union-Square community webpage than it is to the Gangland News website usage. In all three of these examples, the usage is a creative, alliterative expression—a “play on words”—meant to be provoking and catchy. Only in one of these instances, however—the Gangland News website’s usage—is there any reasonably colorable claim that the usage implies an assertion of objective fact, accusing the “trash terrorists” of *specific* crimes which might be actionable in a defamation claim if proven to be false. See *Halliburton*, 690 S.W.2d at 788-89 (requiring there be an allegation of specific crimes committed). The Union-Square website’s usage and that of defendants implies no such accusations that the so-called “trash terrorists” have or would be committing any specific crimes. Like the Union-Square site’s admonition to “Be a good neighbor—Don’t be a trash terrorist,” the Defendant’s flyer admonished the citizens of South St. Louis County to “contribute to [their] fight” against FWI’s proposed Oakville-area solid waste transfer station. The flyer furthermore warned these citizens and admonished FWI and the St. Louis County government not to be a bad neighbor with the all-caps line that finishes the message and is equally as prominent as the “trash terrorists” line: “Don’t Trash South County.” There is no implied assertion of objective fact accusing plaintiffs of committing any specific crime or crimes such as there might be in the Gangland News website’s usage.

The phrase “trash terrorists” as used in defendants’ flyer is not objectively verifiable, in that it has no plain and ordinary objective meaning to verify as ascribable to the plaintiffs Fred Weber, Inc. Therefore the statement does not even possess the potential for falsity, a potentiality required by law in order for the statement to properly form the basis of a claim in defamation. Plaintiffs complaint therefore failed to properly state a claim for defamation, and respondent thus had no jurisdiction upon which to grant plaintiff any relief sought in that complaint. Prohibition should be granted against respondent, with an order to dismiss the complaint for failure to state a claim upon which relief can be granted.

ii. Stripping Away All the Plead Innuendo: Plaintiff Makes “Much Ado About [September 11, 2001]”

Furthermore, as the court must consider the statement stripped of any pleaded innuendo, focusing on the idea meant to be conveyed and how the intended audience was likely to interpret the idea, *see Nazeri, supra* at 311, it becomes yet more apparent that plaintiffs’ defamation claim fails to properly plead falsity as a matter of law. Because there is no “plain and ordinary meaning” of the term, the contexts of the intended audience and the public issue of the debate into which the flyer was injected become especially important to the court’s determination of the statement’s meaning—and thus, whether the statement may provide the basis of a defamation claim. Plaintiffs below have pled dangerous innuendos that respondent failed to look past in refusing to grant relator’s motion to dismiss. Specifically, plaintiffs allege that using the catchy alliterative phrase “trash terrorists” to describe plaintiffs (and their Oakville area transfer station

plans) is equivalent to using *only* the word “terrorist,” and only that word *with* the *allegedly attached innuendo* that plaintiffs were somehow involved in the 9-11 attacks and support anti-American terrorist networks like Al-Qaida, or that plaintiffs were or would be involved in violent acts similar to those perpetrated on September 11, particularly the killing and maiming of innocents. *See* Petition at ¶¶ 17, 24-25, 35, 37. The context of the statement, however, does not allow a reasonable inference that defendants were accusing plaintiffs of being “terrorists” in the sense of plaintiffs’ pleaded “September 11th” innuendos. *Id.*

The contexts in which the statement was made indicate that no connection with the events of September 11, 2001 or any “terrorism” of that type was or could reasonably be implied by defendant’s use of the phrase “trash terrorists.” This occurred in the context of the proposed trash transfer station public controversy. It occurred in the setting of an issue of public concern and debate for which an official government hearing was being held and which was open, by law, for a specific purpose of determining the local public opinion on the trash transfer station proposal. The intended audience of defendant’s flyer was the citizens of the South County area who would have an interest in the proposal and who may be attending the DOH hearing. Defendant sought to raise objections to FWI’s waste transfer station proposal by organizing passionate opposition at the public hearing where it would be decided whether FWI could obtain the necessary permits to proceed with their Oakville-area transfer station agenda. These local residents were “terrorized” not with the fear that they or someone they knew or loved might be killed or violently injured by FWI, but more realistically with the fear that FWI’s proposed trash transfer

station would decrease the quality of life in their neighborhood. This much is shown by the flyer's warning and admonition: "Don't Trash South County." In the context in which it was published, no one in the intended audience could reasonably interpret defendant's flyer as an accusation that FWI had anything to do with 9/11 or had or would commit such types of "terrorist" atrocities. Where the complained of statement in a defamation petition cannot reasonably be interpreted as stating actual facts about plaintiff that would be defamatory, the complaint fails as a matter of law. *See Milkovich*, 497 U.S. at 20; *Falwell*, 485 U.S. at 50.

The pleaded references to September 11th innuendos—the America-hating, the fanaticism, and the killing and injuring of innocents are "much ado about nothing" as far as the law of defamation is concerned. Plaintiffs' attempts to isolate the word "terrorist" out of the actual term at issue, "trash terrorists," is an attempt to confuse the court and sidestep the substantive law of defamation, which requires that the statement be read *in context*—not that the most offensive word be singled out and taken *out of context*—and further requires that the statement—*in context*—be stripped of *any* pleaded innuendo and taken in its most innocent sense. *Nazeri, supra*. Upon a close examination of the complaint as directed by the law of defamation, *see Nazeri*, 860 S.W.2d at 311, its lack of jurisdiction is obvious: plaintiffs have not properly pled the element of falsity. In fact, plaintiffs do *not* plead in their complaint that the term "trash terrorists" is *itself* false—plaintiffs instead insufficiently plead that "[t]he words are wholly false...*in that* FWI is not a terrorist, FWI is not fanatical, FWI has not killed or injured people at any time and FWI does not hate the United States." Petition at ¶ 25 (emphasis added). Plaintiffs thus

only plead that their own *pleaded innuendo* is false. Nowhere in the petition does plaintiff plead that FWI is not a “trash terrorist,” only that FWI is not a “terrorist.” FWI may not have “killed or injured people at any time”—that is a verifiable proposition. It is not, however, a proposition that any reasonable factfinder could find implied by defendant’s statement of calling plaintiffs “trash terrorists.” Other pleaded innuendos are not even objective facts themselves—being a “fanatic” or “hat[ing] the United States” are not even objectively verifiable propositions.

Taking the statement in context in its most innocent sense, and stripping it of all FWI’s pleaded innuendo, it is plain that the complaint fails to state a case in defamation. Plaintiff’s claim fails to plead injury to reputation based on a statement which is provably false, and therefore a writ of prohibition dismissing the complaint should be granted.

2. The Statement is Protected as “Rhetorical Hyperbole”

The statement is protected under an alternative analysis of the “opinion” privilege—the privilege to use “rhetorical hyperbole” in public debate on issues of public concern. The privilege to use “rhetorical hyperbole” protects individuals from suit in defamation, even to the extent that their words *may* reasonably imply objective facts about a plaintiff, when no reasonable reader would actually believe that the defendant was seriously asserting such facts. *See Hustler v. Falwell*, 485 U.S. 46, 57 (1988). The rhetorical hyperbole privilege applies when a factfinder could only reasonably believe that the defendant vehemently disagreed with the position or conduct of the plaintiff such that an overblown, vituperative epithet was necessary to express their strong opposition to plaintiff’s viewpoints or agenda, not that the defendant was actually accusing the

plaintiffs of some objective fact or facts. *See Ribaud v. Bauer*, 982 S.W.2d 701, 705 (Mo.Ct.App. 1998).

The term “trash terrorist” is a loose, figurative term with no objective, literal meaning. A statement with no objective meaning is most certainly one that no “reasonable factfinder could conclude that the statement implies an assertion of objective fact.” *Nazeri*, 860 S.W.2d at 314, and thus one that is non-actionable in defamation. In fact, the Supreme Court stated in *Milkovich* that the use of “loose,” “figurative,” or “hyperbolic” language *negates any reasonable impression* that a statement implies an assertion of an objective fact. *Milkovich*, 497 U.S. at 21-22. The First Amendment guarantees that public debate will not be deprived of “imaginative expression” or “rhetorical hyperbole,” for these forms of speech have “traditionally added much to the discourse of our Nation.” *Id.* at 20. Missouri’s highest court has also stated that epithets that don’t imply extrinsic objective facts of such a specific nature that they would be defamatory are not actionable: “Broad, unfocused, wholly subjective comments that do not suggest to the ordinary reader that the plaintiff committed a crime are not actionable. The law is well-settled that individuals may use pejorative or vituperative language when referring to another as long as they do not suggest *specific* criminal conduct, which would be a statement of fact.” *Halliburton*, 690 S.W.2d at 790 (emphasis added). The Supreme Court of the United States has repeatedly held such vigorous epithets in the mode of “rhetorical hyperbole” as non-actionable opinions in defamation. *See Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 295 (1943) (“[T]o use loose language or undefined slogans that are a part of the conventional give-and-take in our economic and

political controversies—like “unfair” or “fascist”—is not to falsify facts.”); *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 13-14 (1970) (the word “blackmail,” as used, was non-actionable “rhetorical hyperbole” where the context of the article in which it appeared gave absolutely “no indication...that Bresler had engaged in anything approaching” blackmail.); *Letter Carriers v. Austin*, 418 U.S. 264, 284-286 (1974) (use of the word “traitor” in union’s “definition” of a union “scab” was held non-actionable in defamation because it was used in a “loose, figurative sense,” and was “merely rhetorical hyperbole.”). The statement made by defendant that plaintiffs were “trash terrorists” clearly falls within the protected category of “rhetorical hyperbole,” of “loose, figurative language” that is classified as “opinion” for purposes of First Amendment law, incapable of objective verification as to truth or falsity. As stated by the Supreme Court of Missouri, a statement which “only suggest[s] to the ordinary reader that the defendant disagrees with the plaintiff’s conduct and used pejorative statements or vituperative language to indicate his or her disapproval” is not actionable in defamation. *Halliburton*, 690 S.W.2d at 788-89. Plaintiff’s claim therefore fails to state and prove that the statement was “false,” and summary judgment for defendants is necessary and proper on that account.

III. The Conspiracy Claim Collapses as the Defamation Proves Baseless and is a SLAPP Tactic Used to Cast a Net in Retaliation for Speech.

There can be no conspiracy to commit a tort when there is no underlying tort. *Wiles v. Capital Indemnity Corp.*, 280 F.3d 868, 869 (8th Cir. 2002). Because plaintiff’s petition fails to state an actionable claim for any defamation by the flyer, there can be no

conspiracy among any defendants to commit defamation. Dismissal is therefore necessary and proper on this count.

Even if the defamation claims were actionable, in order to succeed on a conspiracy claim, a plaintiff must put forth *specific* evidence that indicates that a conspiracy exists. *In re Temporomandibular Joint (TMJ) Implants Products Liability Litigation*, 113 F.3d 1484, 1498 (8th Cir. 1997). Plaintiffs fail to allege any *specific* facts suggesting that a conspiracy to commit a tort existed between Diehl and any of the unnamed John Does in publishing the flyer. Rather, Diehl and the other concerned citizens who may or may not fall into the “John Doe” category are targeted by this civil conspiracy claim for exercising their First Amendment right to speak on all issues of public concern, especially those matters before administrative agencies of their government charged with taking care that public laws are properly administered and that the public interest is second to none, even if—and in this case, because—the views they choose to express are in opposition to the interests of a powerful waste handling corporation.

The civil conspiracy charges are not only void, but they are a common SLAPP tactic that impermissibly “cast a net” to retaliate against those who engage in dissenting views. Plaintiff seeks to impede free speech activities protected by the U.S. and Missouri Constitutions, and therefore summary judgment for defendant on all counts is necessary and proper.

IV. The Writ of Prohibition is Proper

A writ of prohibition is an extraordinary and powerful remedy, divesting a lower court of the power to act. The Supreme Court of Missouri has therefore “limited the use

of prohibition to three, fairly rare, categories of cases.” *State ex rel. Riverside Joint Venture et al. v. Missouri Gaming Commission*, 969 S.W.2d 218, 221 (Mo. 1998). The first category includes any case where a court “lacks personal jurisdiction over a party or lacks jurisdiction over the subject matter the body is asked to adjudicate.” *Id.* As addressed below, this case falls into the first category, as respondent does not have jurisdiction to proceed on the case as stated in plaintiff’s complaint. Plaintiffs claim failed to plead falsity of the words used by defendant or of any *reasonable* inference therefrom of *objective* facts. Prohibition therefore lies and the peremptory writ should be made absolute, with an order for respondent to take no action other than the dismissal of plaintiff’s claims. This court has both the authority and the duty to issue a permanent writ of prohibition against respondent.

This court is vested with the authority to exert “general superintending control” over respondent Kintz and the trial court below, including the issuance of original and remedial writs such as the one sought by relator here. MO. CONST. Art. V § 4.1. Preventing a lower court from exceeding its jurisdiction is in fact the primary purpose of the writ of prohibition, as contemplated by the legislative command that “[t]he remedy afforded by the writ of prohibition *shall* be granted to prevent the usurpation of judicial power.” *RSMo. § 530.010* (2004). Thus, a writ of prohibition is particularly appropriate in this case.

Nevertheless, it is admitted that no original remedial writ of prohibition should be issued by an appellate court where adequate relief can be afforded by appeal. *Riverside Joint Venture*, 969 S.W.2d at 394, *citing* Rule 84.22. The dispositive analysis in

determining whether a writ of prohibition should issue here thus depends wholly on the inquiry whether relator can obtain *adequate* relief from an appeal after a jury verdict.

“What constitutes adequate relief is addressed to the discretion of an appellate court and prohibition will lie when the facts and circumstances of the particular case demonstrate unequivocally that there exists an extreme necessity for preventive action.” *Id.* It is clear from the constitutional modifications applied to the common law of defamation over the last forty years that relator’s constitutional civil liberties of free speech and press are infringed in such a way by respondent’s improper exercise of jurisdiction in the defamation action below that an appeal after jury verdict could not adequately relieve the chill on First Amendment speech that will be continued by the litigation process. As no adequate relief upon appeal is available to relator here, relator’s petition presents this court with a dire necessity to exercise its authority to issue the extraordinary writ of prohibition. Allowing plaintiff’s suit to proceed to discovery and trial would be to permit furthering the unconstitutional chilling effects on the free speech liberties of relator and other South St. Louis County citizens. A failure to correctly apply the law of defamation, such as respondent’s failure to dismiss plaintiff’s claims below, is *per se* a derogation of the First Amendment.

The law of defamation has undergone serious reformation during the last four decades. This process of re-examination and reformation was undertaken by the Supreme Court of the United States. The highest court in the land’s focal impetus for reforming the law of defamation was the dire need to reconcile the common law of

defamation with the federal constitutional principles of freedom of speech and press as guaranteed by the First Amendment.

It is now firmly settled that the application of the law of defamation by state courts—because defamation is an action to punish and curtail speech—is in and of itself an application of state power which carries with it a risk of abridging the freedom of speech. It makes no difference whatsoever that plaintiffs are a private corporation, or that no governmental official or entity is involved as a party. *See New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (“Although this is a civil lawsuit between private parties, the [state] courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press.... The test is not the form in which state power has been applied, but whatever the form, whether such power has in fact been exercised.”). It is the very exercise of jurisdiction over a subject by a state court which constitutes the “making of law” of which the First and Fourteenth Amendments forbid the abridgement of speech and press. In this case, the defendants were engaged in a public debate over matters of public concern in connection with a public hearing convened by a government entity. The attempt by respondent to exercise jurisdiction over relator in a defamation case, when the Supreme Courts of Missouri and the United States have decided that a state court’s jurisdiction in defamation is drastically curtailed to only those disputes in which the contested language is objectively verifiable, is an egregious infringement of relator’s civil liberties under the First Amendment and Article I, Section 8 of the Missouri Constitution. Indeed, the Missouri legislature has also recognized this infringement, voting into law this year SB807, providing that SLAPP

suits such as this one be subject to expedited dismissal. Had FWI's suit been filed subsequent to the passage of this law, it would have been applicable to the case and resulted in dismissal of the claims. To allow even the further exercise of jurisdiction in order to compel relator to go through discovery and a costly trial is a harm of constitutional magnitude that is only rectifiable through the extraordinary writ of prohibition sought here.

CONCLUSION

Plaintiff's defamation complaint is baseless and provides the court below with no claim upon which relief could possibly be granted. Their objective in filing this suit was not to obtain damages from the defendants, but to silence outspoken, organized and determined opponents of their plan to bring a solid waste transfer station, and all the risks of community degradation and pollution attendant to such a facility, into those citizens' local community. To allow respondent and plaintiffs below to drag relator through a defamation action is to permit using tort law as a vehicle to intimidate citizens from exercising their First Amendment rights when their opinions may be contrary to the interests of government officials or powerful corporations. This chill on public participation is detrimental to the integrity of our system of participatory democracy and open government. As put forcefully and eloquently by Justice William Brennan: "Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Relator's speech falls squarely within the category of speech concerning public affairs. His speech was directed at affecting the outcome of a public land use controversy over which state and

local governmental agencies had control. The ACLU of Eastern Missouri respectfully submits that judgment in favor of relator's petition is necessary to protect our very form of democratic self-government. Accordingly, for the foregoing reasons, the writ should be granted.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This brief complies with Rule 55.03.

This brief complies with the limitations contained in Rule 84.06(b) and Special Rule 1(b).

The brief complies with the page limits of Rule 360.

This brief contains 6,980 words and 555 lines.

A 3½-inch computer diskette containing the full text of the brief has been provided to the clerk and parties to this case. The disks have been scanned for viruses and are virus-free.

This brief was prepared in Microsoft Word 2000 XP using Times New Roman, 13 point font.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was sent first class mail, postage pre-paid, on the 31st day of August, 2004 to Hon. John Kintz, Circuit Court of St. Louis County, Clayton, Missouri, and copies sent via first class mail to counsel:

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