



Although Hampers contends that this June 2010 story contains defamatory statements, he took no action against Westword at the time.

Four years later, in 2014, Westword acquired information calling Ebersohl's veracity into serious question. Westword obtained two decades of extensive police reports, court documents, and copies of restraining orders showing that she had a penchant for not telling the truth and engaging in a pattern of harassing men who no longer wanted to date her or falsely telling the police that the men had harassed her. In response to this information, Westword published an article on June 19, 2014 titled "Sandy Ebersohl's Twenty-Year Trail of Deceit and Fabrication" (the "Snake Charming Article") referencing the June 2010 Article, noting that Ebersohl had been a source for the story and stating that it appeared that she may have fabricated much of the information she gave to Westword as well as the police and others involved in that situation. Mot. Summ. J. Ex. Q. Westword advised in the article that it had not talked to either Hampers or Ebersohl for the story and given that Ebersohl had refused to comment, "her record will have to speak for itself." Mot. Summ. J. Ex. Q p. 19. Contemporaneously, Westword attached an "Editor's Note" to the June 2010 Article, accessible through the paper's online archives (the "Editor's Note Article"), indicating that it had come to Westword's attention that Ebersohl, who was one source for the 2010 story, has a history of fabricating information and a pattern of harassing men who date her and then end the relationship. Mot. Summ. J. Ex. T. The note specifically states that some of the accusations made by Ebersohl against Hampers in 2010 may have been fabricated, and directs the reader to the Snake Charming Article for more information on Ebersohl.

Through this action, Hampers essentially seeks to revive his time-barred claim of defamation against Westword arising from the June 2010 publication. Hampers contends that Westword republished the allegedly defamatory 2010 article and assertions through the Snake Charming Article and Editor's Note Article, causing him to suffer damage to his reputation in the community and to endure emotional pain and suffering. Hampers alleges that the June 2010 Article contains "several" defamatory statements about him, "including statements falsely imputing criminal acts" to Hampers. Compl. ¶ 10. Hampers specifically alleges that:

- The June 2010 Article falsely accused him of "driving 85 mph down side streets," attempting to influence a public official during the alleged ensuring traffic stop, assaulting Ebersohl on the Anschutz Medical Campus, and damaging property and making intimidating threats to a potential witness.
- The Snake Charming Article, not only describes the defamatory June 2010 Article, "but actually repeated some of the defamatory statements, including the accusation Dr. Hampers stole Ebersohl's seizure medication, damaged her property, and offered Ebersohl \$2,000 to lie for him as a witness at a court proceeding."

Compl. ¶¶ 11-15. These are the only statements in the two articles that Hampers contends are defamatory.

In response to Hampers's complaint, Westword filed a motion to dismiss under C.R.C.P. 12(b)(5) contending that his defamation claim is precluded on four grounds: (1) the fair report privilege; (2) substantial truth; (3) the libel-proof plaintiff doctrine; and (4) the incremental harm doctrine. After spending considerable time on the motion, the Court ultimately concluded

that Hampers had at least stated a claim for defamation, and declined to dismiss the case at that time given the exacting Rule 12(b)(5) standard. *See* Order Denying Mot. to Dismiss, July 27, 2016. Because trial courts are charged with attempting to resolve these types of cases promptly, *see Barnett v. Denver Publ'g Co.*, 36 P.3d 145, 147 (Colo. App. 2001), the Court then held a case management conference and set a two-step summary judgment schedule, allowing the submission of summary judgment motions relating to all issues except actual malice first, and then allowing any additional summary judgment motion to be filed on any remaining issues/defenses, particularly actual malice. In accordance with the case management order, Westword submitted a first summary judgment motion contending that the alleged defamatory statements identified in the Snake Charming and Editor's Note Articles were substantially true. This is the motion that is presently before the Court.

## **II. Summary of Parties' Positions**

In its summary judgment motion, Westword contends that when the seven discrete statements contained in the two 2014 articles are considered in the context of the articles as a whole, they are substantially true. Westword specifically argues that the articles make clear that Westword was merely reporting allegations made by Ebersohl concerning her interactions with Hampers, that Westword never stated or implied that it had independently investigated the substance of these allegations, or adopted them as true. Because Westword did nothing more than accurately report Ebersohl's allegations, and invite readers to determine what to believe, the allegations as such are substantially true. While the Court concluded that Westword had to show that the defamatory statements themselves were substantially true in its order denying Westword's motion to dismiss, Westword contends that the Court applied the wrong legal standard in its motion to dismiss order, and invites the Court to reconsider its prior July 2016 order on this issue.

Westword also argues that even if the issue of substantial truth were to turn on the substance of Ebersohl's actual allegations reported by Westword, Hampers cannot show that they are materially false by a clear and convincing standard. According to Westword, the undisputed evidence learned in discovery demonstrates that some of the alleged defamatory statements are essentially true as printed by Hampers's own admission, with, perhaps, only minor deviation from the actual truth. Regarding the remaining statements, which Hampers contends are not true at all as printed, the undisputed evidence shows that Hampers had, in fact, engaged in the same type of conduct although in different circumstances. With respect to these statements, Westword claims that they cannot possibly have harmed Hampers's reputation in the community in light of his undisputed conduct. In short, Hampers, did, in fact, commit acts that are of the same "gist or sting" as the allegedly false and defamatory statements he challenges in this litigation.

Hampers, in response, contends that the Court applied the correct legal standard in its order denying Westword's motion to dismiss and urges the Court to focus only on whether the substance of the challenged statements is true. Hampers argues that the Court's prior determination that the actual substance of the alleged defamatory statements must be true is the law of the case, and there is no compelling reason for the Court to reconsider its prior analysis. Hampers claims that when the alleged defamatory statements are considered, they are not substantially true, nor can it be established that the gist or sting from these statements is the same as the gist or sting from what is true. In an effort to circumvent the page limitations imposed by the Court, Hampers includes Appendix 1 to his response providing in detail why he believes that

each of the defamatory statements identified in his complaint are materially false and why there is at least a disputed issue of material fact with respect to the question of substantial truth.

### **III. Summary Judgment Standard**

C.R.C.P. 56(c) allows a court to grant a motion for summary judgment before trial “when the pleadings and supporting documents establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Gibbons v. Ludlow*, 304 P.3d 239, 244 (Colo. 2013). Because summary judgment “denies litigants their right to [a] trial,” it is a “drastic remedy,” and is “never warranted except on a clear showing that there is no genuine issue as to any material fact.” *Günter v. Palmer & Co.*, 585 P.2d 583, 584 (Colo. 1978).

A material fact is a fact that, when resolved, “will affect the outcome of the case.” *Dominguez Reservoir Corp. v. Feel*, 854 P.2d 791, 795 (Colo. 1993). “Because the trial court may not assess the weight of the evidence or credibility of witnesses in determining a motion for summary judgment, the court may not grant summary judgment when there is a controverted factual issue that must be resolved in a trial.” *Kaiser Found. Health Plan of Colo. v. Sharp*, 741 P.2d 714, 718 (Colo. 1987). Where reasonable people could reach different conclusions about the evidence, summary judgment is not appropriate. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 239 (Colo. 1984).

The burdens to show a dispute about whether there is a genuine issue of material fact are as follows: “The moving party has the initial burden to show that there is no genuine issue of material fact.” *Axiom, Inc. v. Colo. Pub. Util. Comm’n*, 955 P.2d 1023, 1029 (Colo. 1998); *Kaiser Found. Health Plan*, 741 P.2d at 718–19. Where, as here, a party moves for summary judgment on an issue on which it would not bear the burden of persuasion at trial, the party’s initial burden of going forward may be satisfied by showing that there is an absence of evidence in the record to support the non-moving party’s case. *Cont’l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). Because the initial burden is on the moving party, if the moving party does not meet this burden, summary judgment must be denied. *See Lowther v. Schaarschmidt*, 738 P.2d 25, 28 (Colo. App. 1986) (“[If] the moving party’s proof does not itself demonstrate the lack of a genuine factual issue, summary judgment is inappropriate.”); *see also Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1340 (Colo. 1988). But, if the moving party meets its burden, the burden shifts to the nonmoving party to “adequately demonstrate by relevant and specific facts that a real controversy exists.” *City of Aurora v. ACJ P’ship*, 209 P.3d 1076, 1082 (Colo. 2009); *see also In re Interest of S.N.*, 329 P.3d 276, 281–82 (Colo. 2014) (“Only if” the moving party meets its burden “must the opposing party then demonstrate a controverted factual question.”). Then, if the nonmoving party “fails to establish a controverted factual question,” summary judgment should still only be granted “in a narrow set of circumstances.” *Id.* at 282. These circumstances include when “the material facts are undisputed [and] also that reasonable minds could draw but one inference from them.” *Id.*

Nevertheless, if the nonmoving party meets its burden and shows that a controversy exists, summary judgment must be denied. *See Struble v. Am. Family Ins. Co.*, 172 P.3d 950, 955 (Colo. App. 2007). Any dispute over a material fact must then be resolved at trial. *See Dominguez Reservoir Corp.*, 854 P.2d at 795–96; *see also Mt. Emmons Mining Co.*, 690

P.2d at 239 (Summary judgment is reserved “only ” for cases “where there is no dispute as to material facts and thus no role for the fact finder to play” at a trial.).

When “a matter of public concern is involved, a heightened burden applies and a plaintiff is required to prove...falsity by clear and convincing evidence rather than by a preponderance. *Smiley’s Too, Inc. v. Denver Post Corp.*, 935 P.2d 39, 41 (Colo. App. 1996). The Court previously found in its order denying Westword’s motion to dismiss that the alleged defamatory statements involved matters of public concern. *See Order Denying Mot. to Dismiss* p. 19. The Court noted that the allegations in the two Westword articles at issue relate to events giving rise to the prosecution of Hampers for harassment and alleged witness tampering, as well as related judicial proceedings. His conduct was intertwined with his drug addiction relevant to his capacity to practice medicine. He was subjected to federal prosecution and the loss of his medical license, both of which are clearly matters of public concern. Accordingly, in considering Westword’s motion for summary judgment, the Court must apply the “clear and convincing evidence” standard to determine whether there are genuine issues of material fact for trial. *DiLeo v. Koltnow*, 613 P.2d 318, 323 (Colo. 1980).

#### IV. Analysis

##### A. Reconsideration of the Court’s July 2016 Order

Among the various arguments raised in its motion to dismiss, Westword contended that the alleged defamatory statements are substantially true because the two 2014 articles at issue explicitly identified Ebersohl’s allegations as such and presented them as nothing more than allegations that were not necessarily true. Westword contended that the allegations as such are substantially true as long as she actually made the allegations, regardless of whether the substance was actually true. Westword urged that under settled law, the Court was required to consider the challenged publications as a whole, and if its articles were a substantially accurate account of what Ebersohl had alleged, Hampers’s defamation claim failed as a matter of law.

In response, Hampers asserted that Westword could not simply republish a defamatory statement made by a third party and then absolve itself of liability by identifying the statement as something the third party said. According to Hampers, when a defamatory allegation is made, a court must look at the specific statement, regardless of what the publication as a whole might reflect, and hold the publisher liable if the substance of the defamatory statement is untrue, even if identified as the allegation of a third party.

The Court agreed with Hampers in its July 2016 order. Relying heavily on the Restatement (Second) of Torts § 581A (1977) and a New Jersey appellate court case, *Fortenbaugh v. New Jersey Press, Inc.*, 722 A.2d 568 (N.J. Sup. Ct. 1999), the Court found that a defamation defendant cannot escape responsibility by contending that the defamation was stated by another, perhaps unreliable source. Rather, the Court concluded that the underlying substance of the alleged defamatory statements published by Westword must be true, not just that Ebersohl made the allegations to Westword. Importantly, in reaching this conclusion, the Court looked at the alleged defamatory statements made in the June 2010 Article in isolation, ignoring the fact that the June 2010 Article was not directly at issue – rather, Hampers’s complaint was based on the Editor’s Note Article and Snake Charming Article. While the Court explicitly acknowledged in its

order that the 2014 articles reported the challenged statements as things Ebersohl said to its reporter, were not stated as matters of fact without identifying Ebersohl as the source, and that both articles questioned Ebersohl's trustworthiness and the veracity of the allegations that she made, the Court looked only to the June 2010 statements themselves without considering the context in which they were being reported in 2014.

In its summary judgment motion, Westword asks that the Court reconsider its position, correctly noting that under the law of the case doctrine, a trial court has the discretionary power to reconsider its own prior rulings. *See Hardesty v. Pino*, 222 P.3d 336, 340 (Colo. App. 2009). According to Westword, neither of the articles at issue in this case – the 2014 publications – were adopted as true or otherwise asserted the truth of Ebersohl's allegations about Hampers. Instead, the articles confirmed that Westword was merely publishing allegations that Ebersohl had made on prior occasions and advised its readers that the originally published June 2010 Article may not have been true. The Editor's Note appended to the Editor's Note Article reminds readers of the earlier 2010 article and invites readers to draw their own conclusions as to whether any of the allegations concerning Hampers are to be believed.

Under the law of the case doctrine, a court is generally required to follow its prior relevant rulings in the case. *Core-Mark Midcontinent, Inc. v. Sonitrol Corp.*, 300 P.3d 963, 967-68 (Colo. App. 2012). The doctrine is, however, discretionary when applied to a court's power to reconsider its own prior rulings. *Id.* at 968. While a court should be wary of reviewing its prior rulings in the absence of extraordinary circumstances, a court may do so if its previous decision is not sound because of legal error. *Id.* As was the case in *Core-Mark*, because the law in this area involves subtle but meaningful distinctions that can be misunderstood, the Court chooses to reconsider its determination that the actual substance of the alleged defamatory statements had to be substantially true.

After revisiting the Court's prior analysis, and the relevant case law, the Court concludes that it did apply the wrong test and finds that because Westword's reporting on the allegations made by Ebersohl concerning Hampers's conduct was substantially true, Hampers's defamation claim fails as a matter of law. The Court's prior analysis focused on the contents of the June 2010 Article only, overlooking the fact that the alleged defamation is based on the Editor's Note Article and the Snake Charming Article, and that the question of substantial truth must be based on a review of the articles as a whole.

As the Colorado Supreme Court noted in *Gomba v. McLaughlin*, 504 P.2d 337 (Colo. 1972), “[t]he right to assert ‘the truth thereof’ is a constitutional right and, if established to the satisfaction of the finder of fact, is an absolute defense to a libel action.” *Id.* at 338. Truth in this context does not mean literal truth. Rather, “[a] defendant asserting truth as a defense in a libel action is not required to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting, of the matter is true.” *Id.* at 339. “The question, a factual one, is whether there is a substantial difference between the allegedly libelous statement and the truth; or stated differently whether the statement produces a different effect upon the reader than that which would be produced by the literal truth of the matter.” *Id.*

In evaluating alleged defamatory statements, a fact-finder must consider the statements in context. This concept is well-established under Colorado law as the jury instructions

make clear. Instruction 22:11 provides that “[i]n determining the meaning of a statement and whether the statement defamed the plaintiff, you must consider the publication as a whole.” CJI-Civ 22:11 (2016). A fact-finder “must not dwell upon specific parts of the statement....” But “must give each part its proper weight and give the entire publication the meaning that people of average intelligence and understanding would give it.” *Id.* Stated differently, “[a] finding that the language used was defamatory must be predicated on the context of the entire story and the common meaning of the words utilized.” *Burns v. McGraw-Hill Broad. Co., Inc.*, 659 P.2d 1351, 1357 (Colo. 1983). Instruction 22:12 also mandates a contextual analysis of alleged defamatory statements, requiring that when “determining the meaning of a statement and whether the statement defamed the plaintiff, you must consider the statement in light of the surrounding circumstances.” CJI-Civ 22:12 (2016). The circumstances that may affect the manner in which words are understood may include the nature of the discussion in which they occur, and the likely expectations of readers as a result of those circumstances. *Id.*; see also *Keohane v. Stewart*, 882 P.2d 1293, 1299 (Colo. 1994) (confirming that a court must look at the entire context of a publication, the circumstances in which a statement is made, and how a statement is disseminated when considering whether a statement is defamatory).

Considering the alleged defamatory statements as a whole in light of the surrounding circumstances and the context in which they were made as is required, the Court concludes that Hampers cannot show by clear and convincing evidence that the statements are not substantially true.

The alleged defamatory statements appear in the Snake Charming Article and the Editor’s Note Article published by Westword. The Snake Charming Article states:

**S**andy Ebersohl has a way with men. By all accounts, the 48-year-old Colorado Springs woman has been quick to attract them, both in person and on Internet dating sites. But over the past twenty years, Ebersohl has also turned many of their lives into hell on earth.

Westword recently obtained more than two decades’ worth of police reports, court documents and copies of restraining orders that show that Ebersohl has a history of fabricating information. The documents reveal a pattern: Ebersohl starts dating a man, and

when the man tries to break up with her, she starts harassing him. Or, worse, she calls the police to report that he is harassing her, or that he hit her, broke into her house or stole her car. Her claims are almost always unfounded, the documents show.

According to records from the Colorado Bureau of Investigation, she has been arrested at least ten times in Denver, Aurora and Colorado Springs for violating restraining orders, harassment, stalking, and damaging property. In 1993 she pleaded guilty to causing a disturbance by phone. In 1994 she pleaded

guilty to harassment. In 1997 she pleaded guilty to harassing communication. In 2000 she pleaded guilty to disorderly conduct. And in 2005 she pleaded guilty to false reporting. She has been involved in more than a dozen restraining-order cases, either as the person seeking protection or the person from whom protection is being sought.

One of the men she was involved with, Louis Hampers, had problems of his own. In 2010, Westword ran a cover story about the former head of emergency medicine at Children’s Hospital in Aurora. And while the

criminal charges he faced, for prescription-drug fraud, and the loss of his career were his own doing, getting mixed up with Ebersohl probably didn’t help.

Ebersohl was a source in that story, but it now appears that she may have fabricated much of the information she gave to Westword, the police and other people involved in that situation. (A more detailed description can be found near the bottom of this story.)

Neither Ebersohl nor Hampers spoke to us for this story. But in an attempt to shed some light on whether **continued on page 14**

Ebersohl was telling the truth, we examined her history and spoke to some of the men she dated. They warned us that with Ebersohl, the truth is hard to come by.

"I wouldn't believe anything she says," says one man.

Another of her exes agrees. "She's a devious, diabolical woman," he says.

Mot. Summ. J. Ex. Q pp. 13-14.

The Editor's Note Article is prefaced by the following:

**Editor's note:** *In the spring of 2014, it came to Westword's attention that Sandra Ebersohl, who was one source in this story about Louis Hampers, has a history of fabricating information. Westword obtained more than two decades' worth of police reports, court documents and copies of restraining orders that reveal a pattern: Ebersohl starts dating a man, and when he tries to break up with her, she harasses him. Or she claims that he's harassing her. However, documents show that her accusations are usually unfounded.*

*Ebersohl made some of those claims against Hampers, who was dealing with problems of his own during the time that he got mixed up with her: In 2010, two months after his story was published, Hampers was arrested and charged with using five aliases and eight fake patient names to fraudulently obtain drugs such as generic Vicodin, Valium and Ambien 654 times at pharmacies in Denver and Aurora. In 2011, the former Children's Hospital ER doctor pleaded guilty to fourteen of the charges and was sentenced in 2012 to five years of supervised probation and a \$30,000 fine.*

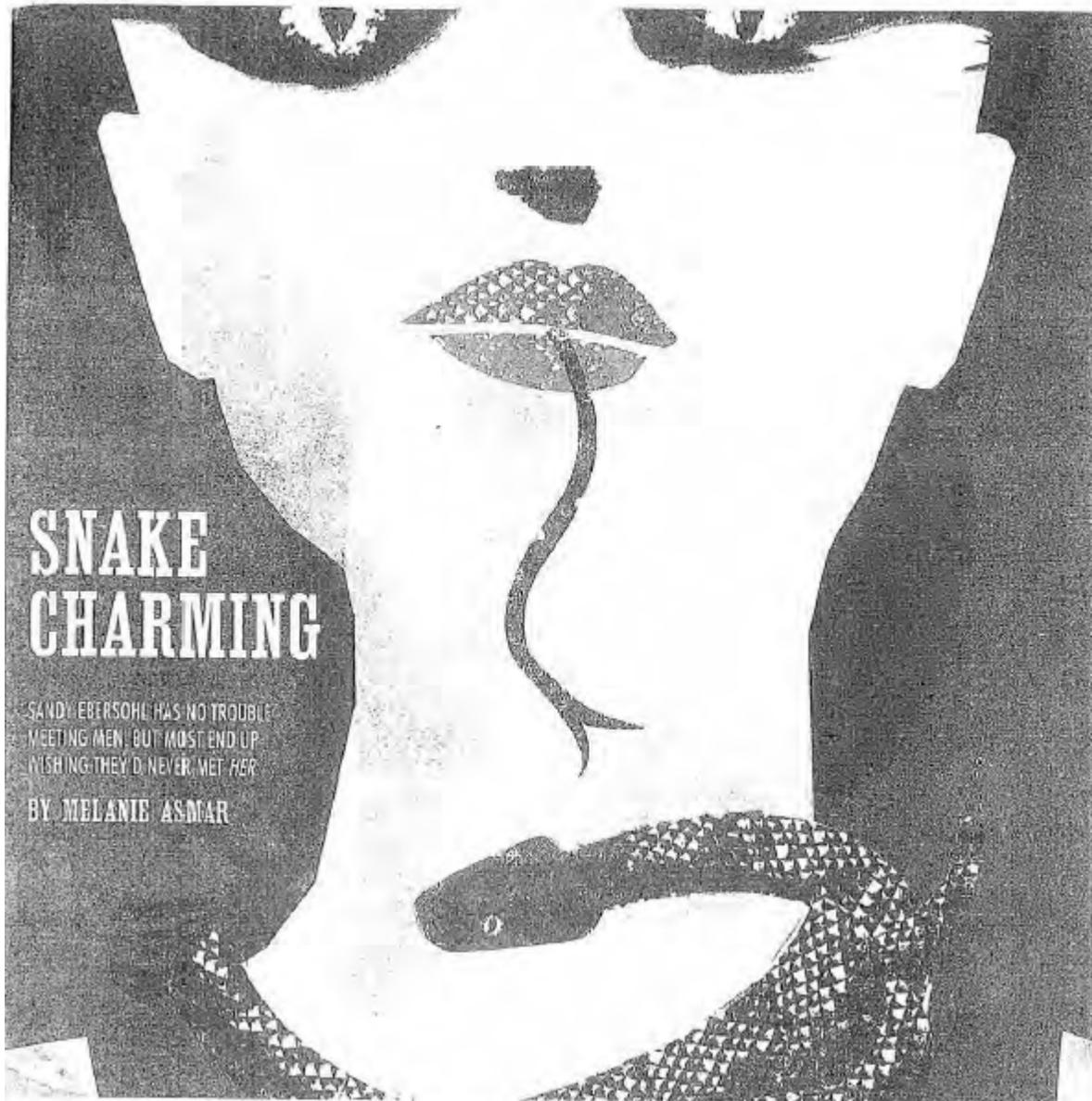
*But it appears that some of the accusations Ebersohl made against Hampers may have been fabricated. For instance, a re-examination of some of the e-mails mentioned in this story shows that the e-mail address from which those messages were sent may not have belonged to Hampers. It differs by a single character -- an additional "1" -- from the e-mail address that Hampers used for all other communication.*

*For more on Ebersohl, read our June 19, 2014, feature story, ["Snake Charming."](#)*

Mot. Summ J. Ex. T p. 1, and then includes the June 2010 Article with the various specific statements that Hampers claims are defamatory.

Undeniably, the substance or gist of the two 2014 articles at issue in this case is that Ebersohl made the various allegations about Hampers and that it is unclear whether they were ever true, not that the underlying allegations are true. The Snake Charming Article and Editor's Note Article do not allege or suggest that the underlying allegations are true. Rather, they simply report that Ebersohl made the allegations and invites the reader to draw his or her own conclusion as to whether what she stated is true. Although Hampers contends that the publications actually imply or suggest that he engaged in the conduct reported, read in the context of the articles as a whole, it is clear that they make no such assertion.

In the first instance, the title and graphic to the Snake Charming Article squarely calls Ebersohl's veracity into question:



Mot. Summ. J. Ex. Q. The article then begins with Westword reporting that it has obtained substantial documentation indicating that when men that Ebersohl has dated try to break up with her, she starts harassing them or accusing them of harassing her and that “[h]er claims are almost always unfounded.” Mot. Summ. J. Ex. Q p. 13. In the opening paragraphs of the article, Westword reports that while Ebersohl was a source for the June 2010 Article, it appears that much of the information provided had been fabricated. Mot. Summ. J. Ex. Q p. 13. At the end of the story, Westword discusses some of the allegations in the June 2010 Article and questions

the veracity, concluding with the question: “So, how much of what Ebersohl told Westword is true .... her record will have to speak for itself.” Mot. Summ. J. Ex. Q p. 19.

Similarly, the Editor’s Note to the Editor’s Note Article, reports that Westword had learned that Ebersohl, one source for the June 2010 Article, had a history of fabricating information, and that it appeared that some of the accusations that she made against Hampers and were reported in that article were untrue. Mot. Summ. J. Ex. T p. 1. The note directs the reader to see the Snake Charming Article for additional information. Mot. Summ. J. Ex. T p. 1. As Westword correctly states, the Editor’s Note confirms that Westword was merely publishing allegations that Ebersohl made and advised its readers, based on the documents that it has obtained, that her statements may not have been true, and that they should draw their own conclusions as to their truth.

Thus, the gist of Westword’s reporting is that Ebersohl made the various allegations about Hampers, not that the allegations themselves are true. As long as it is undisputed that Ebersohl made these allegations, Hampers’s defamation claim must fail.

Hampers admits that Ebersohl made all of the alleged defamatory statements reported in the Editor’s Note Article and Snake Charming Article. When asked whether he denied that Ebersohl actually made all of the allegations reported in 2010, Hampers admits that she made some of the statements directly to him and some were made to the police when Ebersohl filled out forms to obtain a restraining order against him. Mot. Summ. J. Ex. A pp. 73-74. Hampers admits in his deposition that Ebersohl had alleged that he had confiscated her medications and refused to return them, and had confiscated her keys at the Anschutz Medical Center. Mot. Summ. J. Ex. A p. 75; p. 84. Hampers admits that Ebersohl made the same allegations relating to his interaction with her on the Anschutz Medical Center Campus on April 14, 2010 to the campus police. Mot. Summ. J. Ex. A pp. 83-84. Regarding the claim that Hampers had broken Ebersohl’s windshield, which Hampers claims is untrue, Westword specifically reported that “Hampers denied responsibility, [Ebersohl] says, but he did offer to pay for a replacement. Mot. Summ. J. Ex. T p. 9.

Because Westword’s two articles accurately reported allegations that Hampers admits Ebersohl made against Hampers, and accurately reported that Hampers denied responsibility for breaking Ebersohl’s windshield, without endorsing the truth of Ebersohl’s allegations, the statements at issue are substantially true. Given that summary judgment in First Amendment cases involving the press is favored, the Court grants summary judgment in favor of Westword on Hampers’s defamation claim.

That the substantial truth issue turns on whether Ebersohl’s allegations were made, not whether the allegations are actually true is supported in case law considering publications similar to those at issue here.

In the first instance, *Pierce v. St. Vrain Valley School District RE-1J*, 944 P.2d 646 (Colo. App. 1997) supports this conclusion. Although the Court previously distinguished the case, the Court did so based on the incorrect legal filter that it had adopted in its order on Westword’s motion to dismiss. The Court looked only at the fact that Hampers took issue with the specified statements in the June 2010 Article, without considering that they were made in the

context of the two 2014 articles and must be evaluated in light of that context. As the Court previously observed, in *Pierce*, individuals made allegations to a school district that they had been sexually harassed by the plaintiff. *Id.* at 648. The Denver Post then published an article containing statements indicating “that there had been allegations of sexual harassment against plaintiff, that there had been a ‘basis’ for such allegations, and that the allegations were the reason plaintiff resigned for ‘personal reasons.’” *Id.* at 648-49. The newspaper moved for summary judgment contending, in part, that the statements regarding the allegations of sexual harassment were true. *Id.* at 649. On appeal, the plaintiff argued that the allegations of sexual harassment were not bona fide because the substance of the statements was not true and that genuine issues of fact remained as a result.

The Colorado Court of Appeals affirmed the trial court, finding that:

[T]he truthfulness of the harassment allegations themselves is not at issue in this case. Rather, plaintiff’s defamation claim concerns only the truth of the factual statements in the newspaper article that “allegations of sexual harassment” were made, that the allegations “were flying around back in May,” that the Board “found basis for the rumors,” and that plaintiff resigned for personal reasons because of the rumors.

*Id.* at 651.

As was the case in *Pierce*, the truth of Westword’s two 2014 articles turns on whether Ebersohl made the allegations that Hampers contends are defamatory, not on whether the statements were substantively true. The Court draws this conclusion because the articles in question, considered in context and in light of the circumstances in which they were published, do nothing more than report Ebersohl’s allegations as such and make clear that she has a propensity for fabrication and that Westword is not contending that the allegations are true, but leaves it to the reader to decide what to believe.

*Basilus v. Honolulu Publishing Co.*, 711 F.Supp. 548 (D. Hawaii 1989) is also instructive. The defendant, a magazine publisher, published an article titled “Assassination in Palau,” reporting on the political and economic chaos in Palau after the passage of certain legislation, the construction of an electrical power plan, and the assassination of a former president. *Id.* at 549. The plaintiff alleged that a paragraph in the article was libelous, reporting that the former president’s relatives had received an anonymous letter claiming that the plaintiff and another individual had been promised a substantial amount of money if he could secure passage of the legislation, and that they had hired assassins to kill the president. *Id.* The plaintiff contended that the paragraph intended to convey and did in fact convey to the community at large that he had murdered the president and that he had been bribed. *Id.*

The defendant moved for summary judgment contending, *inter alia*, that the publication was true or substantially true in that letters did exist implicating the plaintiff in the assassination, and the Hawaii federal court granted the motion. Noting that under both federal and Hawaii law, truth is a complete defense to an action for defamation, and that proof of truth is measured by the ordinary implication of the words, meaning the gist or sting of the alleged defamation, the court considered the article as a whole and found it not possible to conclude that

the article alleged that the plaintiff had been bribed or killed the president. *Id.* at 551. The gist of the paragraph was that the former president's relatives had received a letter stating that the plaintiff had received a bribe and hired assassins. *Id.* The court noted that "[t]he paragraph does *not* allege that these underlying allegations are true; it simply reports that the relatives did receive such a letter," an undisputed fact. *Id.*

The court's analysis of the context of the article is particularly helpful to the instant case. The court noted:

To begin with, the subtitle of the article states in large print:

Two years ago the first president of  
this tiny island nation was gunned  
down. No one yet knows for sure  
who killed him and why.

Second, the paragraph describing the accusations in the letter clearly attributes them to the letter. Third, the statements were written in the context of a discussion of one of several theories of why [the former president] may have been killed – the "conspiracy theory." Other theories discussed in the article were that the assassination was perpetrated by a "crazy person,"....Fourth, the second paragraph following the paragraph at issue states that the attorney general of Palau refused to investigate Basilius' alleged involvement in the conspiracy due to the anonymous nature of the letters. Finally, the last paragraph of the article reiterates that none of the controversies had been resolved at the time of the writing of the article.

*Id.* Based on this analysis, because the gist of the report was that the president's relatives had received an anonymous letter accusing the plaintiff receiving a bribe and hiring assassins, these statements were substantially true. *Id.* at 552. The letters existed and the paragraph accurately restated the accusations contained in the letter. *Id.* Thus, the court found that "[r]egardless of whether the underlying allegations' truth may be disputed, there is no material dispute that the letters exist, and that defendants reported the 'gist' of them," making summary judgment appropriate. *Id.*; see also *Global Relief Found., Inc. v. N.Y. Times Co.*, 390 F.3d 973, 987 (7<sup>th</sup> Cir. 2004) (finding that a trial court correctly entered summary judgment in favor of media defendant on the basis of substantial truth because the articles had accurately reported that the plaintiff was being investigated by the government without concluding that the plaintiff was actually guilty of the conduct for which it was being investigated); *Green v. CBS Inc.*, 286 F.3d 281, 284 (5<sup>th</sup> Cir. 2002) (finding defamatory statements non-actionable because they merely report allegations); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1098 (4<sup>th</sup> Cir. 1993) (finding that a story "constructed around questions, not conclusions" not actionable as defamation because "[q]uestions are not necessarily accusations or affronts," but "may simply be...expressions of uncertainty" and finding no libel if a publication provides an invitation "to investigate and question"); *Miles v. Ramsey*, 31 F.Supp.2d 869, 880 (D. Colo. 1998) (considering alleged defamatory statement in context of the entire story, not on its own, and finding substantial truth demonstrated where the overall tenor of the articles did not suggest that the

plaintiff was guilty of the alleged defamatory conduct (killing JonBenet Ramsey), and noting that “a fair reading of the articles” suggested that the publisher believed that the plaintiff was not the killer and that “no reasonable trier of fact could conclude otherwise when the articles are read as a whole”); *Neely v. Wilson*, 418 S.W.3d 52, 65 (Tex. 2013) (declining to adopt a rule that reporting of third-party allegations under investigation are substantially true if the media accurately reports the allegations and the existence of any investigation, but noting that “we do not foreclose the possibility that the gist of some broadcasts may merely be allegation reporting, such that one measure for the truth of the broadcast could be whether it accurately relayed the allegations of a third party”).

Employing the same type of analysis here supports summary judgment. The gist of both 2014 articles is that Ebersohl made the allegations that Hampers claims are defamatory, that she cannot be trusted, and that she fabricated some of the accusations – the articles cannot be viewed as reporting allegations made by her as true.

The Editor’s Note Article is not simply a republication of the June 2010 Article (which is the real basis for Hampers’s defamation claim) as Hampers attempts to suggest. Although the June 2010 Article is attached to the note, the Editor’s Note Article reports that Westword had obtained more than two decades’ worth of police reports, court documents, and copies of restraining orders that revealed a pattern – that Ebersohl either harassed men that she dated when they attempted to break up with her or accused them of harassing her, and that the accusations are “usually unfounded.” Mot. Summ. J. Ex. T p. 1. The article reports that some of these accusations were made against Hampers and that the accusations “may have been fabricated.” Mot. Summ. J. Ex. T p. 1. The article then directs the reader to the Snake Charming Article (the “Snake Charming” publication) for more on Ebersohl. Read in context, the article is only a report of the allegations made by Ebersohl, without suggesting that they are true – to the contrary, the article posits that the allegations cannot be trusted. Likewise, the Snake Charming Article is nothing more than a report of allegations made by Ebersohl about Hampers and others and a discussion of her long history of lying about the men that she has encountered. The article makes abundantly clear that it is questionable as to whether the statements that she has made about Hampers and others can be trusted, and that her record of fabrication “[w]ill have to speak for itself.” Mot. Summ. J. Ex. Q p. 19. In short, the article is simply a report of Ebersohl’s allegations without implying that the underlying allegations are true. Because Hampers admits that Ebersohl made the allegations – thus, the allegations were accurately reported by Westword – the articles are substantially true, regardless of whether the underlying statements with which Hampers takes issue are actually true.

Other than claiming that Westword must show the substantial truth of the underlying allegations, Hampers contends that summary judgment should be denied because there are disputed issues of fact as to whether Ebersohl accurately relayed the statements in question to Westword. Hampers claims that without additional discovery, it cannot determine what Ebersohl told to Westword’s reporter. Hampers alleges that there is evidence of differing versions of some of the allegations to their parties. Hampers further argues that to the extent that Hampers may have testified about what Ebersohl said to Westword’s reporter, it is hearsay, and that he testified that he did not know what Ebersohl told Westword. The Court finds Hampers’s position unpersuasive.

As Westword correctly notes, when a party moves for summary judgment on an issue on which it does not bear the burden of persuasion at trial, its initial burden is satisfied by showing that there is an absence of evidence in the record that could support a jury verdict in favor of the non-moving party. Westword met its burden by providing Hampers's admission in his deposition that Ebersohl made the alleged defamatory assertions to him, the police, and others. *See* Ex. A. pp. 73-75. The burden then shifted to Hampers to provide admissible evidence rather than argument of counsel sufficient to create a genuine issue of material fact – evidence upon which a reasonable jury could enter judgment in his favor. Hampers provides no actual evidence contradicting his own admission, nor does he provide any legal authority that Ebersohl had to have made the allegations to Westword's reporter in order for substantial truth to be established. Moreover, Hampers ignores completely the fact that both 2014 articles do not in any manner adopt the truth of Ebersohl's allegations. Under a clear and convincing standard, and viewing the allegations in the context in which they were made, there is no genuine issue of material fact as to the substantial truth of the challenged statements.<sup>1</sup>

#### V. Order

For the foregoing reasons, the Court GRANTS Westword's motion for summary judgment, dismissing Hampers's defamation claim.

IT IS SO ORDERED on this Tuesday, January 03, 2017

BY THE COURT:



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Judge Karen L. Brody  
Denver District Judge

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<sup>1</sup> Because the Court has concluded under the applicable standard that summary judgment should be granted, the Court need not reach the question of whether the underlying defamatory allegations are substantially true.