BEFORE THE COMMISSIONER OF

POLITICAL PRACTICES

In the Matter of the)
Complaint Against JEFF FOX)
and MontCEL)

SUMMARY OF FACTS AND STATEMENT OF FINDINGS

Daniel Fuchs, the successful candidate for House District 15 in the 1994 general election, filed a complaint against the Montana Committee for an Effective Legislature (MontCEL) and Jeff Fox, its Executive Director. The complaint alleges that MontCEL and Jeff Fox violated Mont. Code Ann. § 13-35-234 by making false statements in a campaign flier.

SUMMARY OF FACTS

1. Daniel Fuchs was a candidate for the seat in House District 15 in the November, 1994 general election. Rep. Fuchs defeated his opponent in the election, and is currently serving as representative for the district.

2. Jeff Fox is Executive Director of MontCEL, a political committee. Just prior to the election MontCEL prepared a flier in opposition to Rep. Fuchs's candidacy, and mailed it out under a bulk mailing permit. On the front of the flier is the following statement in quotations: "He has threatened to have someone slit my throat for $50 . . . " Inside the flier is the following language:

> *" . . . physically assaulted my co-worker, kicked in my basement door, had operators break in on my phone conversations, dug in my garbages, and given other physical threats as well."

In the top left corner of the inside of the flier is this statement:

> * Affidavit in support of application for preliminary injunction and temporary restraining order (domestic abuse). DR94-846; August 4, 1994.

The flier also includes the following statements:

> Respondent's conduct has caused me reasonable apprehension of further bodily injury. The specific facts set forth above indicate that a delay in issuing an order would cause immediate and irreparable injury to me before respondent could be heard in opposition.
>
> This information is public record.
>
> One year injunction granted to protect Fuchs' wife and children by Judge William J. Speare on August 17, 1994.

At the bottom of the inside of the flier is the statement:

> On November 8th, please vote No on domestic abuse. Vote No on Daniel Fuchs.

The outside of the flier contains the following language:

> Proudly paid for by the Montana Committee for an Effective Legislature, PO Box 468, Helena, MT 59624; Not authorized by any candidate.

3. Rep. Fuchs contends that the flyer constitutes a personal attack against him, and that it contains false statements.

4. Jeff Fox stated that MontCEL workers obtained a copy of a court file regarding Rep. Fuchs, and that file was the basis for the information contained in the flier. He contends that MontCEL attempted to be accurate, and that there was no attempt to misrepresent the facts.

5. Cause No. DR 94-846, in the Montana Thirteenth Judicial District Court, Yellowstone County, is an action entitled: "Sandra J. Fuchs, Petitioner, and Daniel C. Fuchs, Respondent." The court

documents are public records. Sandra J. Fuchs is Rep. Fuchs's ex-wife, having been divorced from Rep. Fuchs in May, 1994. Ms. Fuchs signed an affidavit in Cause No. DR 94-846. The affidavit is dated and notarized August 4, 1994, and is entitled as follows:

AFFIDAVIT IN SUPPORT OF APPLICATION FOR
PRELIMINARY INJUNCTION AND TEMPORARY
RESTRAINING ORDER
(DOMESTIC ABUSE)

The affidavit is a "fill in the blank" form-type affidavit, with spaces for the affiant to add handwritten information.

6. Paragraph 3 of the affidavit contains the following form language: "Respondent committed physical abuse, harm, or bodily injury against me in _____ County, Montana." Ms. Fuchs wrote "Yellowstone" in the space provided.

7. Paragraph 5 of the affidavit lists the handwritten names and birth dates of two minor children of the petitioner and respondent.

8. Paragraph 6 of the affidavit contains the following form language: "Respondent has committed physical abuse, harm, or bodily injury against me on the following dates and in the following manner:" The affiant, Ms. Fuchs, then inserted the following handwritten information:

> July 31 was the most recent date. As I picked up the girls from Dan, he said lewd comments and called me vulgar names. He aggressively came toward me and I pushed him away. Dan then filed a domestic abuse charge against me. That same night he called several (4-5) times and told me that I was asking for more trouble than I could handle. Dan has followed me on at least 3 occasions, once pushing me. He has threatened to have someone slit my throat for $50.00, physically assaulted my co-worker, kicked in my basement door, had operators

> break in on my phone conversations, dug in my garbages, and given other physical threats as well.

9. Paragraph 7 of the affidavit contains the following form language:

> Respondent's conduct has caused me reasonable apprehension of future bodily injury. The specific facts set forth above indicate that a delay in issuing an order would cause immediate and irreparable injury to me before respondent could be heard in opposition.

10. On August 17, 1994, District Judge William J. Speare signed a document in Cause No. DR 94-846, entitled: "Preliminary Injunction (Domestic Abuse)". The preliminary injunction was served on Rep. Fuchs on August 23 and 29, 1994. Like the affidavit, the preliminary injunction is a "fill in the blank" form document, with spaces for the inclusion of handwritten information by the judge.

11. The preliminary injunction contains the following form language, with handwritten insertions by Judge Speare indicated in brackets:

> The Court has reviewed petitioner's application and affidavit and the evidence presented at the hearing and finds that petitioner is the victim of physical abuse, harm, or bodily injury and that a preliminary injunction should issue.
>
> IT IS THEREFORE ORDERED THAT RESPONDENT IS RESTRAINED AND ENJOINED AS FOLLOWS:
>
> . . .
>
> 2. Respondent shall not molest or disturb the peace of petitioner or of the following children: [Judge Speare wrote in the names of the two minor children as listed in the affidavit].
>
> . . .

> 5. Respondent shall not engage in the following conduct: [Judge Speare wrote in: "Destroy or threaten to destroy Petitioner's personal property; follow & threaten Petitioner - interrupt her phone calls"].
>
> IT IS ORDERED that this Injunction shall remain in full force and effect for a period of ONE (1) YEAR from the date hereof.

12. Sandra Fuchs contends that MontCEL took the information in Cause No. DR 94-846 out of context. She stated that Rep. Fuchs never physically abused her or her children, and that she is not afraid of him. She stated that she signed the affidavit and applied for the injunction so her children would not have to observe her and Rep. Fuchs fighting.

STATEMENT OF FINDINGS

Mont. Code Ann. § 13-35-234 provides:

> **Political criminal libel - misrepresenting voting records.** (1) It is unlawful for any person to make or publish any false statement or charge reflecting on any candidate's character or morality or to knowingly misrepresent the voting record or position on public issues of any candidate. A person making such a statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor.
>
> (2) In addition to the misdemeanor penalty of subsection (1), a successful candidate who is adjudicated guilty of violating this section may be removed from office as provided in 13-35-106 and 13-35-107.

To establish a violation of this statute, it would be necessary to prove that Jeff Fox and MontCEL made or published a false statement reflecting on Rep. Fuchs's character or morality, and that the statement was made "with knowledge of its falsity or with a reckless disregard as to whether it is true or not".

The flier accurately quotes excerpts from a sworn affidavit signed by Sandra J. Fuchs, Rep. Fuchs's ex-wife, filed in Thirteenth Judicial District Cause No. DR 94-846. The flier contains quotation marks where appropriate, and indicates that the information is taken from the affidavit. These are not false statements made by Jeff Fox or MontCEL. Rather, they are reports of statements contained in court documents in Cause No. DR 94-846.

There is one inaccuracy in the flier. It states that the one-year injunction was granted to protect Rep. Fuchs's wife and children. At the time the injunction was issued, according to her affidavit Sandra Fuchs was no longer married to Rep. Fuchs. This does not appear to have been an intentional misrepresentation, and in any event the inclusion of the word "wife" instead of "ex-wife" does not reflect on Rep. Fuchs' character or morality.

Although Mont. Code Ann. § 13-35-234 is a criminal statute, legal principles pertaining to civil libel offer some guidance in analyzing this matter. Statements made in a complaint filed in court are absolutely privileged under Mont. Code Ann. § 27-1-804(2), and cannot be the basis of a civil libel action. Montana Bank of Circle, N.A. v. Ralph Meyers & Son, Inc., 236 Mont. 236, 245, 769 P.2d 1208, 1213 (1989). An affidavit filed in a civil case is also absolutely privileged. 53 C.J.S. Libel and Slander § 74 (1987). In addition, under common law a fair and true report of a judicial proceeding is also a privileged communication, regardless of whether the statements truthfully reported are

themselves true. 53 C.J.S. Libel and Slander § 103 (1987). This principle is codified in Montana at Mont. Code Ann. § 27-1-804(4).

This rule applies not only to comprehensive accounts of judicial proceedings, but also to accounts focusing more narrowly on important parts of such proceedings. Rosenberg v. Helsinki, 616 A.2d 866, 874-75 (Md. 1992); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 254 (4th Cir. 1988). A report of judicial proceedings is "fair" if the overall impression created by the summary is no more defamatory than that created by the original. Brown & Williamson Tobacco Corp. v. Jacobsen, 713 F.2d 262, 270-71 (7th Cir. 1983).

The statements in the flier would most likely be privileged from liability in a civil libel action, based on the legal principles discussed above. Under these circumstances, the evidence does not support to a finding of criminal liability under Mont. Code Ann. § 13-35-234.

Dated this 28th day of February, 1995.

Ed Argenbright, Ed.D.
Commissioner of Political Practices