

4. Opposite the first photograph inside the flier is the following message:

Anti-Child Support. When 78 Representatives voted to get tough on parents who refuse to pay child support, Brad Molnar voted NO. In fact, Brad Molnar voted against 2 bills to strengthen child support collection laws. (HB 482, 3rd Reading, 4/12/93; HB 614, 3rd Reading, 2/22/93).

Rep. Molnar contends these statements misrepresent his voting record and his position on the issues.

5. House Bill (HB) 482, considered during the 1993 Montana Legislative session, was described as "An act providing for civil contempt for failure to pay support; requiring employers, payers, and unions to report hiring information to the Department of Social and Rehabilitation Services; providing a paternity acknowledgment process; providing for the suspension of state-issued licenses for failure to pay support". Upon its initial consideration by the House, Rep. Molnar voted for passage of the bill on second reading, then voted against the bill on third reading. When the bill was returned to the House with Senate amendments, Rep. Molnar voted "no" on third reading (on the question of concurrence with the Senate amendments), on April 12, 1993.

6. HB 614, considered during the 1993 Montana Legislative session, was described as a bill "providing for enhanced ability to collect child support", and included provisions subjecting public retirement benefits to garnishment and attachment for support payments. On February 22, 1993, Rep. Molnar voted "no" on second reading, and the bill failed. Rep. Molnar then voted "no" on a

motion to reconsider, and the motion failed. There was no third reading vote on HB 614.

7. Opposite the second photograph inside the flier is the following message:

Anti-Child Services. In 1993, when 78 Representatives voted to create a committee to ensure responsible services to our children, Brad Molnar said NO. (HB 19, 3rd Reading, 3/16/94).

Rep. Molnar contends these statements misrepresent his position and his voting record, because HB 19 does not create the committee described in the statement.

8. HB 19, considered during the 1993 Montana Legislative session, was a bill for an act "establishing a joint oversight committee on children and families". Rep. Molnar voted against the bill on third reading on March 16, 1993. The bill was passed into law, and created a legislative oversight committee whose duties included reviewing and monitoring public and private programs and sources of funding for the provision of various services to children and families.

9. Opposite the third photograph inside the flier is the following message:

Anti-Child Protection. Strong families are vital to our children's future. That's why 83 Representatives adopted the Montana Family Policy Act to guide legislators in creating laws that support the family. Brad Molnar voted against the act, and our children's future. (HB 18, 3rd Reading, 3/5/94).

Rep. Molnar contends this is a misrepresentation of his voting record on HB 18. He states that he voted "yea" on third reading, and that the ad also misrepresents the intent of the bill.

10. HB 18, considered during the 1993 Montana Legislature, was entitled "an act establishing the Montana Family Policy Act to guide state government actions that impact children and families". Rep. Molnar voted "yea" on the bill on third reading when it was first considered in the House. When the bill was returned to the House with Senate amendments, Rep. Molnar voted "no" on third reading (on the question of concurrence with the Senate amendments), on March 5, 1993. The bill was passed into law, and sets forth a series of family policy objectives "intended to guide the state's efforts to provide services to children and families." Mont. Code Ann. §§ 41-7-101, 41-7-102.

11. The research, layout, and composition for the campaign flier was performed by personnel from the Montana Committee for an Effective Legislature (MontCEL). Candidate Kroll reviewed the flier and questioned Karen Powell, of MontCEL, concerning its accuracy. Upon being assured that the information contained in the flier was accurate, candidate Kroll approved the use of the flier. Candidate Kroll believes the flier is accurate. He approved the content of the flier because he disagrees with Rep. Molnar's position on the child and family related issues discussed in the flier.

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.

The evidence must be reviewed to determine whether candidate Kroll misrepresented Rep. Molnar's voting record or position on public issues. HB 482 and HB 614 were two bills clearly aimed at strengthening the laws regarding collection of child support payments. The House journals establish that Rep. Molnar voted against both bills, as represented by candidate Kroll. The flier inaccurately represents that Rep. Molnar voted against HB 614 on third reading on February 22, 1993. Rep. Molnar actually voted against the bill on second reading, and then after its defeat voted "no" on a motion to reconsider. Rep. Molnar does not complain of this inaccuracy, and it does not appear to be either a significant or an intentional substantive misrepresentation.

HB 19 created a legislative oversight committee which reviews and monitors programs that provide services to children. Candidate Kroll's description of the committee as one "to ensure responsible services" to children is not a clear mischaracterization of the function of the committee. The House journals show that Rep. Molnar voted against the bill, as represented by candidate Kroll.

HB 18 created the Montana Family Policy Act, which sets forth a series of objectives "intended to guide the state's efforts to provide services to children and families". Candidate Kroll's description of the act as one "to guide legislators in creating

laws that support the family" may have erroneously stated the intent of the bill, since it does not appear to be aimed at actions of the Legislature. As candidate Kroll represented in the flier, Rep. Molnar voted against the bill on third reading on March 5, 1993¹, after its return from the Senate with amendments. Rep. Molnar contends that he voted against the amendments, and not against the bill. His vote, however, could fairly be represented as a vote against the bill in its amended form.

The representations that Rep. Molnar votes "anti-child", "anti-child support", "anti-child services", and "anti-child protection" are supported by candidate Kroll with the citations to the bills and the dates of Rep. Molnar's votes on the bills. These representations must obviously be construed as candidate Kroll's interpretation of Rep. Molnar's votes on the various issues.

Mont. Code Ann. § 13-35-234 is a criminal statute. A violation can be established only if the evidence supports a finding that a misrepresentation or false statement is made "with knowledge of its falsity or with a reckless disregard as to whether it is true or not ". Mont. Code Ann. § 13-35-101 states that the "penalty provisions of the election laws of this state are intended to supplement and not to supersede the provisions of the Montana Criminal Code." Mont. Code Ann. § 45-2-101(33) defines "knowingly" as follows:

¹The flier lists the date of the vote as March 5, 1994, rather than 1993, when the vote was actually taken. This was apparently an oversight and, in any event, Rep. Molnar does not complain about this inaccuracy.

. . . [A] person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as "knowing" or "with knowledge", have the same meaning.

In determining whether the representations that are at issue in this case were made with the requisite mental state, it would be necessary to prove that candidate Kroll was "aware of a high probability" that the representations were false.

A violation of the statute can also be proved if there is evidence that a person acted with "reckless disregard". The Compiler's Comments to Mont. Code Ann. § 13-35-234 note that the source of the "standard" in subsection (1) of the statute is "apparently drawn from New York Times v. Sullivan, 376 U.S. 254 (1964)". That case involved a civil libel action filed by a public official against a newspaper. The Supreme Court held that recovery would only be allowed if the public official could prove that the alleged libelous statement was made with "actual malice"; that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." Sullivan, 376 U.S. at 279-280.

In a later case, Herbert v. Lando, 441 U.S. 153 (1979), the Supreme Court, citing Sullivan, stated that "reckless disregard for truth" means that the defendant "in fact entertained serious doubts as to the truth of his publications". The Court noted that such "subjective awareness of probable falsity" may be found if "there

are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Herbert, 441 U.S. at 156-57.

Other cases have held that "reckless disregard" is "more than mere negligence", Major v. Drapeau, 507 A.2d 938, 941 (R.I. 1986); and that "a failure to investigate is not sufficient in itself to establish reckless disregard", Bartimo v. Horsemen's Benevolent and Protective Association, 771 F.2d 894, 898 (5th Cir. 1985). In Green v. Northern Publishing Co., Inc., 655 P.2d 736, 742 (Alaska 1982), the Court observed:

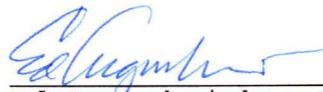
Reckless disregard, for these purposes, means conduct that is heedless and shows a wanton indifference to consequences; it is conduct which is far more than negligent. [Citation omitted]. There must be sufficient evidence to permit the inference that the defendant must have, in fact, *subjectively entertained serious doubts as to the truth of his statement.* [Italics in original].

Applying these principles to the facts in this case, the evidence does not support a finding that candidate Kroll acted with the requisite knowledge or reckless disregard in making the representations regarding Rep. Molnar's voting record and position on issues. Candidate Kroll relied on information he obtained from MontCEL. He believed the information accurately reflected Rep. Molnar's voting record, and he continues to believe that the representations in the flier are accurate. A review of Rep. Molnar's voting record on the bills reveals that for the most part the representations are accurate, although obviously some may question the characterization of those votes by candidate Kroll.

There is no evidence that candidate Kroll was "aware of a high probability" that the representations contained in the flier were

false, or that he "subjectively entertained serious doubts" as to the truth of the representations. Candidate Kroll's flier vigorously criticizes the record of his opponent in the election, based on Rep. Molnar's voting record on selected bills. The "anti-child" representations obviously constitute candidate Kroll's subjective interpretation of his opponent's voting record, and can therefore not be labeled as either true or false statements. There is insufficient evidence to establish a violation of Mont. Code Ann. § 13-35-234.

Dated this 21st day of February, 1995.



Ed Argenbright, Ed.D.
Commissioner of Political Practices