

STATE OF INDIANA ) MARSHALL SUPERIOR COURT NO. 2  
 )SS:  
COUNTY OF MARSHALL )

SANDRA HURD )  
Plaintiff, )  
 )  
vs. )  
 )  
PULASKI COUNTY BOARD OF )  
COMMISSIONERS, TRACEY SHORTER, )  
LARRY BRADY, TERRY YOUNG, )  
SHEILA GARLING, and KEVIN )  
TANKERSLEY, jointly and severally )  
and in their official capacities, )  
Defendants. )

CAUSE NO. 50D02-1409-CT-000033

**FILED**  
IN OPEN COURT

JAN 24 2017

*Deborah VanDerMark*  
CLERK OF SUPERIOR COURT No. 2  
MARSHALL COUNTY, STATE OF INDIANA

**ORDER REGARDING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

Consolidated with: )  
 )  
SANDRA HURD. )  
Plaintiff, )  
 )  
vs. )  
 )  
TRACEY SHORTER, individually )  
Defendant. )

**INTRODUCTION**

On December 12, 2016, Defendants Pulaski County Board of Commissioners, Tracey Shorter, Larry Brady, Terry Young, Sheila Garling, and Kevin Tankersely (collectively, "Defendants") appeared by attorney Alexander Will, and Plaintiff Sandra Hurd ("Hurd") appeared by attorney Christopher Kimbrough. At issue were the Defendants' Motion for Summary Judgment (filed October 10, 2016), Hurd's Response in Opposition (filed November 23, 2016), and the Reply of the Defendants (filed December 16, 2016). After consideration of the motions,

arguments, designations of evidence, and relevant case law, the Court now concludes and Orders as follows.

### **STANDARD OF REVIEW**

Pursuant to Indiana Trial Rule 56(C), “summary judgment is appropriate where the designated evidence shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Carr v. American Family Insurance*, 767 N.E.2d 535, 537 (Ind. 2002). The burden is on the moving party to prove that there are no genuine issues of material fact and he is entitled to judgment as a matter of law. *See Schmidt v. American Trailer Ct.*, 721 N.E.2d 1251, 1253 (Ind. Ct. App. 1999). “A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue.” *Morris v. Crain*, 969 N.E.2d 119, 123 (Ind. Ct. App. 2007) (*citing Huntington v. Riggs*, 862 N.E.2d 1263, 1266 (Ind. Ct. App. 2007)).

When reviewing a motion for summary judgment, the Court must consider only the evidentiary matter properly designated to the trial court in order to determine whether a genuine issue of material fact remains for resolution by the trier of fact. *See Ind. Trial Rule 56(C)*. All facts and inferences from the designated evidentiary material must be liberally construed in favor of the non-moving party. *See Selleck v. Westfield Insurance Co.*, 617 N.E.2d 968, 970 (Ind. Ct. App. 1993). Even if the facts are not in dispute, summary judgment is inappropriate when the evidence before the court reveals a good faith dispute as to the inferences to be drawn from those facts. *State v. American Motorists Insurance Company*, 463 N.E.2d 1142, 1146 (Ind. Ct. App. 1984).

Indiana Trial Rule 56(E) provides, in pertinent part: “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set

forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.” *Myers v. Irving Materials*, 780 N.E.2d 1226, 1228 (Ind Ct. App. 2003). Under Indiana law, it is clear that a party may not wait until the summary judgment hearing to oppose a motion. *Morton v. Moss*, 694 N.E.2d 1148 (Ind. Ct. App. 1998). When non-moving party does not come forward with specific evidence in opposition to the properly submitted materials that support summary judgment, the moving party’s designated materials are accepted as true. *Myers*, 780 N.E.2d at 1228 (citing *Templeton v. City of Hammond*, 679 N.E.2d 1368, 1371 (Ind. Ct. App. 1997).

### **MATERIAL FACTS**

Sometime in or around 2008, Hurd was employed as Superintendent of the Pulaski County Home.<sup>1</sup> In this capacity, Hurd was required to report to the Pulaski County Board of Commissioners, an entity consisting of the following members: Tracey Shorter (“Shorter”), Larry Brady (“Brady”), and Terry Young (“Young”). Additionally, Sheila Garling (“Garling”), the Pulaski County Auditor, served as the Secretary to the Board, and Attorney Kevin Tankersley (“Tankersley”), provided legal representation for the Board.

The County Home received financial funding from the Residential Care Assistance Program (“RCAP”), a program administered by the Indiana Family and Social Services Administration (“FSSA”). Specifically, the RCAP provides assistance in the form of monetary payments to qualifying county home residents and to qualifying residents of residential care facilities. As a stipulation, such facilities only receive funding for days that residents/patients are actually present at the particular facility.

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<sup>1</sup>The County Home is a facility that houses indigent residents who are unable to afford nursing homes or other care-taking services.

Because the RCAP is a “self-reporting” program, participating county homes and residential care facilities are required, in two specific ways, to report to the FSSA for billing purposes. The first reporting procedure requires facilities to complete a monthly census form indicating the status of all RCAP participating residents, listing each resident’s status for every day of each month. Should a facility fail to submit a census form, the RCAP money would not be tendered to said facility. The second reporting method requires each facility to complete a “status change form” any time a resident is not present at the facility overnight. Thus, any time a resident was on “leave of absence,” a separate status change form must be filled out and delivered to the FSSA.

From July 2012 to June 2014, Pulaski County contracted with FSSA to receive RCAP payments for residents of its County Home. For the time period of July 2012 through June 2013, the contractual agreement between Pulaski County and the RCAP provided: “The contractor must use a status change form to inform the RCAP Coordinator when a resident is out of the Contractor’s facility for any reason, including but not limited to leave of absence, hospital or nursing home stay, elopement, imprisonment, or death.” The contract further required the Pulaski County Home to “comply with all applicable policies and procedures.”

Furthermore, the FSSA dispatched a bulletin sometime on or around October 15, 2012 to care providers explaining the leave of absence policy. Specifically, the leave of absence policy mandated that a resident who accrues more than thirty (30) leave of absence days in one contract year must be discharged from the program. Moreover, the contractual provision required facilities to notify the RCAP when a “resident is out of the Contractor’s facility for any reason, including but not limited to leave of absence...”

In her capacity as Superintendent, Hurd received all FSSA notices under the contract (documents that delineated the facility’s reporting terms), managed the RCAP program, and

reported to the FSSA. Additionally, Hurd was responsible for filling out the aforementioned monthly census forms; in other words, Hurd was required to disclose - by way of a "legend code" - whether a resident was staying at a nursing home, hospital, or the County Home.

In her reporting during August 2012 through July 2013, Hurd communicated that "Patient A" was always "present" at the County Home.<sup>2</sup> Despite Patient A's periodic, extended departures from the County Home, Hurd designated Patient A as "present" on the census form as opposed to "leave of absence." Consequently, Hurd's reporting of Patient A's presence was inaccurate. To justify her actions, Hurd maintained that she was trained by her predecessor to make such designations, and the "leave of absence" in the legend code was a new selection that was not present on the old form.<sup>3</sup> In other words, Hurd filled the form out as she had always done, by marking the resident as "present" during days when said resident may have actually been absent from the County Home.

In or around July 24, 2013, Patrick Cavanaugh, a County Home Caretaker, was terminated. During Cavanaugh's exit interview with Shorter, he revealed that the RCAP paperwork was incorrect. Shortly thereafter, Shorter entered Hurd's office and reviewed the RCAP paperwork. Upon doing so, Shorter uncovered contradictions in the census reporting documentation. Specifically, Shorter found that Patient A's presence had never been designated as "leave of absence" despite the individual being frequently away from the facility. Around this time, Shirley Knebel, another County Home employee, filed a complaint against Hurd, wherein she too alleged,

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<sup>2</sup> In the interest of anonymity and protection of medical privacy, the referenced individual has been designated as "Patient A," as opposed to their true name.

<sup>3</sup> Specifically, the RCAP changed the layout of the census forms in July 2013, and thereon, required electronic submission for census reporting. In addition to listing the resident's name and days of the month, the form required the County Home to mark a resident as: present; in the hospital, in a nursing facility; or as "*leave of absence*."

among other things, that Patient A's presence at the County Home was inaccurately reported. Subsequent to the filing of Knebel's complaint, Hurd submitted amended FSSA census forms to reflect Patient A's leave of absences.

On August 12, 2013, the Pulaski County Board of Commissioners initiated an independent investigation into the allegations against Hurd. Around this same time, the Board had received an invoice for a butchered cow for the County Home, however, the processed beef could not be located. Due to the inability to pinpoint the meat, Shorter developed concern that Hurd had perhaps confiscated the beef. Shorter, who was the department head of the County Home, engaged in a conversation with County Home employee Charlene Spence. The substance of the conversation centered upon an invoice the Board had received for a butchered cow and also a couch found to be missing from the County Home.<sup>4</sup>

Upon the conclusion of the independent investigation, the private investigator determined that Hurd's improper census reporting of Patient A may constitute fraud and warranted a more thorough inquiry by the FSSA and county attorney. Based upon her findings, the independent investigator recommended the replacement of Hurd as County Home Superintendent. On August 27, 2013, an emergency session was convened by the Board, the subject of which was whether to retain Hurd's employment. At the meeting, the Board discussed the investigative report, its concerns with regards to Hurd, and in the end, voted to terminate Hurd. Following the vote, Shorter issued a public statement on behalf of the Board, in which she stated, in part, the following:

Sandy Hurd's employment with the County was terminated today. She had been placed on a ten-day suspension pending an investigation into the allegation that she was misreporting the appropriate number of days a resident of the county home actually spent on the premises to RCAP...Mrs. Hurd intentionally reported that the resident was at the home more days than he actually was. The result of this was that the County received more funding through

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<sup>4</sup> A subsequent investigation by Detective Bailey of the Indiana State Police revealed that Hurd had no involvement with the beef nor the missing couch.

RCAP than it should have... This was inappropriate under the law... When the issue was first raised to Mrs. Hurd she corrected the RCAP form and self-reported to RCAP that it was a mistake. The investigation revealed that she in fact admitted to doing this intentionally to benefit the resident...<sup>5</sup>

Shortly thereafter, Pulaski County Prosecuting Attorney Stacey Mrak contacted the Indiana State Police requesting that an investigation be conducted as to the complaints and/or allegations against Hurd. Indiana State Police Detective Michael Bailey took the helm of the investigation, and conducted an inquiry as to the RCAP issue, the missing couch, and the missing beef. Detective Bailey initiated his investigation by questioning Tankersley as to the allegation of theft of County Home property, to which, Tankersley provided what knowledge he possessed. Subsequently, Detective Bailey contacted the FSSA regarding the RCAP allegation, however, he was informed by FSSA representatives that the matter was being handled non-criminally. Accordingly, Detective Bailey closed this portion of his investigation, and the FSSA proceeded to conduct a formal audit of the Pulaski County Home. In the end, Pulaski County was required to reimburse the FSSA \$4,217 for the overpayments related to Patient A. With regards to Detective Bailey's investigation as to the beef cow a missing furniture, he concluded that the evidence did not support any criminal wrongdoing by Hurd.

On November 1, 2014 Hurd filed a Complaint against Shorter, wherein she alleged defamation *per se* and invasion of privacy by false light. On or about December 5, 2013, Shorter filed her Answer to Hurd's Complaint. Then, on April 17, 2014, Hurd filed a Complaint against the Pulaski County Board of Commissioners, wherein she alleged, again, defamation *per se* and invasion of privacy by false light. A Motion to Change Venue was filed by the Defendants on July 7, 2014; on September 29, 2014, the parties filed a Joint Notice of Selection of Marshall County as Venue, which was ultimately granted. A hearing was held in Marshall Superior Court No. 2 on June 29, 2015, the subject of which was

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<sup>5</sup> The parties dispute whether Hurd admitted to intentionally modifying the records to benefit the County Home.

Defendants' Motion to Dismiss. Upon the conclusion of the hearing, the Court denied the Defendants' Motion to Dismiss, however, ordered Hurd to file a more definite statement or an Amended Complaint. Hurd filed her Amended Complaint on July 29, 2015. On October 10, 2016, the Defendants filed a Motion for Summary Judgment, and the Court set the Motion for hearing on December 12, 2016.

## **APPLICABLE LAW**

### Defamation

Defendants argue that Hurd's claims cannot survive a motion for summary judgment because the allegedly defamatory statements were true. Under Indiana law, defamation is defined as "that which tends to injure reputation or diminish esteem, respect, good will, or confidence in the plaintiff, or to excite derogatory feelings or opinions about the plaintiff." *Lovings v. Thomas*, 805 N.E.2d 442, 447 (Ind. Ct. App. 2004). Guiding case law instructs that a statement is defamatory if it tends "to harm a person's reputation by lowering the person in the community's estimation or deterring third persons from dealing or associating with the person." *Kelley v. Tanoos*, 865 N.E.2d 593, 596 (Ind. 2007).

To establish a claim of defamation, the plaintiff must prove the existence of a communication that possesses the following four elements: defamatory imputation; malice; publication; and damages."<sup>6</sup> See *Trail v. Boys & Girls Clubs of Northwest Indiana*, 845 N.E.2d 130, 134 (Ind. 2006) (quoting *Davidson v. Perron*, 716 N.E.2d 29, 37 (Ind. Ct. App. 1999), *trans. denied*). A statement is defamation *per se* when the language of a statement, without reference to extrinsic evidence, constitutes an imputation of criminal conduct; a loathsome disease; misconduct in a person's trade, profession, office or occupation; or sexual misconduct. See *Dugan v. Mittal Steel USA, Inc.*, 929 N.E.2d 184, 186 (Ind. 2010).<sup>7</sup> However, under Indiana law, the truth serves as an absolute defense to a claim of defamation. Ind. Const., art. 1, § 10;

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<sup>6</sup> Importantly, the Court notes that under Indiana law, the tort of defamation encompasses slander and libel.

<sup>7</sup> In actions for defamation *per se*, damages are presumed. *Dugan* at 186.



See also *Shepard v. Schurz Communications, Inc.*, 847 N.E.2d 219, 225 (Ind. Ct. App. 2006).

#### Qualified Privilege as a Defense to a Claim for Defamation

The Defendants also argue that Hurd's claims for defamation and invasion of privacy by false light are barred by the doctrine of qualified privilege. "A qualified privilege applies to communications made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he had a duty, either public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty." See *Williams v. Tharp*, 914 N.E.2d 756, 762 (Ind. 2009) (citing *Bals v. Verduzco*, 600 N.E.2d 1353, 1356 (Ind. 1992)). "As a defense to defamation, the qualified privilege operates not to "change the actionable quality of the words published, but merely [to] rebut the inference of malice that is [otherwise] imputed." See *Williams* at 762.

Notably, a plaintiff may overcome the privilege by establishing that the privilege has been abused. *Id.* Abuse is not proven by showing spite, but by showing that that the "speech went beyond the scope of the purposes for which the privilege exists." *Id.* A plaintiff may prove abuse by showing: the communicator was primarily motivated by ill will in making the statement; that there was excessive publication of the statement; or the statement was made without the belief or grounds for belief in its truth. *Holcomb v. Walter's Dimmick Petroleum, Inc.*, 858 N.E.2d 103, 106 (Ind. 2006). In order to show that a statement was made without the belief for its truth, recklessness is not enough, and a plaintiff must establish a defendant actually knew that statement to be false. *Williams* at 765-766.

Furthermore, Indiana observes a "public interest privilege," which serves to "protect communications made to one entitled to act in the public interest." *Kelley v. Tanoos*, 865 N.E.2d 593 (Ind. 2007). The public interest privilege possesses the following elements:

An occasion makes a publication conditionally privileged if the circumstances include a correct or reasonable belief that: (a) there is information that affects a sufficiently important public interest, and (b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to

take action if the defamatory matter is true.

*Elliot v. Roach*, 409 N.E.2d 661, 672-673 (Ind. Ct. App. 1980).<sup>8</sup>

Furthermore, “[s]tatements made in good faith pursuant to investigation by police of a crime are made in the performance of a public duty and are privileged.” See *Kelley*, 865 N.E.2d at 600. Similarly, Indiana also recognizes common interest privilege. The common interest privilege protects communication made in connection with certain membership qualifications, including intracompany communications and is intended to aid “full and unrestricted communication on matters in which the parties have a common interest or duty.” *Kelley* at 597-598.

### **DISCUSSION**

In her Amended Complaint, Hurd has alleged that the following statements represent communications with defamatory imputation: Shorter and Brady’s accusation and dismissal of Hurd (at the public Board meeting) for allegedly falsifying federal records; Shorter’s discussion with County Home employee Charlene Spence as to whether Spence knew that Hurd had falsified federal records; Shorter’s discussion with Spence regarding property missing from the County Home; Shorter’s supposed prompting of a criminal investigation with the Indiana State Police against Hurd for alleged falsification of federal records and stealing County Home property; and Shorter’s statements to Detective Bailey regarding the missing property from the County Home.

As a result of the alleged aforementioned statements, Hurd has asserted a claim for defamation *per se* and invasion of privacy by false light, contending that: Defendants went on a “witch hunt” to find reasons to terminate her from her position at the County Home; the Defendants defamed Hurd by terminating her for allegedly committing a criminal act; Defendants accused Hurd of stealing property

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<sup>8</sup> The common interest privilege is not available if the privilege is abused. *Kelley*, 865 N.E.2d at 600.

from the County Home; and the Defendants abused their qualified privilege.

#### Qualified Privilege

The Defendants have argued that they are entitled to the protection of qualified privilege; specifically, the Defendants have cited the public interest privilege and the common interest privilege.<sup>9</sup> In terms of the public interest privilege, the Defendants argue that the statements made by Brady and Shorter at the August 27, 2013 meeting were permitted, because the circumstances induced a reasonable belief that: 1) there was information that affected a sufficiently important public interest; and 2) the communication of the defamatory matter was made to a public officer who was authorized to take action if the defamatory matter was true. *Elliot*, 409 N.E.2d 661, 672-673.

In opposition, Hurd contends that the content of Brady and Shorter's statements were false, motivated by ill will, and made without a belief or grounds for belief in their truth; thus, Hurd argues, the Defendants have abused both the public and common interest privilege. In support thereof, Hurd contends that "there is strong evidence that Shorter could have been motivated by ill will;" that Shorter did not "care for" Hurd; and that Shorter conducted a "witch hunt" against Hurd. Hurd also contends that the statements were made without belief or grounds for belief in their truth, asserting that the Defendants knew that statements forwarded to the Indiana State Police were false.

However, in reviewing the respective arguments and designations, the Court concludes otherwise. Firstly, Shorter and Brady's comments addressed a question of public importance (County funds and the termination of a public employee). Thus, by the circumstance's very nature, the public interest privilege is invoked "to protect communications made to one entitled to act in the public interest." *Elliot*, 409 N.E.2d 661, 672-673.

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<sup>9</sup> Courts have found that qualified privilege to also provide protection for torts related to defamation, including intentional infliction of emotional distress, negligence, and punitive damage. *Williams*, 914 N.E.2d at 769.

Next, the Court considered whether such comments (specifically, Shorter and Brady's comments at the August 27, 2013 meeting) were an abuse of the qualified privilege; that is, whether Brady or Shorter made such statements out of ill will or without a belief or grounds for the truth. The Court concludes that Hurd has not satisfied her burden in establishing abuse to overcome the qualified privilege. The Court deems the statements made by Brady and Shorter to be the result of reasonable conclusions, which they developed after giving consideration to the third-party investigator's report and other circumstantial evidence. In other words, the statements were made with belief or grounds for belief that Hurd intentionally misreported the census data.<sup>10</sup> The Court therefore concludes: there was no existence of ill will or malicious motivation; that the statements were not made without a belief or grounds for belief in their truth; and ultimately, there was no abuse of qualified privilege.<sup>11</sup> As such, the statements made at the public board meeting are protected by public privilege and are consequently shielded from Hurd's claims of defamation and invasion of privacy by false light.<sup>12</sup>

Likewise, the statements and/or communications made by Shorter to Detective Bailey in regards to his criminal investigation of Hurd are also safeguarded by the public interest privilege. As previously mentioned, Indiana case law instructs that communications made to law enforcement to report criminal activity are qualified privilege. *Kelley*, 865 N.E.2d at 600. Here, the statements provided to Detective Bailey were made pursuant to furthering the Indiana State Police's investigation, an inquiry requested by Prosecutor Mrak.

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<sup>10</sup> The Defendants possessed a reasonable basis for making such statements regarding Hurd's conduct, including: the monthly census forms requiring "LOA" designations; policy bulletins that delineated instructions as to "LOA" designations; and Hurd's statement explaining her misreporting (i.e. Patient A would be required to pay "out of pocket").

<sup>11</sup> The Court will not explore whether Hurd intentionally misreported the census information or whether such reporting was the consequence of mere clerical error; that is simply not the issue. Instead, the issue is whether the Defendants were reasonable in their conclusions and comments.

<sup>12</sup> Hurd has also failed to establish excessive publication, the third prong for abuse of privilege.

In the Motion for Summary Judgment, it is also argued that the common interest privilege protects Shorter's communications with Charlene Spence and Brady (at the August 27, 2013 meeting). In support thereof, Defendants' memorandum argues that "the common interest privilege protects communication made in connection with certain membership qualifications, including intracompany communications." *Kelley* at 597. The Motion for Summary Judgment asserts that Shorter's statements and communications (with Spence) were made within the company, or County government. Furthermore, such statements were of common interest, because such expressions were targeted towards ensuring that Hurd did not falsely report County Home information which may ultimately threaten County funding and make certain that Hurd had not misappropriated County property.

Here, the Court finds the communications and/or statements to be safeguarded by the common interest privilege for the following reasons: 1) Shorter's statements to Spence, a county employee, qualify as intracompany communications; 2) the statements made by Brady and Shorter were targeted towards addressing a question of public concern (i.e. County funds, unaccounted for County property) and were therefore not made out of ill will; 3) Spence's intracompany communications with Spence regarding the cow and couch were made out of concern for locating such items; and 4) there is no indication that such statements were "excessively communicated." For all the foregoing reasons, the Court finds that statements made by Brady and Shorter to be protected by qualified privilege.

In her Amended Complaint, Hurd conceded that as to her claim against Shorter (in her individual capacity), and Garling and Young (in their official capacities) summary judgment was appropriate. However, the Court also finds there is no factual basis by which to support a claim against Tankersley, and therefore, the Court concludes that summary judgment is also appropriate as to Tankersley.

### **CONCLUSION AND ORDER**

The Court has considered the Defendants' Motion for Summary Judgment, as well as the properly


designated supporting material and memoranda, all Responses and Replies thereto, and all applicable law.

The Court concludes there is no genuine issue of material fact that the Defendants' statements are protected by qualified privilege and there is no indication that such privilege was abused. Thus, the Court grants summary judgment in favor of the Pulaski County Board of Commissioners, Tracey Shorter, Larry Brady, Terry Young, Larry Brady, Sheila Garling, and Kevin Tankersley.

The Court determines there is no just reason for delay, and expressly directs entry of judgment herein in favor of Defendants Pulaski County Board of Commissioners, Tracey Shorter, Larry Brady, Terry Young, Larry Brady, Sheila Garling, and Kevin Tankersley and against Plaintiff Sandra Hurd on the Plaintiff's claims alleged against these Defendants.

So ordered this 24<sup>th</sup> day of January, 2017.

The Clerk is directed to forward copies to the parties.

  
DEAN A. COLVIN, SPECIAL JUDGE  
MARSHALL SUPERIOR COURT NO. 2

