IN THE COURT OF APPEALS
STATE OF GEORGIA

WILLIAM JOSEPH HANIG and COAKLEY HANIG,	:	
Appellants,	:	
v.	:	COA No. A24A1551
CHRISTINA LOFT,	:	
Appellee.	:	

BRIEF OF APPELLANTS

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INTRODUCTION

The underlying case involved, in part, an email by Lt. Col. William Hanig (ret.), of the United States Air Force, to the chain of command above Maj. Christina Loft. (RI-V2-8, 31-32); (RI-V3-368, 708); (RII-V2-151).[1] Maj. Loft sued Lt. Col. Hanig (ret.) and his wife Ms. Coakley Hanig and claimed that the email, along with two other communications, constituted defamation. (RI-V2-6-16). The Hanigs denied any of the communications constituted defamation, averred "[e]ach allegedly defamatory statement was either a true statement of fact or a statement of opinion supported by the truth," and contested the subject matter jurisdiction of the trial court. (RI-V2-44-53). Aside from the issues related to the merits, the legal issues involved in this appeal include federal preemption (particularly field preemption), intra-military immunity, and subject matter jurisdiction.

STATEMENT OF JURISDICTION

The underlying case involves tort claims of defamation. The Court of Appeals of Georgia has proper appellate jurisdiction under Article VI, Section V, Paragraph III of the Constitution of the State of Georgia of 1983. This case does

[1] Citations to the record from the previous, interlocutory appeal (COA No. A22A0517) are expressed the following way: (RI-V[vol. #]-[pg. #]). Citations to the record prepared and sent to this Honorable Court with this current appeal are expressed as follows: (RII-V[vol. #]-[pg. #]).

not fall within any area designated to be heard before the Supreme Court of Georgia under Article VI, Section VI, Paragraphs II and III of the State Constitution.

This appeal is timely. The final judgment[2] was entered on November 8, 2023. The motion[3] to set aside the judgment was timely filed on December 7, 2023, within 30 days of the entry of judgment (the deadline for a motion for new trial[4]), within the same term of court as that within which judgment was rendered,[5] and well within the three-year statute of limitations under O.C.G.A. § 9-11-60(f). "A judgment void because of lack of jurisdiction of the … subject matter may be attacked at any time." O.C.G.A. § 9-11-60(f). The Order[6] below denying the motion to set aside the judgment was filed on February 13, 2024.

The Hanigs timely filed an application for discretionary appeal on March 11, 2024, within 30 days of the appealed Order, as required by O.C.G.A. § 5-6-35(d). This Honorable Court granted the Hanigs a discretionary appeal on April 1, 2024, in COA No. A24D0276. (RII-V2-220). The Notice of Appeal was timely filed on April 8, 2024. (RII-V2-1-2). The Clerk of this Honorable Court docketed this appeal and issued a Notice of Docketing on May 23, 2024.

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[2] (RII-V2-151-4).
[3] (RII-V2-156-9).
[4] O.C.G.A. § 5-5-40(a).
[5] *See* O.C.G.A. § 15-6-3 (21).
[6] (RII-V2-205-11).

The Hanigs now timely appeal the trial court's denial of their motion to set aside the final judgment.

ENUMERATION OF ERRORS

The denial by the trial court of the motion to set aside the final judgment constitutes error for the following reasons:

1. Due to federal preemption by Article 139 of the Uniform Code of Military Justice (UCMJ), the trial court lacked subject matter jurisdiction to adjudicate Lt. Col. William Hanig (ret.)'s email to Maj. Christina Loft's chain of command as being false and constituting defamation.
2. Due to federal preemption by 10 U.S.C. § 1552, the trial court lacked subject matter jurisdiction as to the proper remedy for any reputational damage to Maj. Loft within the military chain of command.
3. Intra-military immunity, which was a nonamendable defect appearing on the face of the record and pleadings, barred Maj. Loft's defamation claim regarding the email sent by Lt. Col. Hanig (ret.) to the military chain of command and divested the trial court of subject matter jurisdiction.
4. Because the verdict included no special damages and Lt. Col. Hanig (ret.)'s email, as shown by the record and pleadings, did not constitute defamation per se, the verdict failed to support the judgment awarding damages for the email.

5. Because the verdict included no special damages and the Hanigs' Facebook post, as shown by the record and pleadings, did not constitute defamation per se, the verdict failed to support the judgment awarding damages for the Facebook post.

STATEMENT OF THE CASE AND THE FACTS

In its prior Order Denying Defendants' Motion for Summary Judgment, the trial court set forth the following undisputed facts:

> While Defendants (hereinafter "the Hanigs") were out of town on a trip, their cat wandered from their yard and was ultimately found in an adjacent neighborhood by Plaintiff (hereinafter "Loft") in her neighbor's bushes. Loft took reasonable measures to locate the owners. After three weeks and being unable to locate the owners, she gave the cat to a friend who lived in Florida. A week later she was contacted by the Hanigs, after they noticed Loft's posting on "Pawboost" about finding the cat. Loft responded to the Hanigs and advised them she had given the cat away by that time. Loft contacted her friend to see if she were willing to give the cat back to them, but the friend was unwilling. Loft passed along this information to the Hanigs, but refused to provide them her friend's name or contact information. Ultimately, due to her concerns of what Mr. Hanig – a retired Lieutenant Colonel in the U.S. Air Force – may potentially do to her career in the military, the friend changed her mind and gave the cat to the Hanigs.
>
> Prior to the cat's return, the Hanigs made a report with the Houston County Sheriff's Office. A few days later, Mr. Hanig emailed someone whom he believed to be in Loft's chain of command regarding the issue. A few days after that, the Hanigs posted about the matter on

> Facebook. These communications form the bases of Loft's Complaint for defamation.

(RI-V3-708). The "friend" was Lt. Mariah Deckard of the U.S. Air Force, as identified by Maj. Loft in an affidavit. (RI-V3-651).

While implicitly granting summary judgment as to the Hanigs' report to the Houston County Sheriff's Office,[7] the trial court denied summary judgment as to the email and as to the Facebook post. *See* (RI-V3-709-11).

The Facebook post was as follows:

> Holly update: As many of you know, Holly (our cat of 10 years) left our yard (had house-sitter) while we were out of country. As not with animal control, our search was long walks and flyers and checking on all recommended sites for lost pets (thanks for everyone's guidance). Ultimately we did find a post about Holly. We immediately contacted Ms Loft with a return call the next evening indicating she gave the cat to "one of her Lt's". She checked with Lt and stated she would not return Holly. Animal Control and Houston County Sheriff are investigating, but would like to ask for your help making sure her coworkers (within JSTARS) understand her values and moral compass. This would apply to both Ms Loft, a Major within Joint STARS, and the unknown Lt within JSTARS. Their value system believes it is correct to take a cat from its home of ten years.
> This is a pic of Sj with Holly when she got her from Santa 10 yrs ago and a pic a couple of nights before we left on our trip [sad face emoji]

[7] "At the hearing on the Motion for Summary Judgment, Loft did not contend any specific statement contained in the incident report was in fact defamatory (and this Court does not find one attributable to the Hanigs)." (RI-V3-709).

(RI-V2-17).

The trial court focused on the statement "that Loft's 'value system believes it is correct to take a cat from its home of ten years.'" (RI-V3-710).

The trial court found that an issue of material fact existed as to whether the Facebook post imputed a crime (theft) to Ms. Loft and constituted defamation per se, reasoning that "with references to investigations by the Houston County Sheriff and Animal Control, the inference that Loft committed a crime would not be unreasonable and appears to be the conclusion reached by numerous readers as evidenced by their comments to the Facebook post." (RI-V3-709-10). It was, however, shown by Maj. Loft herself in her pleadings that the Houston County Sheriff's Office investigated the dispute regarding the cat and that Animal Control was involved. (RI-V2-8-9, 33-40).

In the email, Lt. Col. Hanig (ret.) informed the military chain of command of the facts then known to him including that Maj. Loft had taken possession of the cat ("which would have prevented her from returning home") and given the cat to the lieutenant and that the lieutenant refused to return it. (RI-V2-31-2). He stated, "As a previous Commander, this would call in to question the judgement and decision-making skills of both Maj Loft and Lt." (RI-V2-32). He concluded with a request for "a 30 minute meeting to allow [him] to voice [his] concerns." (RI-V2-32).

The trial court found that an issue of material fact existed as to whether the email constituted defamation per se and reasoned, "In sending an email directly to someone Hanig believed to be in Loft's chain of command, in which he repeatedly questions Loft's judgment and her 'decision-making skills,' the Court finds that Hanig cannot shield himself with the claim he was merely stating his opinion." (RI-V3-709, 711).

A jury tried the case on the merits.[8] The jury found both the email and the Facebook post to be "defamatory."[9] The jury awarded general damages of $35,000 for each communication and awarded $25,000 in punitive damages for each communication.[10] As such, a money judgment in the total amount of $120,000 was entered upon the verdict.[11]

The jury's verdict included no special damages.[12]

[8] *See, generally*, (RII-V2-151-4).
[9] (RII-V2-148).
[10] (RII-V2-148-50).
[11] (RII-V2-153).
[12] (RII-V2-148-50).

PRESERVATION OF ENUMERATED ERRORS

The Hanigs' Motion to Set Aside Judgment (RII-V2-156-9), the Affidavit of William Hanig (RII-V2-160-2), the Brief in Support of the Motion (RII-V2-163-71), and a Supplemental Brief (RII-V2-197-204) preserved the enumerated errors. In particular, the enumerated errors were preserved as follows:

1. The first enumerated error was raised initially in the Third Defense in the Hanigs' Answer (RI-V2-44) and raised again in their Motion to Set Aside Judgment (RII-V2-156).
2. The second enumerated error was raised initially in the Third Defense in the Hanigs' Answer (RI-V2-44) and raised again in their Motion to Set Aside Judgment (RII-V2-156-7).
3. The third enumerated error was raised initially in the Third Defense in the Hanigs' Answer (RI-V2-44) and raised again in their Motion to Set Aside Judgment (RII-V2-157).
4. The fourth enumerated error was raised in the Motion to Set Aside Judgment (RII-V2-158).
5. The fifth enumerated error was raised in the Motion to Set Aside Judgment (RII-V2-158).

STANDARD FOR DEFAMATION

The law recognizes four essential elements of defamation: "(1) a *false* and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault by the defendant amounting to at least negligence; and (4) special harm [i.e., special damages] or the actionability of the statement irrespective of special harm [i.e., defamation per se]." Neff v. McGee, 346 Ga. App. 522, 525 n.3 (2018) (quoting Smith v. DiFrancesco, 341 Ga. App. 786, 787-88 (2017)) (emphasis in original). In the case at bar, elements numbers **1** and **4** are the most critical to the merits of the case.

"Defamation law overlooks minor inaccuracies and concentrates upon substantial truth." Vito v. Inman, 286 Ga. App. 646, 648 (2007) (citing Jaillett v. Ga. Television Co., 238 Ga. App. 885, 888 (1999)). "Truth is a complete defense to alleged libel or slander. And, a defamation action will lie only for a statement of fact. This is because a statement that reflects an opinion or subjective assessment, as to which reasonable minds could differ, cannot be proved false." Cottrell v. Smith, 299 Ga. 517, 523 (2016) (citations omitted). "The failure to include more information or the omission of information from a published statement does not constitute libel, even though it is not the whole truth." McDonald v. Few, 270 Ga. App. 671, 672 (2004) (citing Yandle v. Mitchell Motors, 199 Ga. App. 211, 212 (1991); Jim Walter Holmes v. Strickland, 185 Ga. App. 306, 309 (1987)).

Although "[a]n opinion can constitute actionable defamation if the opinion can reasonably be interpreted, according to the context of the entire writing in which the opinion appears, to state or imply defamatory facts about the plaintiff that are capable of being proved false," Cotrell, 299 Ga. at 523 (alteration in original) (citation omitted), yet

> [t]he requirement that, to be actionable, a statement of opinion must imply an assertion of objective facts about the plaintiff unquestionably ***excludes from defamation*** liability not only ***statements of rhetorical hyperbole*** but also ***statements clearly recognizable as pure opinion because their factual premises are revealed***…. If an opinion is based upon facts already disclosed in the communication, the expression of the opinion implies nothing other than the speaker's subjective interpretation of the facts.

Lucas v. Cranshaw, 289 Ga. App. 510, 514 (2008) (quoting Jaillett v. Ga. Television Co., 238 Ga. App. 885, 890 (1999)) (alteration in original) (ellipsis in original) (emphasis added).

> The expression of opinion on matters with respect to which reasonable men might entertain differing opinions is not libelous. An assertion that cannot be proved false cannot be held libelous. A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Webster v. Wilkins, 217 Ga. App. 194, 195-96 (1995) (quoting Kendrick v. Jaeger, 210 Ga. App. 376, 377-78 (1993)).

"Because the jury in this case found no special damages, a verdict for defamation is sustainable only if there was defamation per se, which would include slander per se." Cottrell, 299 Ga. at 523 (citing O.C.G.A. §§ 51-5-1 and 51-5-4; Dun & Bradstreet, Inc. v. Miller, 398 F.2d 218, 222 (5th Cir. 1968)).

"In regard to imputing a crime, [t]o constitute slander per se, … the words at issue must charge the commission of a specific crime punishable by law. Where the plain import of the words spoken impute no criminal offense, they cannot have their meaning enlarged by innuendo." Cottrell, 299 Ga. at 524 (quoting Dagel v. Lemcke, 245 Ga. App. 234, 244 (2000)).

> As for defamation in regard to a trade, profession, or office,
>
> ***
>
> [a]lthough statements disparaging a business' reputation within its trade may sometimes constitute libel per se, language imputing to a business or professional man ignorance or mistake on a single occasion and not accusing him of general ignorance or lack of skill is not actionable per se. A charge that plaintiff in a single instance was guilty of a mistake, impropriety or other unprofessional conduct does not imply that he is generally unfit.

Id. at 524-25 (quoting Kin Chun Chung v. JP Morgan Chase Bank, N.A., 975 F. Supp. 2d 1333, 1349 (N.D. Ga. 2013)) (brackets in original).

In the case of Webster v. Wilkins the statement at issue was as follows: "[The plaintiff] gives women in general a bad name … I probably shouldn't say this, but I want to take that kid from her. She's unfit to have a kid." 217 Ga. App. at 194 (ellipsis in original). This Honorable Court, affirming the grant of summary judgment to the defendants in that case, held that statement to be "a wholly subjective opinion not capable of proof or disproof." Id. at 194, 196-97. In reaching that holding, this Court reasoned that the statement constituted "a subjective, hyperbolic opinion" and "concern[ed] a matter on which reasonable people might differ; i.e., [the plaintiff's] parental capabilities." Id. at 195.

ARGUMENT AND CITATION OF AUTHORITY

1. **Due to federal preemption by Article 139 of the Uniform Code of Military Justice (UCMJ), the trial court lacked subject matter jurisdiction to adjudicate Lt. Col. William Hanig (ret.)'s email to Maj. Christina Loft's chain of command as being false and constituting defamation.**

Standard of Review: *De novo* is the standard of review for an issue of federal preemption and for the legal issue of jurisdiction. Gentry v. Volkswagen of Am.,

238 Ga. App. 785, 786 (1999) (federal preemption); In the Interest of B.W., 361 Ga. App. 430, 431 (2021) (jurisdiction).

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UCMJ Article 139, codified also in 10 U.S.C. § 939, field preempted the trial court from adjudicating the complaint communicated by the email that property, a cat, had been wrongfully taken by military members.

The federal preemption doctrine arises from the Supremacy Clause of the United States Constitution. *See* Gentry v. Volkswagen of Am., 238 Ga. App. 785, 786-87 (1999). "[S]tate law that conflicts with federal law is 'without effect.' And, 'common law liability may create a conflict with federal law, just as other types of state law can." Id. at 787 (quoting Cipollone v. Ligget Group, Inc., 505 U.S. 504, 516 (1992)). Federal preemption can remove subject matter from the jurisdiction of a court. *See*, *generally*, International Longshoremen's Asso. v. Davis, 476 U.S. 380 (1986).

The doctrine recognizes three types of federal preemption: "(1) express preemption; (2) field preemption (regulating the field so extensively that Congress clearly intends the subject area to be controlled only by federal law); and (3) implied (or conflict) preemption." Gentry, 238 Ga. App. at 787 (quoting Irving v. Mazda Motor Corp., 136 F.3d 764, 767 (11th Cir. 1998)).

> Congress has exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of complaints and grievances ….

Chappell v. Wallace, 462 U.S. 296, 302 (1983).

The UCMJ provides as follows:

> The following persons are subject to this chapter:
>
> (1) Members of a regular component of the armed forces
>
> ….
>
> (4) Retired members of a regular component of the armed forces who are entitled to pay….

10 U.S.C. § 802(a). The regulatory framework of the UCMJ clearly shows Congressional intent that subject matter involving discipline within the military and falling within the UCMJ preempt state-level, civilian court jurisdiction.

Article 139 ("Redress of Injuries to Property") of the UCMJ provides the following:

> (a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces, he

> may, under such regulations as the Secretary concerned may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three commissioned officers and, for the purpose of that investigation, it has power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages so assessed and approved.
>
> (b) If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be considered just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.

10 U.S.C. § 939. As shown, Article 139 confers jurisdiction to the military chain of command to conduct a quasi-judicial administrative investigation and evaluation of a complaint that property has been wrongfully taken by members of the military. The Article shows Congressional intent that the authority of the chain of command to determine the truth or falsity of a complaint made to the chain of command that military members have wrongfully taken property preempt the jurisdiction of any state-level, civilian court to adjudicate the complaint as true or false.

The email at issue was subject matter falling within the exclusive jurisdiction of the military, because the email communicated a complaint to the military chain of command that military members had wrongfully taken property, a cat. The underlying dispute over the cat, though not originally a military matter, became a military matter under Article 139 when it was communicated to the military chain of command. The comprehensive nature of the UCMJ and the regulatory framework of Article 139 clearly show Congressional intent that a complaint made to the military chain of command that military members have wrongfully taken property be adjudicated, if at all, exclusively by the military chain of command and in accordance with the procedure set forth in Article 139. Whether the military exercised jurisdiction or even deemed the dispute a military matter is irrelevant to Congressional intent and the legal question of subject matter jurisdiction.

A complaint under Article 139 is a complaint of either willful damage to or wrongful taking of property done by military members. 10 U.S.C. § 939(a). A complaint under Article 139 of wrongful taking does not require any allegation that military members are guilty of theft, a crime. *See* 10 U.S.C. § 939(a); *compare with* 10 U.S.C. § 921 (UCMJ Article 121) (defining and punishing the theft crimes of "larceny" and "wrongful appropriation"). The remedy offered by Article 139 is purely civil in nature: "assessment of damages." *See* 10 U.S.C. § 939(a).

Inherent in the Hanigs' complaint, as communicated in the email, was that property of theirs had been wrongfully taken by military members.[13] The email complained that the cat, property belonging to Lt. Col. Hanig (ret.)'s family, had been taken by Maj. Loft and Lt. Deckard (whose name was then unknown) and that Lt. Deckard refused to return the cat.[14] As pointed out by Lt. Col. Hanig (ret.) in the email, taking possession of the cat "prevented her from returning home."[15] The lack of an accusation that either Maj. Loft or Lt. Deckard had stolen the cat or had criminal intent to commit theft did not negate the complaint that the taking was wrongful. As for whether the taking was, indeed, wrongful, Article 139 sets forth the administrative procedure for investigating and adjudicating the matter. *See* 10 U.S.C. § 939.

The Order below erroneously considers that a military member facing a false complaint under Article 139 "would … be left without remedy" if the federal preemption doctrine were applied.[16] Article 139 proceedings include an investigation by a panel, affording an opportunity to expose the truth or falsity of the complaint. *See* 10 U.S.C. § 939(a). Article 139 itself thus provides an administrative remedy for a false accusation that property has been willfully

[13] *See* (RI-V2-31-2).
[14] *See* (RI-V2-31-2).
[15] (RI-V2-32).
[16] *See* (RII-V2-207).

damaged or wrongfully taken. A false complaint under Article 139 cannot cause damage to a military member's career or reputation within the military if Article 139 proceedings expose the falsity of the complaint. As shown below, the statute 10 U.S.C. § 1552 also offers an administrative remedy for damage to a military member's career or reputation within the military institution. Even if no remedy is available, the absence of a civil remedy has no bearing on the issue of federal preemption.

The trial court's observation that a "false accuser [under Article 139] would be shielded against any liability"[17] merely restates the problem with Maj. Loft's defamation claim regarding the email and is immaterial to resolving the issue of federal preemption.

Because under state law, falsity was an essential element of Maj. Loft's defamation claim regarding Lt. Col. Hanig (ret.)'s email to the military chain of command, federal law preempted the trial court from adjudicating the claim. *Cf.* Jackson v. U.S. Steel Corp., 763 Fed. Appx. 805, 806-7 (11th Cir. 2019) (holding state-level defamation claims preempted by the Labor Management Relations Act because finding the essential element of falsity would require adjudication of an underlying dispute regarding a collective bargaining labor contract).

[17] (RII-V2-207).

2. Due to federal preemption by 10 U.S.C. § 1552, the trial court lacked subject matter jurisdiction as to the proper remedy for any reputational damage to Maj. Loft within the military chain of command.

Standard of Review: *De novo* is the standard of review for an issue of federal preemption and for the legal issue of jurisdiction. Gentry v. Volkswagen of Am., 238 Ga. App. 785, 786 (1999) (federal preemption); In the Interest of B.W., 361 Ga. App. 430, 431 (2021) (jurisdiction).

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In Chappell v. Wallace, *supra*, the Supreme Court of the United States "h[e]ld that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." 462 U.S. at 304. In support of its decision, the Supreme Court cited two statutes that provided appropriate remedies: Article 138 ("Complaints of Wrongs"), of the UCMJ, and 10 U.S.C. § 1552(a). Id. at 302-303.

The statute 10 U.S.C. § 1552 is part of a Chapter that comprehensively treats "Correction of Military Records." Subsection (a) of the statute provides, in part, "The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice…." 10 U.S.C. § 1552(a). The gist of Maj. Loft's defamation claim regarding the email was that the email, being sent to her chain of

command, tortiously damaged her reputation within the military chain of command. The proper remedy for that alleged reputational injury is set forth by 10 U.S.C. § 1552 and lies outside the subject matter jurisdiction of the trial court.

The comprehensive codification of military regulations and remedies clearly shows Congressional intent that the remedy offered by 10 U.S.C. § 1552(a) for damage to reputation within the military institution preempt remedies offered by state-level, civilian courts.

3. **Intra-military immunity, which was a nonamendable defect appearing on the face of the record and pleadings, barred Maj. Loft's defamation claim regarding the email sent by Lt. Col. Hanig (ret.) to the military chain of command and divested the trial court of subject matter jurisdiction.**

Standard of Review: *De novo* is the standard of review for nonamendable defects appearing on the face of the record and pleadings when "the facts are undisputed and the issues presented on appeal involve questions of law." Shannon v. Hatch, 359 Ga. App. 787, 788-9 (2021) (quoting Davis v. Crescent Holdings & Investments, 336 Ga. App. 378 (2016)).

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The expression of Lt. Col. William Hanig (ret.)'s concerns in the email regarding the judgment and decision-making skills of Maj. Loft and Lt. Deckard was a military matter over which the trial court lacked jurisdiction. Because any liability on the part of Mrs. Hanig for the email was entirely derivative of any liability on the part of Lt. Col. Hanig (ret.), intra-military immunity applies to her to the same extent as to Lt. Col. Hanig himself, who sent the email.[18]

> The doctrine of intra-military immunity … decries the propriety of civilian courts delving into military matters and calling to bar military decisions and institutions. Thus, our evolving jurisprudence has created a zone of protection for military actors, immunizing actions and decisions which involved military authority from scrutiny by civilian courts.
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> ***
>
> [T]he 'incident to military service' test may preclude a claim even though its pursuit, under the particular circumstances of the case, might not weaken military discipline or interfere with discretion as to military matters.

Dudney v. State of Ga. DOD, 322 Ga. App. 464, 466 (2013) (citations omitted) (internal quotation marks and block indentations omitted). Under the intra-military immunity doctrine, "civilian courts may not sit in plenary review over intraservice

[18] *See* Chambers v. Gwinnett Cmt. Hosp., 253 Ga. App. 25, 30 (2001). Of note, the jury did not expressly find Mrs. Hanig was liable for her husband's email at all. *See* (RII-V2-148-50).

military disputes." Ga. DOD v. Johnson, 262 Ga. App. 475, 480 (2003) (quoting Wood v. United States, 968 F.2d 738, 739 (8th Cir. 1992)).

The intra-military immunity doctrine covers nonphysical, as well as physical, types of injuries. *See, e.g.*, Dudney, 322 Ga. App. at 467 (applying the intra-military immunity doctrine to "termination of [] military service"); Cross v. Fiscus, 830 F.2d 755, 755, 758 (7th Cir. 1987) (applying absolute immunity in the intra-military context to a claim of defamation); Deckinger v. Castro-Reyes, 689 F. Supp. 531, 534 (D. Md. 1988) (applying the intra-military immunity doctrine to defamation).

Expressing concerns to the chain of command regarding the judgment and decision-making skills of other officers was within the panoply of rights and duties of William Hanig as a retired officer within the same branch of service.

> Officers on the retired list are not mere pensioners in any sense of the word. They form a vital segment of our national defense for their experience and mature judgment are relied upon heavily in times of emergency. The salaries they receive are not solely recompense for past services, but a means devised by Congress to assure their availability and preparedness in future contingencies. This preparedness depends as much upon their continued responsiveness to discipline as upon their continued state of physical health. Certainly, one who is authorized to wear the uniform of his country, to use the title of his grade, who is looked upon as a model of the

> military way of life, and who receives a salary to assure his availability, is a part of the land or naval forces.

United States v. Hooper, 9 U.S.C.M.A. 637, 645 (1958). In Cross v. Fiscus, applying absolute immunity to claims of defamation, the United States Court of Appeals for the Seventh Circuit held, "Higher officers are entitled to know -- if it is true -- that an officer is not behaving properly. That enlisted personnel may provide misinformation rather than the truth does not contract the scope of their duties …." 830 F.2d at 758. Similarly, in Deckinger v. Castro-Reyes, the United States District Court for the District of Maryland held "that to permit military plaintiffs to recover for defamation when they are determined unfit for service, a determination that is inevitably published to others, would completely undermine the goals of" the intra-military immunity doctrine. 689 F. Supp. at 534. For these reasons, Lt. Col. Hanig (ret.), in sending the email to the military chain of command, was a "military actor" for the purposes of intra-military immunity, and the substance of the email falls outside the subject matter jurisdiction of the trial court.

The dispute between Maj. Loft and Lt. Col. Hanig (ret.) over Maj. Loft's judgment and decision-making skills was, as proven by the record and pleadings, a "military matter" and an "intraservice military dispute." This is true regardless of whether or not the underlying dispute over the cat was a military matter. Maj. Loft's reputation within the military institution was also inherently a military

matter. In the email, Lt. Col. Hanig expressed his concerns "[a]s previous commander" regarding the "judgement and decision-making skills" of two fellow military officers.[19] The trial court denied summary judgment as to the email on the stated basis that "[i]n sending an email directly to someone Hanig believed to be in Loft's chain of command, in which he repeatedly questions Loft's judgment and her 'decision-making skills,' the Court finds that Hanig cannot shield himself with the claim he was merely stating his opinion." (RI-V3-711).

Any reputational damage caused by the email "ar[o]se out of activities 'incident to military service,'"[20] which were, namely, communications between military officers about other military officers. Maj. Loft made an affidavit stating, in part, as follows:

> After the Hanigs filed a law enforcement report against me, implied I stole their cat on Facebook and disparaged me to my chain of command, events, including but not limited to the following, occurred: Lt Col Michael Roy emailed me through official military channels and recommended I resolve the issue with the Hanigs.

(RI-V3-368). As the trial court recognized in a discovery order entered prior to trial regarding personnel records and testimony from the United States Air Force, "[t]he testimony … from Lt. Col. Cullen [was] relevant to the subject matter of

[19] (RI-V2-32).
[20] *Cf.* Dudney v. State of Ga. DOD, 322 Ga. App. 464, 467 (2013) ("termination of [] military service").

Plaintiff's claim that Defendants' statements about Plaintiff ha[d] caused damage to her reputation within the United States Air Force …." (RII-V2-62).

Because any injury to Maj. Loft's reputation caused by the email was an intra-military matter, the doctrine of intra-military immunity divested the trial court of jurisdiction over the subject matter.

4. **Because the verdict included no special damages and Lt. Col. Hanig (ret.)'s email, as shown by the record and pleadings, did not constitute defamation per se, the verdict failed to support the judgment awarding damages for the email.**

Standard of Review: *De novo* is the standard of review for nonamendable defects appearing on the face of the record and pleadings when "the facts are undisputed and the issues presented on appeal involve questions of law." Shannon v. Hatch, 359 Ga. App. 787, 788-9 (2021) (quoting Davis v. Crescent Holdings & Investments, 336 Ga. App. 378 (2016)).

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To begin with, the claim of Maj. Loft that the email constituted defamation per se by attacking her reputation as a military officer conflicts with the rejection by the trial court of the Hanigs' legal defense of intra-military immunity.

The email stated, in pertinent part, the following:

> Along with the Deputy from Houston County Sheriff's Office, I now question the judgment of both Maj Loft and the unknown Lt. Maj Loft took the action of giving Holly away, not working with Lt to return Holly – maybe even advising against?, and was also non-responsive to request for discussion with Lt. The Lt is not returning Holly to a family that she has been with since shortly after birth (10 years) with logic being that she has fallen in love with Holly after seven days. As a previous Commander, this would call in to question the judgement and decision-making skills of both Maj Loft and Lt.

(RI-V2-32).

Those statements clearly and obviously express a statement of opinion with stated facts revealing the basis for the opinion. An opinion regarding the judgment and decision-making skills of a person is a matter on which reasonable minds could disagree. In that sense, it is much like an opinion regarding the fitness of a parent. *See* Webster, 217 Ga. App. at 195. Whether that opinion is accurate—or even reasonable—is of no concern under the law. *See* id. Lt. Col. Hanig (ret.) had every legal right to express his opinion of Maj. Loft, especially because he set forth its factual basis. *See* Lucas, 289 Ga. App. at 514.

The trial court erroneously rejected the legal defense that the statement about Ms. Loft's judgment and decision-making skills was an expression of opinion. *See* (RI-V3-711). The stated reasoning of the trial court was that Lt. Col. Hanig (ret.) "sen[t] an email directly to someone Hanig believed to be in Loft's chain of command, in which he repeatedly questions Loft's judgment and her 'decision-making skills.'" (RI-V3-711). That reasoning is faulty and unsound because the

identity of the intended recipient of a message does not alter whether the contents of the message constitute a statement of fact or a statement of opinion.

Another problem is that the entire email concerned only a single incident. *See* (RI-V2-31-2). "A charge that plaintiff in a single instance was guilty of a mistake, impropriety or other unprofessional conduct does not imply that he [or she] is generally unfit." Cottrell, 299 Ga. at 525. While questioning the judgment and decision-making skills of Maj. Loft, Lt. Col. Hanig (ret.) never accused Maj. Loft of being generally unfit as an officer. *See* (RI-V2-31-2).

Because the record and pleadings fail to show either special damages or defamation per se, the verdict and judgment are unsustainable under Cottrell v. Smith, 299 Ga. 517 (2016).

5. **Because the verdict included no special damages and the Hanigs' Facebook post, as shown by the record and pleadings, did not constitute defamation per se, the verdict failed to support the judgment awarding damages for the Facebook post.**

Standard of Review: *De novo* is the standard of review for nonamendable defects appearing on the face of the record and pleadings when "the facts are undisputed and the issues presented on appeal involve questions of law." Shannon v. Hatch, 359 Ga. App. 787, 788-9 (2021) (quoting Davis v. Crescent Holdings & Investments, 336 Ga. App. 378 (2016)).

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No person reading the Facebook post could reasonably interpret the Facebook post as meaning that Maj. Loft had committed theft.

Context shows the remark about "tak[ing] a cat from its home" to be clearly figurative speech (and "rhetorical hyperbole") referring to the refusal to return the cat after having taken possession of it, rather than an accusation that Maj. Loft had physically removed the cat from the Hanigs' residence. *See* (RI-V2-17). The Hanigs directly stated, at the very beginning of the post, that the cat had left the yard. (RI-V2-17). The post did not state that the cat had been taken from the yard. *See* (RI-V2-17). The statement, "Their value system believes it is correct to take a cat from its home of ten years," (RI-V2-17), expressed an opinion regarding the value system of Maj. Loft and Lt. Deckard.

The Facebook post revealed the facts leading the Hanigs to their opinion of Maj. Loft's value system. No defamatory facts were implied. The Hanigs stated in the post that Maj. Loft informed them that the lieutenant "would not return Holly." (RI-V2-17). From that fact, the Hanigs evidently drew a negative opinion regarding the "values and moral compass" of Maj. Loft and Lt. Deckard. *See* (RI-V2-17).

Consideration of the comments made by readers alluding to theft, or stealing, confuses the issue. The contents of the Facebook post included facts concerning the dispute between Maj. Loft and the Hanigs over the cat. The issue is not whether readers concluded from the facts stated in the Facebook post that Maj. Loft had committed theft. The issue is whether a person reading the Facebook post would reasonably conclude that the Facebook post itself charged Maj. Loft with theft. The question is how a reasonable person would interpret the meaning of the Facebook post.

The Houston County Sheriff's Office investigated the dispute over the cat. That fact, being true, absolutely bars any claim that the reference to the Houston County Sheriff's Office constituted defamation. *See* Cottrell, 299 Ga. at 523. Granted, readers of the Facebook post would naturally have knowledge of the fact that the Houston County Sheriff's Office—among its many other functions—investigates crime, including theft. Yet that fact is extrinsic to the Facebook post itself, and innuendo cannot give rise to defamation per se. *See* id. at 524. An investigation, even by a law enforcement agency, can be noncriminal in nature. The Facebook post did not characterize the investigation as criminal. *See* (RI-V2-17).

Because the record and pleadings fail to show either special damages or defamation per se, the verdict and judgment are unsustainable under Cottrell v. Smith, 299 Ga. 517 (2016).

CONCLUSION

For all the foregoing reasons, William Joseph Hanig and Coakley Hanig, Appellants herein, pray that this Honorable Court reverse the denial of their motion to set aside the judgment.

CERTIFICATION OF WORD COUNT

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted, this 6th day of June, 2024.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing counsel, Rebecca C. Moody, MOODY & ASSOCIATES LAW OFFICE, LLC, P.O. Box 422, 905 Jernigan Street, Perry, GA 31069, with a true and correct copy of the foregoing Brief of Appellants by placing the copy in the United States Mail, properly addressed and with sufficient postage, this 6th day of June, 2024.

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