IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JANELLE BARLASS,

Plaintiff,

v.

CITY OF JANESVILLE, STEVE KOPP, DENISE CARPENTER and JANESVILLE GAZETTE NEWSPAPER,

Defendants.

OPINION AND ORDER

10-cv-454-slc

Plaintiff Janelle Barlass is the former operator of a short-lived bar in Janesville, Wisconsin named Corvinas, which was popular with African-Americans. Corvinas closed in August 2009 after it lost its liquor license, apparently due to a change in the composition of its controlling LLC. Barlass, proceeding pro se, believes otherwise and has filed this lawsuit under 42 U.S.C. § 1983 against the City of Janesville and its former Deputy Chief of Police, Steve Kopp, alleging that they violated her rights to Equal Protection by scrutinizing her bar more closely than those that served primarily white customers, and that they violated her rights under the First Amendment by retaliating against her for publicly accusing the police department of targeting her bar for racial reasons. Barlass also has asserted state law claims for defamation against the *Janesville Gazette*, which ran a number of stories in the summer of 2009 regarding Corvinas and its dealings with Janesville's alcohol licensing committee, and against Denise Carpenter, a bar owner who made negative comments about Corvinas at one of those committee meetings.[1] Jurisdiction is present under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343(a)(3)(4).

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[1] Barlass's complaint made other claims against other defendants, but the court dismissed those claims at the screening stage. *See* Orders, dkts. 8 and 12.

Each of the defendants has moved for summary judgment on a variety of grounds. As discussed below, the court is granting each of these motions. Barlass does not have standing to assert equal protection claims against the Janesville defendants, nor does she have standing to bring a defamation claim against Carpenter because she has failed to show that she suffered any injury that is separate and distinct from any injuries that might have been suffered by Corvinas Exchange, LLC, which is the corporate entity that operated the bar. With respect to her claim of retaliation against defendant Kopp and the City of Janesville, Barlass has failed to adduce evidence from which a jury could conclude that she suffered any adverse action after she spoke out publicly, or that any adverse action was causally related to her protected speech; further, she has no evidence of any policy or custom that would support imposing liability on the city. Finally, Barlass cannot maintain her defamation action against the *Janesville Gazette* because she failed to provide it with pre-suit notice as required by Wis. Stat. § 895.05(2).[2]

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[2] Also pending are two discovery motions filed by Barlass: 1) her motion to compel the Janesville defendants to produce a workable digital recording of the meetings of the Alcohol License Advisory Committee and to provide documents responsive to her discovery requests, dkt. 67; and 2) her motion to compel the *Janesville Gazette* to produce a copy of a letter (apparently written by her or on her behalf) asking it to retract an unspecified story in May or June 2009. Dkt. 68. These motions will be denied. First, Barlass failed to aver that she attempted to meet and confer with defendants before filing her motions, as required by this court's discovery procedures. More substantively, it appears that defendants have met their discovery obligations. The Janesville defendants assert that they provided a new digital recording of the ALAC meetings to Barlass and that they have provided all documents responsive to her discovery requests that are not privileged. Further, to the extent that they do not have documents to verify concerns by the committee that there were "problems" at Corvinas, this lack of documentation would tend to help Barlass, not hurt her.

With respect to the *Janesville Gazette*, although the paper did not file a response to the motion to compel, its local editor has filed an affidavit in support of the summary judgment motion in which he swears that he reviewed the records at the newspaper and could not find any letter, correspondence or other document from or on behalf of Barlass or Corvinas requesting a retraction or correction of any article published by the *Gazette*. Aff. of Sid Schwartz, dkt. 57. Given this assertion, this court has no basis to find that the *Gazette* is withholding relevant information responsive to plaintiff's discovery requests.

Before setting out the facts, I note that Barlass did not follow this court's rules for proposing facts in opposition to a summary judgment motion. Instead of filing a separate set of additional facts in response to each motion as required by this court's procedures, *Procedure to be Followed on Motions for Summary Judgment*, at pp. 5-6, attached to pretrial conf. order, dkt. 22, Barlass incorporated additional facts in her response to defendants' statements of material facts. Because of this I have disregarded those proposed facts. *Schmidt v. Eagle Waste & Recycling , Inc.*, 599 F.3d 626, 630 (7th Cir. 2010) (court may strictly enforce compliance with its local rules governing summary judgment.) But even if I had considered Barlass's additional facts, the defendants still would obtain summary judgment. Most of Barlass's "facts" consist of unfounded accusations about the defendants' motives and self-serving denials of the facts that harm her claims. Such conclusory allegations, unsupported by any documents or testimony based on first-hand knowledge, are insufficient to defeat a summary judgment motion.

From defendants' proposed findings of fact and Barlass's responses thereto, I find the following facts to be undisputed and material for the purposes of deciding the summary judgment motions:

FACTS

I. The Parties

Plaintiff Janelle Barlass resides in Janesville, Wisconsin. She is the registered agent of Corvinas Exchange, LLC, a Wisconsin limited liability company that was registered on April 14, 2009. From May to August 2009, Corvinas Exchange, LLC operated a bar located in downtown Janesville called "Corvinas," sometimes referred to as "Corvina's." Corvinas Exchange, LLC is not a party to this lawsuit.

Defendant City of Janesville is a municipal corporation located at 18 North Jackson Street, Janesville, Wisconsin and is a body corporate which operates and maintains the Janesville Police Department. The Municipal Code of the City of Janesville provides for an "Alcohol License Advisory Committee" ("ALAC") which advises the Janesville Common Council on matters related to alcohol licensing. The ALAC is composed of four citizens and one member of the Common Council and it meets once a month. Defendant Steven J. Kopp was the Deputy Chief of Police for the City of Janesville and he was the police liaison to the ALAC. As Deputy Chief, Kopp reported to the Chief of Police. The Chief of Police has the authority to make policy for the police department; the Deputy Chief does not.

Defendant *Janesville Gazette* publishes a daily newspaper which it supplements with an internet version, the *GazetteXtra*.

Defendant Denise Carpenter was the owner of a bar called "Quotes" that was located near Corvinas.

II. Corvinas Exchange, LLC Obtains a Liquor License

Corvinas was located in a building at 121/123 East Milwaukee Street in Janesville owned by Farrokh "Fred" Shahlapour and Jaleh Dabiri, his wife. Corvinas opened for business in October 2008. Shahlapour held the liquor license and Barlass ran the bar for him. Corvinas played music that appealed to younger crowds, including R&B and hip-hop, and its clientele was predominantly African-American. In 2009, on St. Patrick's Day (Tuesday, March 17), two fights occurred inside Corvinas and a motorcycle parked outside was kicked over. Barlass closed the bar that night at 12:30 a.m. instead of the usual closing time of 2:00 a.m.

In early 2009, Barlass partnered with a businessman named Amir Sharifi to form a limited liability corporation named Corvinas Exchange, LLC, for the purpose of transferring control of Corvinas from Shahlapour to the LLC. In April 2009, the new LLC applied to transfer the bar's liquor license from Shahlapour to the LLC.

The ALAC considered the LLC's application at a May 5, 2009 meeting at which Barlass and Sharifi appeared. Deputy Chief Kopp also appeared and reported that there had been concerns in the past about increased calls for police services at Corvinas and he described the type of complaints. Sharifi acknowledged that there had been some problems with crowding beyond capacity and there had been a fight in the bar, but said he was hoping to address these problems with different security measures. A member of the ALAC told Sharifi that she had also heard of problems with underage drinking at Corvinas. Despite all this, the ALAC voted to recommend that the Common Council grant the LLC's application.

On May 26, 2009, the Council approved the license transfer. At the meeting, two Council members advised Sharifi that they were aware of problems at Corvinas and that he should take steps to resolve them or the license might be revoked. (One condition associated with ownership of the liquor license was that the police had the right to enter the premises during business hours without giving prior notice or obtaining permission.)

At a June 2, 2009 meeting of the ALAC, Kopp reported that Corvinas had quieted down compared to past months.

III. The June 28, 2009 Incident

Early Sunday morning on June 28, 2009, a Janesville police officer encountered a disturbance involving about 30 people about 1½ blocks away from Corvinas. An underage female who reportedly had been drinking in Corvinas had been stabbed in a fight that was said to have started in the bar. As a result of this disturbance, Barlass was cited for and later found guilty of allowing an underaged person into a place where liquor is sold. On June 29, 2009, Kopp wrote to Sharifi and Barlass and asked them both to appear before the ALAC at its next meeting on July 7, 2009.

Before the July meeting, Kopp assembled a packet of information for the ALAC's consideration, including his letters to Barlass and Sharifi and a list of 47 police contacts with Corvinas between January 1 and June 13, 2009. Some of these contacts referred to a corresponding police department report number, but many did not. Many police contacts with Corvinas for which no report had been prepared were described as "bar/business walkthrough" or "security check," which were routine contacts initiated by the police department. Kopp's report showed that in June 2009, police responded to complaints for disorderly conduct, theft, loud music and trespass. Kopp included this information in the packet because starting in early June 2009, Corvinas appeared to be having more serious problems with patron behavior than it had previously.

In a memo to the ALAC dated June 30, 2009, Kopp recapped the results of the police investigation of the June 28, 2009 incident. He reported that police had learned that the incident had originated inside Corvinas; that bar employees had ejected the participants in the disturbance but then never called the police; and that the suspect in the stabbing was a 20-year-

old female who had been served alcohol in Corvinas without first having been carded.[3] In his memo, Kopp advised the ALAC that it either could continue to monitor Corvinas or could recommend to the Common Council that the bar's alcohol license be revoked or suspended.

On July 6, 2009, a Janesville radio station ran a story about Corvinas titled in a podcast as "Stabbing at Janesville bar concerns public officials."

IV. The July 7, 2009 ALAC Meeting

On July 7, 2009, Sharifi and Barlass appeared before the ALAC. Barlass was represented by her lawyer, Richard Rice. Defendants Kopp and Carpenter also were present. Barlass was informed at the meeting that there had been a large number of complaints relating to Corvinas.

Before the July 7, 2009 ALAC meeting, Barlass had had two interactions with Janesville police in her bar in which she believed the officers had acted inappropriately. One involved an officer who came into Corvinas early in the evening when there were about five or six African-American patrons in the bar; the officer sarcastically remarked "Looks like trouble in here." Barlass does not know if this officer knew any of the patrons or had had previous contacts with them. In the other encounter, two officers came into the bar and told Barlass that she should think about changing the kind of music she played in the bar if she didn't want to "end up like Spanky's," referring to a bar that had also catered to African-Americans and had closed. During

[3] Barlass disputes that the fight started in the bar or that an underaged person was served alcohol in the bar, accusing the Janesville police of "blaming" the incident on Corvinas. However, the police reports from the incident confirm the results of the police investigation. Barlass Aff., dkt. 81, exh. P, at 133-176. Further, Barlass was found guilty of the citation for allowing an underaged person into an alcohol-licensed establishment. Her self-serving and uncorroborated denials do not create a genuine dispute of fact on this issue.

the July 7, 2009 ALAC meeting, Barlass expressed her opinion that the police were targeting Corvinas because of the race of most of its patrons. Kopp responded that Barlass was out of line because that police responded to problems and that race had nothing to do with it.

Defendant Carpenter spoke at the July 7 2009meeting. Carpenter's bar, named "Quotes," was located near Corvinas, about 2½ blocks down the street and around the corner. Quotes was similar to Corvinas in that it had a live DJ on a regular basis. Carpenter stated that when she opened Quotes, she had a very large crowd and that the Janesville Police Department had helped her obtain proper security training for her employees. Carpenter remarked: "Corvina's [*sic*] on the corner is hurting my business. Her establishment is giving downtown a bad name and bad press. Downtown is no longer viewed as a safe place to come."

Near the end of the discussion, Kopp stated that although the Janesville Police Department was concerned about the problems at Corvinas, the police chief was not yet prepared to seek revocation or suspension of the liquor license. He recommended that the meeting serve as a "stern warning" to Barlass and Sharifi. The ALAC directed them to appear again at its August meeting to discuss what steps Barlass and Sharifi had taken to ameliorate the stated concerns about Corvinas.

On July 16, 2009, Barlass hand-delivered to Kopp a letter prepared by her lawyer. In the letter, Barlass indicated that Corvinas intended to cooperate with police to address concerns about the bar. She also noted that police officers had come to Corvinas four or five times, that these contacts had been mostly positive and that she had an "open door" policy whereby police officers or anyone else should feel free to come to the bar. Barlass also wrote that Kopp had told her after the July 7, 2009 ALAC meeting that his reference to 47 incidents at Corvinas was not

accurate because that number included police walk-throughs; according to Barlass, she had found only thirteen police reports of incidents involving Corvinas between January 1 and June 29, 2009.

V. The August 2009 ALAC Meeting

On August 4, 2009, Barlass and Kopp again appeared before the ALAC. Kopp reported that in the month since the last meeting, police had been called to Corvinas for a number of reasons, including in response to reports of marijuana use or sale outside the premises; in response to a possible disturbance where officers discovered that bar security had walked off the job because they were not being paid; an arrest for disorderly conduct after an exiting patron punched a motorist's car; an incident where Corvinas' security manager, David Toles, had been punched in the face by a bar patron; a request for police presence by Shahlapour while he served an eviction notice on the bar; and a complaint from the owner of an adjacent business that Corvinas' patrons were urinating and vomiting in his doorway.

In response, Barlass and Toles (the security manager) described the measures that they were taking to improve security at the bar. Kopp stated that the police department was not recommending that the ALAC take any action with respect to Corvinas' liquor license.

VI. Sharifi Resigns from the LLC and Corvinas Closes

In August 2009, Sharifi submitted to the City a notarized statement that he and Barlass had signed. The letter reported that Sharifi was "resigning" from Corvinas Exchange LLC.[4] The

[4] Barlass now insists that the document submitted by Sharifi was fraudulent and that the city was obliged to "look into it further." Barlass, however, has provided nothing but her own assertion to support her claim of fraud and her suggestion that the city was obliged to investigate tod confirm the authenticity of Sharifi's letter.

City determined that under its municipal code, Sharifi's relinquishment of his ownership interest in the company constituted a "substantial change in ownership" that required Corvinas Exchange LLC to obtain a new alcohol license.[5]

On August 18, 2009, Shahlapour filed an eviction action against Barlass. Barlass eventually surrendered the keys to him.[6]

Barlass was notified in a letter dated August 26, 2009 that the City had revoked the liquor license for Corvinas.

VII. The *Janesville Gazette*'s Coverage of Corvinas

From May to August 2009, the *Janesville Gazette* ran a number of articles about Corvinas and its dealings with the ALAC. On May 18, 2009, while Corvinas Exchange, LLC's application

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[5] Janesville's Municipal Code provides:

5.06.200 Substantial change in beneficial ownership–New alcohol license required

A.. A new alcohol license is required for each substantial change in the beneficial ownership of any alcohol licensed business or interest. For purposes of this section, "beneficial ownership" includes, but is not limited to, any and all direct and indirect legal, equitable and financial rights, titles, interests of whatsoever kind and nature.

B. For a corporation, "substantial change" includes, but is not limited to, each and every action of whatsoever kind and nature affecting, singularly or in aggregate, twenty percent (20%) or more of the issued shares of stock.

C. For a partnership, "substantial change" includes, but is not limited to, each and every action of whatsoever kind and nature affecting, singularly or in aggregate, twenty percent (20%) or more of the individual and/or aggregate general and/or limited partner beneficial ownership interest.

D. For a sole proprietor, "substantial change" includes, but is not limited to, each and every change in the beneficial ownership of the business.

[6] Barlass disputes the propriety of Shahlapour's eviction action. Whether Barlass had a valid defense to the eviction is beyond the scope of this lawsuit and is not relevant to the claims on which she was granted leave to proceed.

for a liquor license was pending before the City Council, the *Janesville GazetteXtra* published an article online titled "Concerns about crowds at Corvina's." The article reported that Corvinas had become so popular that it had exceeded its capacity and there were long lines to get into the bar. This article also reported that according to Kopp, there had been a traffic accident near the bar that had required the police to work crowd control.

On July 7, 2009, the *GazetteXtra* posted online an article titled "A downtown Janesville bar is asked to deal with crowd control issues." The article reported that Kopp had said that other taverns had successfully dealt with security issues by discussing their problems with police, but that decision-makers at Corvinas had avoided past invitations to talk.

On July 8, 2009, the *GazetteXtra* posted an article online titled "Janesville police say Corvina's is trouble." The story reported on the July 7, 2009 ALAC meeting, including Barlass's accusation of discrimination and Kopp's response. The article also quoted Carpenter's remark about Corvina's hurting her business.

On August 2, 2009, the *GazetteXtra* posted an article online titled "Quotes and Corvina's serve energetic, young crowds." The article mentioned the Janesville police, but did not mention Kopp. The article included a list of various bars and the number of contacts police had with the establishment from January 1 to July 22. According to the article, police records showed that Corvinas had 69 police contacts; Quotes had 87.[7]

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[7] Barlass insists that Kopp furnished this information to the *Janesville Gazette* and that it was false. There is no support in the record for either assertion. The *Gazette* article indicated that it had obtained its information from "police records," not from Kopp. Barlass's claim of falsity rests on the fact that she has been provided with only 19 police reports; therefore, she argues, the other 50 police contacts must have been fabricated. This is faulty logic. As reported in the *Gazette* and stated in Kopp's affidavit in support of his summary judgment motion, the list of police contacts included routine police walk-throughs, security checks and other minor incidents for which no police reports were written.

On August 3, 2009, the *GazetteXtra* posted an article titled "Trouble plagues bars that cater to growing minority population." The article mentioned Corvinas and Quotes in Janesville as well as unnamed Madison bars. The article quoted Kopp as stating that another bar in Janesville named Spanky's had had many more serious incidents than Corvinas and that police were trying to get out ahead of any trouble at Corvinas. The article also included the following remarks by Kopp: Quotes Bar & Grill had more police contacts since January 1, but the difference was that Quotes reported incidents more frequently to the police; Janesville police were scrutinizing Corvinas out of concerns raised by officers, two nearby bar owners, another one of Corvinas' neighbors and a passerby; Kopp was getting reports about groups of people, not specific races of people.

On August 4, 2009, the *Janesville GazetteXtra* published an article online titled "Committee: Corvina's needs to do more to control bar." The article reported on the August 2, 2009 ALAC meeting. It quoted Kopp as saying that the police department had been involved in six incidents at Corvinas in the last month but that he was not alarmed by the number or type of incidents. The article noted that one ALAC member had expressed disappointment at the lack of improvement at Corvinas.

On August 5, 2009, the *Janesville GazetteXtra* published an article online titled "ALAC: Corvina's still needs work." Kopp was quoted in the article as stating that there was "nothing alarming [at Corvinas] from a police perspective" in the past month.

On July 30, 2010, eleven months after Corvinas closed, the *Gazette* published an article titled "Janesville Bar Closes Following Complaint." The article was about a different bar that had opened in the in location that Corvinas had occupied, but the article referred to Corvinas and its owners.

As a policy matter, when the *Gazette* receives a letter from someone who complains that the newspaper published incorrect information, the letter is given to the local news editor, Sid Schwartz for review and action. Schwartz has been the *Gazette*'s local news editor since November 21, 2005. Schwartz did not receive any letter, correspondence or other document from Barlass or anyone on her behalf related to articles published in the *Gazette*. Schwartz reviewed the *Gazette*'s records and did not locate any letter or document dated July 16, 2009 from or on behalf of Barlass or Corvinas, nor any other letter from or on behalf of Barlass or Corvinas, requesting the newspaper to retract or correct any article.

OPINION

I. Summary Judgment Methodology

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Spath v. Hayes Wheels Int'l-Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). As the moving parties, the various defendants in this lawsuit have the initial burden of identifying the bases on which they seek summary judgment and to cite to supporting evidence in the record. *Costello v. Grundon*, 651 F.3d 614, 635 (7th Cir. 2011). The reviewing court must construe the evidence in the light most favorable to plaintiff as the nonmoving party and must draw all reasonable inferences in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Chelios v. Heavener*, 520 F.3d 678, 685 (7th Cir. 2008); *Spath*, 211 F.3d at 396. If a moving party fails to meet its burden of proof, then the court cannot enter summary judgment for that party even if the opposing party fails

to present relevant evidence in response to the motion. *Cooper v. Lane*, 969 F.2d 368, 371 (7th Cir. 1992).

In opposing summary judgment, the non-movant cannot "merely rest on its pleadings; it must affirmatively demonstrate, by producing evidence that is more than 'merely colorable,' that there is a genuine issue for trial." *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 704 (7th Cir. 2011) (citing *Anderson*, 477 U.S. at 249). A genuine issue of material fact is not demonstrated by the mere existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, or by "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson*, 477 U.S. at 252.

II. Equal Protection and Retaliation Claims Against the City of Janesville and Kopp

A. Standing

The first issue raised by defendants is whether Barlass even has standing to assert her claims. As defendants point out, the alleged target of their purported retaliation and discrimination was Corvinas, which was owned and operated by an LLC, not by Barlass, and the LLC is not a party to this lawsuit. To determine whether plaintiff has standing, the court must answer two questions.

First, the court must determine whether the plaintiff alleges an "injury in fact," that is, whether she has "a sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy subject to a federal court's Art. III jurisdiction." *Singleton v. Wulff*, 428 U.S. 106,

112 (1976). The requisite elements of Article III standing are well established: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The requirements of Article III standing are not subject to waiver or forfeiture because without them, the court lacks jurisdiction. *Freedom From Religion Foundation, Inc. v. Nicholson*, 536 F.3d 730, 737 (7th Cir. 2008).

Barlass alleges that as a result of defendants' actions, she lost business income and ultimately, her business. But as the Janesville defendants point out, the City of Janesville did not revoke Corvinas Exchange, LLC's liquor license based on any recommendation from Kopp or because of perceived problems at Corvinas; it revoked the license because Sharifi resigned from the LLC, thus changing the ownership of the licensee. In response, Barlass suggests that Sharifi would not have done so had it not been for the negative press and excessive police focus on the bar. Barlass Aff., dkt. 81, at ¶55 (asserting that Sharifi did not want to be liable for any matters pertaining to Corvinas "due to the way in which the City was handling the situation"). If this were true, then it would provide a sufficient causal nexus to allow the court to answer the first standing question in favor of Barlass. But there is no evidentiary support for Barlass's assertion on Sharifi's behalf. In the absence of Sharifi's own affidavit, Barlass's report is hearsay and speculation. Even if Barlass has accurately surmised Sharifi's state of mind, there is no evidentiary support for this surmise, so the court cannot accept it as fact. *See Schmidt*, 599 F.3d at 630 (proposed findings of fact must be supported by admissible evidence so that the court can determine precisely what facts are disputed and resolve summary judgment motions on the merits.) As a result, Barlass's claimed chain of causation seems to break at the first link.

This could be the end of the analysis, but one could infer that Barlass is contending that defendants' actions caused a loss of business income before Sharifi withdrew from the LLC; this probably would be enough to establish Barlass's standing. So, let's play out the hand and answer the second standing question, which asks whether Barlass is the proper party to be asserting the particular legal rights on which she bases her suit. *Singleton*, 428 U.S. at 112. In this regard, Barlass "generally must assert [*her*] own legal rights and interests, and cannot rest [*her*] claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Stated another way, "one cannot sue, other than in a representative capacity, to enforce a right that belongs to someone else." *Lefkovitz v. Wagner*, 395 F.3d 773, 776 (7th Cir. 2005). This element of standing, which has been codified in Fed. R. Civ. P. 17(a), commonly is referred to as a "prudential principle" of standing as opposed to an Article III requirement, although the concepts are closely related. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982); *RK Co. v. See*, 622 F.3d 846, 851 (7th Cir. 2010).

Principles of business organization often come into play as part of this prudential standing analysis. Courts in Wisconsin, as in most jurisdictions,"do not disregard lightly" the principle that a corporation is a legal entity separate from its owners or shareholders. *Consumer's Co-op of Walworth Co. v. Olsen*, 142 Wis. 2d 465, 474, 419 N.W. 2d 211, 213 (1988); *Milwaukee Toy Co. v. Industrial Comm'n of Wis.*, 203 Wis. 493, 495, 234 N.W. 748, 749 (1931). Because of this legal separateness, rights of action accruing to a corporation belong to the corporation and cannot be asserted by the members as individuals. *Twohy v. First Nat. Bank of Chicago*, 758 F.2d 1185, 1194 (7th Cir. 1985); *Rose v. Schantz*, 56 Wis. 2d 222, 229, 201 N.W. 2d 593, 597

(1972); *Marshfield Clinic v. Doege*, 269 Wis. 519, 526, 69 N.W.2d 558, 56 (1955). As the court explained in *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896-97 (5th Cir. 1968):

> [I]t is universal that where the business or property allegedly interfered with by forbidden practices is that being done and carried on by a corporation, it is that corporation alone, and not its stockholders (few or many), officers, directors, creditors or licensors, who has a right to recovery, even though in an economic sense real harm may well be sustained as the impact of such wrongful acts bring [sic] about reduced earnings, lower salaries, bonuses, injury to general business reputation, or diminution in the value of ownership.

(quoting *Martens v. Barrett*, 245 F.2d 844–46 (5th Cir. 1957)).

Although a limited liability company like Corvinas Exchange, LLC, is not a corporation, "it is like one in being distinct from a natural person." *United States v. Hagerman*, 545 F.3d 579, 581 (7th Cir. 2008). Wisconsin has extended the limitation on shareholder standing to limited liability companies in Wis. Stat. § 183.0305, which provides as follows:

> A member of a limited liability company is not a proper party to a proceeding by or against a limited liability company, solely by reason of being a member of the limited liability company, except if any of the following situations exits:
>
> (1) The object of the proceeding is to enforce a member's right against or liability to the limited liability company.
>
> (2) The action is brought by the member under s. 183.1101.

Section 183.1101 of the Wisconsin Statutes provides that an individual member of a limited liability company can bring suit when authorized to do so by the company, under procedures set out in the statute. Barlass makes no suggestion that she is bringing this suit on behalf of Corvinas Exchange, LLC or that she was authorized to do so. Further, if she *were* bringing suit on the LLC's behalf, then she could not appear in this court without a lawyer. *Muzikowski v.*

Paramount Pictures Corp., 322 F.3d 918, 924 (7th Cir. 2003) (corporation may appear in federal court only through licensed counsel).

The mere fact that a corporation may have a cause of action, however, does not mean that an individual shareholder cannot bring her own suit alleging injury from the same wrongful acts. *Buschmann v. Professional Men's Ass'n*, 405 F.2d 659, 663 (7th Cir. 1969). The question the court must ask is: Whose right is sought to be enforced by the lawsuit, the corporation's or the individual member's? *Rose*, 56 Wis. 2d at 229, 201 N.W. 2d at 597. In order for a shareholder (or, by extension, a member of a limited liability company) to have an independent claim, the injury must be

> one to the plaintiff as a shareholder as an individual, and not to the corporation[;] for example, where the action is based on a contract to which the shareholder is a party, or on a right belonging severally to the shareholder, or on a fraud affecting the shareholder directly, or where there is a duty owed to the individual independent of the person's status as a shareholder, it is an individual action.

Krier v. Vilione, 2009 WI 45, ¶30 n. 13, 317 Wis. 2d 288, 311 n. 13, 766 N.W.2d 517 (2009) (quoting 12B Fletcher, Cyclopedia of the Law of Corporations § 5911 (perm. ed., rev. vol. 2009); *see also Lefkovitz v. Wagner*, 395 F.3d 773, 776 (7th Cir. 2005) (if individual partners sue to enforce rights belonging to a nonconsenting third party, namely the partnership, the court must dismiss the suit). In answering this question, the court should consider the allegations of the complaint to discern "the true character of the action," without being bound by the plaintiff's characterization of her suit. *Doege*, 269 Wis. at 561-62, 69 N.W. at 526.

1. Equal Protection

Applying these principles, I conclude that Barlass lacks standing to assert an individual equal protection claim based on the alleged discrimination against Corvinas. The entire thrust of Barlass's equal protection claim is that the Janesville police and the ALAC were policing Corvinas bar more heavily than other bars because it attracted a large number of African-American customers, causing injury to the business. As defendants point out, Barlass fails to allege that any of the actions that she contends were discriminatory were directed at her personally; rather, the target of these actions was Corvinas bar and the manner in which it was doing business. *See, e.g.,* Sec. Amended Complaint, dkt. 6, at 2 (accusing defendants of "trying to take away my liquor license to my bar establishment known as Corvinas" because of its African-American clientele), and 5 (alleging that city has custom of attempting to put "black" bars out of business and that Corvinas was "singled out" and scrutinized more closely than bar establishments serving predominantly white customers). Further, all of the injuries that she alleges with particularity are those sustained by the LLC: loss of business income and damage to the bar's reputation. *Id*. at 5 (the constant presence of police annoyed patrons, irritated neighboring businesses, caused establishment to lose revenue and detoured patrons). Barlass makes no claim that she suffered any individual discrimination or that she was damaged in any way beyond the damages sustained by the business.

Indeed, Barlass makes no attempt to show that she suffered an injury separate and distinct from that of the LLC or its other member at the time, Sharifi. Her only argument on this point (asserted in response to a similar defense by defendant Carpenter) is that "Corvinas is Janelle Barlass and/or Janelle Barlass is Corvinas." Barlass appears to believe that because

Sharifi was a silent partner and she was responsible for the day-to-day operation of the bar, an injury to Corvinas was a direct injury to her. But as noted above, where the individual member's injury derives from that sustained by the company, she cannot bring suit, no matter how small or closely-held the company.

Barlass chose to establish an LLC for the purpose of obtaining a liquor license and operating the bar; now she must live with the consequences of that choice. In the words of the Wisconsin Supreme Court, "One cannot maintain the corporate structure when it inures to one's benefit and then ignore the constraints of corporate law when it does not." *Krier,* 2009 WI 45, ¶26, 317 Wis. 2d at 307, 766 N.W.2d at 526. *See also Chartier v. McKloskey*, 2007 WI App 230, ¶¶ 6-8, 306 Wis. 2d 127, 740 N.W. 2d 903 (Table) (Wis. Ct. App. Sept. 18, 2007) (50% shareholder in corporation lacked standing to sue lawyer for malpractice based on lawyer's failure properly to disburse funds from judgment obtained on behalf of corporation; any injury was injury to corporation and plaintiff had not shown that he suffered separate and distinct injury from that of corporation or other shareholders) (unpublished disposition); *Kush v. American States Ins. Co.*, 853 F. 2d 1380, 1383-84 (7th Cir. 1988) (sole shareholder of insured corporation could not bring claim against corporation's liability insurer for intentional infliction of emotional distress allegedly arising out of insurer's handling of corporation's claim because shareholder was neither insured nor beneficiary of insurance policy on which his claim was based); *ClubXtreme, Inc. v. City of Wayne*, 2010 WL 1626415, *4-5 (E.D. Mich. April 21, 2010) (slip copy) (sole shareholder of corporation that operated nightclub lacked individual standing to bring civil rights claims based on city council's recommendation that nightclub's liquor license not be renewed). Accordingly, I conclude that Barlass lacks individual standing to bring an equal protection claim based on discrimination directed at Corvinas.

2. Retaliation

Barlass alleges that defendants Kopp and the City of Janesville provided negative information to the press about Corvinas and increased the police presence at the bar in retaliation for her remarks at the July 7 ALAC meeting, in which she accused police of unfairly targeting her bar because of the race of many of its patrons. Although Barlass appeared at that meeting as a representative of the license holder, Corvinas Exchange, LLC, she had an individual right under the First Amendment to speak out on matters of public concern.

Although it is true that all of the alleged retaliatory actions (excessive police presence, negative portrayals of the bar to the media) were directed at Corvinas, indirect retaliation may be sufficient to establish a constitutional violation if the plaintiff can show that it was likely to deter First Amendment activity in the future. Here, as Judge Crabb found in the order granting Barlass leave to proceed on this claim, it is not difficult to conclude that a reasonable bar owner would be dissuaded from criticizing the city and police department if she knew that this would cause the police to report false information about crimes and to harass her customers. *Accord Thompson v. North American Stainless, LP*, ___ U.S. ___, 131 S. Ct. 863, 868 (2011) (finding it "obvious" that a reasonable worker might be dissuaded from engaging in protected activity if she knew her fiancé would be fired). "Criticisms of the government lie at or near the core of what the First Amendment aims to protect." *Marable v. Nitchman*, 511 F.3d 924, 932 (9th Cir. 2007).

B. Merits

1. First Amendment Retaliation Claim Against Kopp

To defeat the motion for summary judgment on her retaliation claim under § 1983, Barlass must adduce sufficient evidence from which a reasonable jury could find that: (1) Barlass engaged in constitutionally protected speech; (2) Kopp took adverse action against Barlass that would likely deter First Amendment activity in the future; and (3) Kopp's adverse actions were motivated at least in part as a response to Barlass's protected speech. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009); *Mosely v. Board of Education of Chicago*, 434 F. 3d 527, 533 (7th Cir. 2006).

Kopp concedes that plaintiff engaged in constitutionally protected speech when she complained at the July 7, 2009 ALAC meeting that the police department was discriminating against Corvinas bar because of the race of its patrons. Such complaints are constitutionally protected speech.

However, it is not clear from Barlass's submissions what action she is contending Kopp took against her in retaliation for her remarks. Generally speaking, Barlass complains that Kopp provided the ALAC and the media with "unsubstantiated" information about incidents and complaints about Corvinas that cast Corvinas in a negative light, in turn damaging its business. Unfortunately, Barlass paints with such a broad brush that it is difficult to discern whether she has made out the elements of her claim.

First, Barlass points to actions by Kopp *prior* to the July 7, 2009 ALAC meeting. Such actions cannot possibly be within the scope of Barlass's retaliation claim: a defendant cannot be motivated to retaliate against comments that haven't been made yet. To establish a prima facie

case of retaliation, Barlass must adduce evidence–-not merely conclusory allegations–of false information provided by Kopp *after* her remarks at the meeting.

Second, in many cases Barlass takes words and phrases used by the *Gazette* in its headlines and articles and puts them in Kopp's mouth. Kopp had no control over what the *Gazette* printed or how it spun its stories. Barlass cannot prevail on her claim that Kopp engaged in a retaliatory campaign of defamation based on things he never said.

After sifting through Barlass's affidavit, I am able to identify only the following post-July 7, 2009 statements by Kopp about Corvinas that Barlass appears to be claiming were false:

> Kopp's statement to the *Gazette*, reported on August 3, 2009, that police were keeping an eye on Corvinas because of concerns raised by officers, two nearby bar owners, another one of Corvinas' neighbors and a passerby; and
>
> Kopp's statement at the August ALAC meeting that police were involved in seven incidents on six nights at Corvinas, including two unsubstantiated reports of drug use, reports of battery, a "walk-off" by Corvinas' security staff because they had not been paid; and a complaint by a neighboring business that Corvina's patrons were urinating and vomiting in his entryway.

With respect to the first statement, Barlass insists that the statement was false because there are no police reports to substantiate it. Contrary to Barlass's understanding, the lack of police reports does not show, or even *tend* to show, that Kopp was lying when he explained why the police were keeping an eye on Corvinas. Kopp said that "concerns" had been raised, not that police reports had been made. To defeat the motion for summary judgment, Barlass cannot merely assert her personal belief that Kopp was lying; she must adduce *evidence* from which a jury could draw that conclusion. Absent some showing by Barlass that the Janesville police document each and every complaint or call made to the department, the mere absence of documents to

back up Kopp's statement is not evidence of its falsity. *See Walter v. Fiorenzo*, 840 F.2d 427, 434 (7th Cir. 1988) ("[a] motion for summary judgment cannot be defeated merely by an opposing party's incantation of lack of credibility over a movant's supporting affidavit").

As for the second statement, Barlass's own submissions corroborate Kopp's description of the types of calls to which police had responded at Corvinas since the July 7, 2009 ALAC meeting. Barlass Aff., dkt. 81, exhs. W-Y, AA-BB (police reports of various incidents). Moreover, Kopp told the committee that in spite of the reports, there was "nothing alarming from a police perspective" and that he was recommending that the ALAC take no further action at that time. Reporting accurately on police calls made to the establishment and describing them as "nothing alarming" is simply not an adverse action that would have deterred a reasonable person in Barlass's position from speaking out in the future. To the contrary, a reasonable bar owner would find Kopp's characterization of the situation to be reassuring, not retaliatory. In short, Barlass has failed to adduce facts from which a jury could conclude that defendant Kopp supplied the press with false information in response to her remarks at the July 7, 2009 ALAC meeting.

The only other arguably retaliatory action that appears in Barlass's submissions is her assertion that the police parked outside Corvinas regularly, questioned bar patrons and "shook the bar down" for trouble. Barlass has failed to support her allegations with evidence. Further, these allegations are too vague and conclusory to stave off summary judgment. What did the police do? When? How often? Why? Barlass does not say. Further, she provides no evidence that (a) the police presence escalated after her remarks at the July 7, 2009 ALAC meeting or (b) the extra police presence was directed by Kopp.

Finally, one might reasonably ask how Barlass can reconcile her current claim of retaliation with her July 16, 2009 letter to Kopp stating that police were welcome at Corvinas and that she intended to work with them. The undisputed evidence establishes that: a person had been stabbed on June 28, 2009 during a disturbance which was found to have started in Corvinas; that the bar's staff had not handled the incident properly; and that at least one underaged patron had been allowed into the bar that night. Under these circumstances, no reasonable juror could conclude that the non-specific "increased police presence" at Corvinas was directed by Kopp in retaliation for Barlass's speech. *Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994) (noting that while causation generally is jury question, it can provide basis for summary judgment when "the question is so free from doubt as to justify taking it from the jury").

2. Retaliation Claim Against the City

Barlass seeks to impose liability on the City of Janesville through the actions of Kopp and the ALAC. In the analysis above I have found that Kopp did not engage in unlawful retaliation. As for Barlass's claim against the ALAC, it is unnecessary to address the merits of that claim because even if the committee acted unlawfully–and there is no evidence that it did–Barlass has failed to show a basis for establishing municipal liability.

A city can be found liable for constitutional violations committed by its officials only if the official acted pursuant to a municipal custom, policy or practice. *Palka v. City of Chicago*, -- F.3d --, 2011 WL 4921385, *5 (7th Cir. Oct. 18, 2011). To make this showing, Barlass must put forth evidence showing that her injury was caused by: (1) the enforcement of an express

policy of the City; (2) a widespread practice so permanent and well settled as to constitute a custom or usage with the force of law, or (3) a person with final policymaking authority. *Id*. (citations omitted).

It is undisputed that neither Kopp nor the ALAC had final policymaking authority. Barlass does not contend that the City has an express policy permitting retaliation and she has adduced no evidence showing a widespread practice of retaliation against people who criticize police practices. Accordingly, her retaliation claim against the City of Janesville must be dismissed.

III. State Law Defamation Claim Against Carpenter

Barlass contends that defendant Carpenter defamed her when she made the following statement at the July 7, 2009 ALAC meeting: "Corvina's up on the corner is hurting my business. Her establishment is giving downtown a bad name and bad press. Downtown is no longer viewed as a safe place to come." To prove this claim, Barlass must put forth evidence showing that the alleged defamatory statement: (1) was spoken to someone other than herself, (2) is false, (3) is unprivileged and (4) tends to harm her reputation so as to lower her in the estimation of the community or deter third persons from associating with her. *Hart v. Bennet*, 2002 WI App 231, ¶21, 267 Wis. 2d 919, 941, 563 N.W. 2d 472. Carpenter contends that Barlass cannot meet her burden because her comments were made about "Corvinas" and not Barlass.[8] Carpenter is correct.

[8] Carpenter also contends that her statements were not false and were conditionally privileged. Because Carpenter prevails on her first argument, I need not address the others.

"It is well settled that defamatory words must refer to some ascertained or ascertainable person, and that that person must be the particular plaintiff." *Schoenfeld v. Journal Co.*, 235 N.W. 442, 444, 235 N.W. 442 (Wis. 1931) (citations omitted); *see also* W. Prosser, The Law of Torts § 111 (4th ed. 1971) (because tort action of defamation is personal to party defamed, person may not recover for defamatory statement made about another, even if statement indirectly inflicts some injury upon party seeking recovery). As Carpenter points out, the only ascertainable "person" to which her statement referred was Corvinas, not Barlass. And, says Carpenter, because Corvinas was indisputably owned by Corvinas Exchange, LLC, any defamation claim against Corvinas belongs to the LLC, not Barlass.

Although I have not found a Wisconsin case directly on point, courts in other jurisdictions have rejected defamation actions brought by shareholders or owners of limited liability companies for allegedly defamatory statements made about the company. Applying the rule, discussed previously, that "a corporation and not its shareholders can complain of an injury sustained by, or a wrong done to, the corporation," the court in *Konica Minolta Business Solutions, U.S.A., Inc. v. Allied Office Products, Inc.*, 724 F. Supp. 2d 861, 868 (S.D. Ohio 2010), held that the majority shareholder of a corporation could not bring a personal defamation action based on statements that were made about his company, not made about him individually. The court rejected the shareholder's contention that his status as a personal guarantor for the corporation gave rise to an injury separate and distinct from other shareholders, finding any relationship between the guaranty and the defamation claim to be "tenuous at best." *Id*.

Similarly, in *Norman v. Borison*, 192 Md. App. 405, 421-22, 994 A. 2d 1019, 1029 (Md. App. 2010), the court held that the owner of a limited liability company could not maintain an

action for defamation where the statements were not made about him individually but rather were about his business relations with the company he owned. Employing the same reasoning as the court in *Konica*, the court refused to endorse the plaintiff's contention that the defamation claims by a company and its owners were interchangeable, explaining that to do so would "chip away at the basic precept that corporations and individuals are legally separate entities." *Id*. at 423, 994 A. 2d at 1029. *See also Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1202 n. 4 (9th Cir. 2001) (shareholder had no standing to sue for defamation directed towards corporation because "the wrong . . . suffered by the stockholder is merely incidental to the wrong suffered by the corporation and affects all stockholders alike.").

Barlass concedes that Carpenter did not refer to her personally in her remarks at the July 7, 2009 ALAC meeting. Like the plaintiff in *Norman*, she argues that "Corvinas is Janelle Barlass and/or Janelle Barlass is Corvinas," pointing out that she was responsible for the operation of the bar and Sharifi was merely a silent partner. Like the courts in *Konica* and *Norman*, I reject this argument. Barlass presents no evidence to back up her conclusory assertion that anyone hearing a reference to "Corvinas" would understand it to be a reference to her personally. Further, to treat the claims of the LLC as interchangeable with Barlass's would be contrary to the Wisconsin Supreme Court's admonition that the corporate form is not to be disregarded lightly. As stated above, having made the choice to establish an LLC as a means of carrying out her business, Barlass cannot now ignore the existence of the LLC in order to avoid its disadvantages. Because Barlass did not suffer an injury separate and distinct from that suffered by the LLC, she cannot maintain a defamation action based on Carpenter's remark at the ALAC meeting.

IV. State Law Defamation Claim Against the Janesville Gazette

Finally, Barlass was granted leave to proceed on a state law defamation claim against the *Janesville Gazette*. This claim must be dismissed because it is undisputed that Barlass failed to give proper notice of the alleged defamation as required by Wis. Stat. § 895.05(2).[9] That statute provides that before a person may sue a media defendant for libel, "the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter." Wis. Stat. § 895.05(2). To be valid, a pre-suit notice must: (1) be in writing; (2) be directed to those alleged to be responsible or liable; (3) specify the article and statements therein which are claimed to be false and defamatory; (4) contain a statement of what are claimed to be the true facts; and (5) be given before any civil action is commenced. *Hucko v. Joseph Schlitz Brewing Company*, 100 Wis. 2d 372, 381, 302 N.W. 2d 68 (Ct. App. 1981). If even one of the five requirements is not met, the pre-suit notice is insufficient and the plaintiff's claim must be dismissed. *DeBraska v. Quad Graphics, Inc.*, 2009 WI App. 23, ¶22, 316 Wis. 2d 386, 402, 763 N.W. 2d 219 (2009).

In addition to the pre-suit notice requirement, Wisconsin law requires a plaintiff suing for defamation to set forth in her complaint the "particular words complained of." Wis. Stat. § 802.03(6). In this case, the only article that Barlass specifically identified in either her Second Amended Complaint or the supplement to that complaint is the July 30, 2010 article published nearly a year after Corvinas closed. *See* dkt. 6, at 13; dkt. 9, at 9. She continues to focus on this

[9] The *Gazette* also contends that Barlass's claims against the *Gazette* should be dismissed because the allegedly defamed person was not Barlass but the bar, Corvinas, which was owned and operated by Corvinas Exchange, LLC. The *Gazette* waived this argument by failing to raise it until its reply brief, and even then it failed to offer any meaningful analysis. *Harper v. Vigilant Ins. Co.*, 433 F.3d 521, 528 (7th Cir. 2005) (arguments raised for the first time in reply brief are waived).

article in her response to the summary judgment motion. Dkt. 82, at 3-4. Accordingly, because Barlass failed to provide notice in her complaint of any other allegedly defamatory statements published by the Gazette, she cannot proceed on them.

In any event, even assuming Barlass's second amended complaint and its supplements could be read to include the stories printed in the Gazette during the summer of 2009, the defamation claims would have to be dismissed because there is no evidence that Barlass provided any pre-suit notice to the Gazette that satisfies the elements of Wis. Stat. § 895.5(2). In her response and unsworn affidavit, Barlass contends that pre-suit notice was provided to the *Gazette* through the following:

1) By delivering to the *Gazette* a copy of the July 16, 2009 letter that was sent to Kopp;

2) A July 16, 2009 letter to the *Gazette* written by her attorney, Richard Rice;

3) A pre-suit written notification delivered to the *Gazette*;

4) A letter to the *Gazette* requesting retraction of a few stories;[1] and

5) Verbal notice to the *Gazette*.

None of these alleged notices is sufficient to defeat the summary judgment motion. I begin at the bottom of the list. Barlass says she talked to a woman named Roxanne at the Gazette numerous time and told her that the newspaper was printing false information. But verbal notice is insufficient under the statute: the notice must be written.

[1] Although Barlass's submissions are unclear, it appears this letter may be the same as the letter she claims was written by her lawyer (#2, above), which may also be the July 16 letter to Kopp (#1, above). *See* Pltf.'s Response to Proposed Findings of Fact No. 21, dkt. 83.

Assertions (3) and (4) must be disregarded under the "sham affidavit" rule. Under this rule, a deponent may not use an affidavit sworn to after a deposition to contradict deposition testimony without giving a credible explanation for the discrepancies. *Bank of Illinois v. Allied Signal Safety Restraint*, 75 F.3d 1162, 1170 (7th Cir. 1996). Post-deposition testimony should be excluded only if it is inherently inconsistent and squarely contradicts previous testimony, *id*.. Those criteria are met in this case. In her responses to interrogatories and at her deposition, Barlass identified the July 16, 2009 letter to Kopp and the letter she says was written to the *Gazette* on the same date as the *only* written notices that she had provided:

> Q: And the July 16, 2009, letter that you claim was dropped off and written to the Gazette, that's the only written correspondence you've had with the Gazette, is that correct?
>
> A: Written correspondence, yes."

Barlass Dep., attached to Olson Aff., dkt. 56, exh. 2, p. 115, line 15-20. Her suggestion now that additional written correspondence exists baldly contradicts her prior sworn testimony and must be disregarded. Furthermore, Barlass does not provide any description of what these alleged notices said. Thus, this court has no basis on which to conclude that these notices met the requirements of the statute.

This leaves the July 16, 2009 letter that was addressed to Kopp and the letter that was allegedly drafted by Barlass's lawyer and sent or delivered to the *Gazette* on that same date. Although there is some suggestion by Barlass that these letters are one in the same, *see* Pltf.'s Response to Proposed Findings of Fact, dkt. 83, Nos. 17 and 21, for the sake of completeness I will assume that she is claiming that two different letters were sent.

The July 16, 2009 letter that was addressed to Kopp does not satisfy the statute because it is not addressed to those alleged to be responsible or liable, it fails to specify the article and statements therein which are claimed to be false and defamatory, and it does not contain a statement of what are claimed to be the "true facts." Although it hardly needs mention, the July 16 letter to Kopp, assuming that it was delivered to the *Janesville Gazette*, could not qualify as pre-suit notice with respect to the July 2010 article because that article had not been printed yet.

The July 16, 2009 letter to the *Gazette* that Barlass purports was prepared and sent by her lawyer also fails to meet the statutory requirements. First, Barlass has not produced a copy of this letter and neither her lawyer nor the *Gazette* has a copy. Although a party's sworn testimony can be enough to give rise to a dispute of fact, here Barlass's bald assertion that she delivered a letter that her lawyer denies preparing and the newspaper denies receiving does not raise more than a metaphysical doubt as to the material facts.

But rather than risk making a credibility determination during a summary judgment determination, I will assume, simply for the purpose of deciding the *Gazette*'s motion, that such a letter was prepared and delivered to the newspaper. Barlass has not provided any evidence from which to conclude that this letter met the statutory requirements. In her answers to interrogatories, Barlass indicated only that the letter told the *Gazette* "To cease printing of false information," Plt.'s Answers to Interrogatories, dkt. 56, exh. 3, at 3; at her deposition, Barlass said that the letter asked the *Gazette* to stop printing inaccurate information about Corvinas and take steps in the future to verify information before printing it. Dkt. 56, exh. 2, pp. 112-113. These general descriptions of the letter's contents are insufficient to establish that Barlass specified the article and statements therein which she claimed to be false and defamatory or that she provided the *Gazette* with a statement of what she claimed to be the true facts.

In sum, Barlass failed to provide the *Janesville Gazette* with any written notice that satisfies the requirements of Wis. Stat. § 895.05(2), which is a mandatory prerequisite to filing suit against the newspaper for defamation. Accordingly, her claims against the *Gazette* must be dismissed.

ORDER

IT IS ORDERED that:

1. Defendant Denise Carpenter's motion for summary judgment, dkt. 43, is GRANTED.

2. Defendant Janesville Gazette's motion for summary judgment, dkt. 53, is GRANTED.

3. The motion for summary judgment of defendants Steve Kopp and City of Janesville, dkt. 60, is GRANTED.

4. Plaintiffs' motions to compel, dkts. 67 and 68, are DENIED.

5. Plaintiffs' motion for the issuance of subpoenas, dkt. 85, is DENIED AS MOOT.

6. The Clerk of Court is directed to enter judgment closing this case.

Entered this 28th day of November, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge