STATE OF MAINE **WALDO, SS.**	**SUPERIOR COURT** **CIVIL ACTION** **DOCKET NO.BELSC-CV-10-41**

ALEXIS INGRAHAM and
BRETT INGRAHAM

PLAINTIFFS

v.

MADELINE B. GRAY d/b/a
NICKERNEWS.NET

DEFENDANT

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS ALEXIS INGRAHAM AND BRETT INGRAHAM'S OPPOSITION TO DEFENDANT MADELINE B. GRAY'S MOTION FOR SUMMARY JUDGMENT

NOW COME the Plaintiffs Alexis Ingraham and Brett Ingraham, by and through their undersigned counsel, David J. Van Dyke, Esquire, Hornblower Lynch Rabasco & Van Dyke, P.A., and hereby respectfully submit the following Memorandum of Points and Authorities in Opposition to Defendant Madeline B. Gray's Motion for Summary Judgment, dated September 28, 2011.

Plaintiffs submit together with this incorporated memorandum of points and authorities their Counter-Statement of Material Facts in Dispute and the accompanying affidavits of Plaintiffs Alexis Ingraham and Brett Ingraham.

For the reasons discussed below, genuine issues of material fact exist here which are preclusive of summary judgment. Additionally, Defendant is not entitled to judgment in her favor as a matter of law.

Defendant's motion for summary judgment should be denied in its entirety.

FACTUAL BACKGROUND

This is a defamation action brought by the owners and operators of a horse farm (the Ingrahams) asserting that Ms. Gray's web site (NickerNews.net) defamed them by making a number of false and damaging statements regarding them.

The Ingrahams assert that Ms. Gray/NickerNews.net published and disseminated false and defamatory statements regarding the Ingrahams and their farm operation including, among other allegations:

a. A spring and summer 2010 flyer attributed to "NickerNews.net" which stated that the Ingrahams have been subjected to "years of complaints" regarding their care and treatment of horses, and "continue to neglect dozens of horses".

b. Another flyer of the same timeframe which accused the Ingrahams of "massive horse neglect" including "dozens of horses [which] were at immediate risk of starvation and exposure".

c. In excess of 100 NickerNews "articles" and blogs between approximately February 15, 2010 and July 1, 2010 accusing the Ingrahams of grotesque animal abuse. A three-day representative sampling of the articles and blogs follow: ["N]umerous complaints dating back to several years"; "dozens of horses" being emaciated, without adequate shelter, in need of immediate medical attention; horses being eaten (February 11, 2010); Alexis Ingraham of abuse "for many years" and of having political clout to avoid arrest and prosecution (February 11, 2010); of having seventy four horses on the Ingraham property in October, 2009, many ultimately hauled off to "killers" in Canada (February 11, 2010); sends horses to "a slaughter facility" and have no 'financial

> ability to care for [horses] (February 11, 2010); no open water available to the horses (February 12, 2010); the Ingrahams' horse abuse has been going on for "ten years" (February 12, 2010); the Ingrahams' horses are hauled off to a Litchfield, Maine where they are "tied and then shot" (February 12, 2010); the Ingrahams are "literally slaughtering" horses (February 12, 2010); implying that the Ingrahams are undoubtedly abusing any "kids or elderly" [persons] in their care (February 12, 2010); that Alexis Ingraham and her parents have been callously allowing horses to die for years and would "rather see [a horse die] than turn a horse over to the State (February 13, 2010).

CSMFD at para. 20.

As set forth in the accompanying Affidavits of Alexis Ingraham and Brett Ingraham, the alleged offensive statements were not true. **CSMFD at paras. 21-31.**

In 2010, the Ingrahams were charged with 8 counts of misdemeanor cruelty to animals relating to fifteen (15)[1] specific and identified (by name) horses, as well as a number of dogs, pigs and goats. These charges arose out of observations at the Ingrahams' farm between the finite and specific dates of February 18, 2010 and June 3, 2010. **CSMFD at paras. 32-33.**

The allegations in the criminal case were narrow and finite. The criminal charges did not include any allegations – among their elements -- that the Ingrahams neglected "dozens of horses", had been subjected to "years of complaints", had "dozens of horses" in their care and/or custody in immediate risk of starvation and exposure, or emaciated or without adequate shelter or medical care, had horses eaten, had multiple horses hauled off to killers in Canada or had horses hauled off to Litchfield, Maine where they were tied and then shot or had horses slaughtered. Similarly, the criminal charges did not include any allegations that Alexis Ingraham possessed the political clout to avoid arrest or prosecution. Additionally – and perhaps most

[1] Some confusion exists whether the criminal complaints allege neglect to fifteen (15) or sixteen (16) horses (*compare* Defendant's motion at p. 10). The undersigned believes that two of the referenced horses are, in fact, the same horse. However, it is respectfully submitted that the numerosity of the involved horses is of no importance to either Defendant's motion or the Ingraham's opposition.

notably --, the criminal charges did not include any allegations that the Ingrahams ever abused any children or elderly persons in their care.

Earlier this year (2011), the Ingrahams plead no contest (pursuant to Maine's equivalent to *North Carolina v. Alford,* 400 U.S. 25 (1970) to the said eight misdemeanor counts. In so doing, they maintained their innocence respecting the charges but acknowledged that a properly-charged and properly-constituted jury could have found them guilty of the charged conduct. **CSMFD at paras. 15 and 34.** Their pleas related *only* to the allegations contained within the elements of the charges.[2] They did not plea to or admit any other conduct whatsoever.

ARGUMENT

1. The Applicable Legal Standard

The Court is aware of the standard to be applied in consideration of a motion for summary judgment. Pursuant to Me. R. Civ. Procedure Rule 56, summary judgment may be granted only where no genuine issue of material fact exists and the moving party is entitled to judgment in its favor as a matter of law. *Kraul v. Maine Bonding and Casualty Company,* 672 A.2d 1107, 1109 (Me. 1996) (citing to Me. R. Civ. Procedure 56, 2 Field, McKusick & Roth, *Maine Civil Practice* Section 56.4 at 39 (2d edition 1970) (hearing on summary judgment motion is "not in any sense a trial"); *Northeast Coating Technologies, Inc. vs. Vacuum Metalurgical Co., Ltd.,* 684 A.2d 1322, 1324 (Me. 1996).

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[2] The Ingrahams respectfully assert that – for the court's consideration of whether any estoppel attaches to their said pleas -- their pleas must be interpreted *narrowly*: That applicable principles of plea construction compel that the Ingrahams are pleading only with respect to the minimum factual allegations which may sustain the charged elements.

The presence of genuine issues of material fact (as here) is necessarily fatal to a motion for summary judgment where (as here), especially where (as here) the movant defendant is not otherwise entitled to judgment in her favor as a matter of law.

2. Defendant Madeline Gray is Not Entitled to Summary Judgment

The gravamen of Defendant's motion is that the Ingrahams' *Alford*-type pleas preclude their prosecution of this defamation action. Defendant asserts that the doctrine of *collateral estoppel* attaches to the pleas and offers a defense to Defendant's defamatory statements pursuant to Maine's "substantial truth" doctrine.

As demonstrated below, the offensive defamation arises out of allegations far, far afield from the narrow and finite elements of the eight misdemeanor charges to which the Ingrahams pled. The doctrine of *collateral estoppel* does not apply to the offensive defamation allegations.

Additionally, assuming *arguendo* that the doctrine of *collateral estoppel* does somehow reach the offensive defamation allegations, the doctrine is not implicated by the pleas in this case.

Moreover, Maine's "substantial truth" doctrine cannot be read to shield statements about apples from admissions respecting oranges.

Defendant's motion for summary judgment should be denied.

A. The offensive defamation arises out of allegations far, far afield from the narrow and finite elements of the eight misdemeanor charges to which the Ingrahams plead. Accordingly, the doctrine of *collateral estoppel* does not apply to the offensive defamation allegations.

As discussed above, the criminal charges to which the Ingrahams pled were narrowly defined by their elements. Facts beyond those set forth in the precise wording of the charges were not pled to.

Nowhere in any of the charges asserted was there any reference to, for example:

- multiple years of complaints of animal neglect or abuse;
- having horses eaten;
- having multiple horses hauled off to killers in Canada;
- having horses hauled off to Litchfield, Maine where they were tied and then shot;
- having horses slaughtered;
- Alexis Ingraham possessing the political clout to avoid arrest or prosecution or
- abusing children or elderly persons in the Ingrahams' care.

Thus, it cannot be said that the Ingrahams pled to any facts of the sort described immediately above.

Yet those facts, among many others of similar nature, are what Defendant alleged in her defamatory statements.

The doctrine of collateral estoppel provides that the determination of an essential fact or issue *actually litigated* on the merits and *resolved* by a valid final judgment in a prior action is conclusive on that fact or issue in subsequent litigation between the parties or their privies. *Spickler v.* York, 505 A.2d 87 (Me. 1986); S.*H. Nevers Corp. v. Huskey Hydraulics,* 408 A.2d 676, 679 (Me. 1979); *Hossler v. Barry,* 403 A.2d 762, 767 (Me. 1979); *Cianchette v. Verrier,* 155 Me. 74, 151 A.2d 502 (1959).

Application of the doctrine logically implies that the fact(s) relevant to the subsequent litigation is/are, in fact, determined in the prior litigation. *See* cases cited immediately above.

Accordingly, insofar as the alleged defamation arises out of allegations far afield from the narrow and finite elements of the eight misdemeanor charges to which the Ingrahams pled, the doctrine of *collateral estoppel* does not apply to the offensive defamation allegations.

B. Assuming *arguendo* that the doctrine of *collateral estoppel* somehow reaches the offensive defamation allegations, the doctrine is not implicated by the pleas in this case.

Even assuming *arguendo* that one or more of the facts respecting the challenged defamatory statements are deemed to be somehow within the elements of the eight misdemeanor offenses pled to, that doctrine is not implicated by virtue of the *Alford*-type pleas.

The collateral estoppel effect of an *Alford*-style plea has never been established in Maine. There is a split between authorities on the subject. The matter is simply not settled.

Notwithstanding Defendant's assertions to the contrary, the overwhelming weight of authority holds that an *Alford*-type plea, analogous to a *no lo* plea – does not have estoppel effect *as to the facts underlying the charged offense* although it does have preclusive effect as to its constitution as a criminal conviction. **This is a crucial distinction wholly ignored by Defendant's (unfortunately superficial) analysis.**

Numerous courts have rejected the notion that estoppel – as to the underlying facts as opposed to the fact of conviction -- arises out of an *Alford*-type plea. For example, the United States First Circuit Court of Appeals (applying Massachusetts law) found an *Alford*-type plea to be more closely analogous to a *no lo contendre* (no contest) plea than to a guilty plea, and found

such a plea to have no estoppel effect. *Olsen v. Correiro*, 189 F.3d 52 (1st Cir. 1999). In *Olsen,* the First Circuit explained its analysis as follows:

> The reasons behind a rule making the nolo plea inadmissible are readily apparent. First, although nolo pleas have been characterized in a number of different ways, *see* 21 Am.Jur. 2d *Criminal Law* § 727 (1998), in most jurisdictions, including Massachusetts, a nolo plea is not a factual admission that the pleader committed a crime. Rather, it is a statement of unwillingness to contest the government's charges and an acceptance of the punishment that would be meted out to a guilty person. *See, e.g.*, *North Carolina* v. *Alford*, 400 U.S. 25, 36 & n. 8 (1970) ("Throughout its history . . . the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency."); *Thomas* v. *Roach*, 165 F.3d 137, 144 (2d Cir. 1999); *Fisher* v. *Wainwright*, 584 F.2d 691, 693 n. 3 (5th Cir. 1978); *Commonwealth* v. *Ingersoll*, 14 N.E. 449, 450 (Mass. 1888). This is the main reason that a nolo plea is treated differently than a guilty plea, which is an express admission of guilt by the pleader and is therefore admissible in subsequent proceedings. *See* Fed.R.Evid. 410 advisory committee's notes, 1972 proposed rules ("The present rule gives effect to the principal traditional characteristic of the *nolo* plea, i.e. avoiding the admission of guilt which is inherent in pleas of guilty."); Fed.R.Crim.P. 11(e)(6) advisory committee's notes, 1974 amendment ("A plea of nolo contendere is, for purposes of punishment, the same as the plea of guilty. . . . Unlike a plea of guilty, however, [a nolo plea] cannot be used against a defendant as an admission in a subsequent criminal or civil case. . . . A defendant who desires to plead nolo contendere will commonly want to avoid pleading guilty because the plea of guilty can be introduced as an admission in subsequent civil litigation."); *see also Blohm* v. *Commissioner of Internal Revenue*, 994 F.2d 1542, 1554 (11th Cir. 1993) ("A guilty plea is more than a confession which admits that the accused did various acts. . . . A guilty plea is distinct from a plea of nolo contendere. A guilty plea is an admission of all of the elements of a formal criminal charge." (citations and internal quotation marks omitted)); *United States* v. *Williams*, 642 F.2d 136, 139 (5th Cir. Unit B Apr. 8, 1981).
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> A second reason behind Rule 410's exclusion of nolo pleas is a desire to encourage compromise resolution of criminal cases. *See Williams*, 642 F.2d at 139; *United States* v. *Grant*, 622 F.2d 308, 312 (8th Cir. 1980); Leonard, *The New Wigmore: A Treatise on Evidence, Selected Rules of Limited Admissibility*, § 5.4.4, at 5:49,

> 5:52 & n. 48 (1998); *cf.* Fed.R.Evid. 410 advisory committee's notes, 1972 proposed rules ("Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise."); Fed.R.Crim.P. 11(e)(6) advisory committee's notes, 1979 amendment (noting the importance of plea bargaining). The reach of this policy rationale has limits, of course; the plain language of the rule reflects Congress's balancing of the promotion of compromise against the admission of relevant evidence. *Cf., e.g.*, *United States* v. *Cusack*, 827 F.2d 696, 697-98 (11th Cir. 1987) (stating that the fruits of plea discussions are not barred by Rule 11(e)(6), since such a rule would go beyond the balance of values struck by Congress).
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> 189 F.3d at 59, 60 [footnotes omitted].

See also, among many, *United States v. McMurray,* ___ F.3d ___, 09-5806 (6th Cir. August 4, 2011) (conforming to the consistent determinations of four separate United States Circuit Courts of Appeal):

> We recently "declined to differentiate between an *Alford* plea and a straightforward guilty plea" when reviewing an immigration judge's ("IJ") decision that an alien had been convicted of "a particularly serious crime" under the Immigration and Nationality Act, § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii). *Ikharo v. Holder*, 614 F.3d 622, 633-34 (6th Cir. 2010). The alien argued that "the IJ impermissibly relied on facts contained in the indictment and plea agreement as well as during the plea hearing." *Id.* at 633. In rejecting the alien's argument, the *Ikharo* court relied on a Ninth Circuit case in which the court was analyzing whether a crime was a "crime of violence" under the Sentencing Guidelines and "held that the key question under the Guidelines was `whether a defendant has a *conviction* for a crime of violence, not whether the defendant has admitted to being guilty of such a crime.'" *Id.* (quoting *United States v. Guerrero-Velasquez*, 434 F.3d 1193, 1197 (9th Cir. 2006)). *The Ninth Circuit, however, has since held that the transcript of a plea hearing for a West plea — "the California equivalent of an Alford plea,"* Doe v. Woodford, *508 F.3d 563, 566 n. 2 (9th Cir. 2007) — does not establish the factual predicate for a sentence enhancement unless the defendant admitted to the facts.* United States v. Vidal, *504 F.3d 1072, 1089 (9th Cir. 2007)*
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> ...

> Although we agree with *Ikharo* that an *Alford*-type plea does not undermine the fact of a defendant's prior conviction, *we are persuaded by the reasoning of the Second, Fourth, Ninth, and District of Columbia Circuits that an Alford-type plea may impact our analysis of whether a defendant necessarily admitted the elements of a predicate offense through his plea.*
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> (Emphasis added.)

See also, among many, *United States v. Alston*, 611 F.3d 219 (4th Cir. 2010); *In re David*, 72 A.D.3d 1167, 1169, 1170; 898 NYS2d 305 (NY 2010); *Shehan v. Gaston County,* 190 NC App. 803 (NC 2008); *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008); *Clark v. Baines*, 84 P.3d 245 (Wash. 2004) ("Applying collateral estoppel to give an *Alford* plea preclusive effect in a subsequent civil action is uniquely problematic. Where a defendant is convicted pursuant to an *Alford* plea not only has there been no verdict of guilty after a trial but the defendant, by entering an *Alford* plea, has not admitted committing the crime."); *United States v. De Jesus Ventura*, 565 F.3d 870 (D.C. Cir. 2009).

The cases cited by Defendant are generally not to the contrary. *Delgado-Lucio*, *Mackins,* and *Argot* (*see* Defendant's motion at p. 7) are all cases in which the court (properly) found *Alford*-type pleas to be convictions. The Ingrahams do not dispute that *Alford*-type pleas constitute convictions. However, none of those cases speak to the collateral estoppel effect of such a plea as to the facts underlying the convictions. *Arzilla* (*also see* Defendant's motion at p. 7) was not based on an *Alford*-type plea at all.[3]

[3] Defendant's counsel presumably did not read *Arzilla*. *Arzilla* was predicated upon a plea under *People v. Serrano*, 20 A.D.2d 777 (NY App. 1964) which is substantively different from a plea under *Alford*. A *Serrano*-type plea is one in which the defendant plead *guilty* but made statements in the course of the plea inconsistent with guilt.

C. The doctrine of "substantial truth" does not save Defendant's motion.

Insofar as the offensive defamation statements are grossly far afield from the narrow and limited elements of the plead-to offenses, the "substantial truth" doctrine does not save Defendant's motion for summary judgment.

Admittedly, Maine does recognize the "substantial truth" doctrine. *See McCullough v. Visiting Nurse Assoc. of Southern Maine,* 691 A.2d 1201 (Me. 1997) (cited by Defendant in her motion at p. 9). However, that doctrine is inapposite to the present case. Defendant defines "substantial truth" quite differently than does the Law Court. The Law Court's definition of "substantial truth" is readily discernible from its opinion in *McCullough. McCullough* involved allegations of defamation arising out of a plaintiff nurse's termination by the defendant. In *McCullough,* the Law Court stated:

> The statement that she [the plaintiff nurse] was terminated for "several incidents" when, in fact, she was only terminated for two incidents, is substantially true even though it may not be technically accurate. To a reasonable person, the statement that McCullough was discharged because of several incidents is no more damaging to her reputation than an accurate statement would have been, namely, that she had been discharged because of two incidents. *See also* RESTATEMENT (SECOND) OF TORTS § 581A cmt. f (1977) (It is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance.).
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> *McCullough*, 691 A.2d at para. 10, p. 1203.

The "substantial truth" doctrine does not provide Defendant cover here.

Failing to provide sufficient feed for fifteen (or sixteen) horses, for example, over a finite 16-week period is not "substantially" the same as being subjected to "years of complaints"; having "dozens of horses" in immediate risk of starvation and exposure, or emaciated or without

adequate shelter or medical care; having horses eaten (!?); having multiple horses hauled off to killers in Canada; having horses hauled off to Litchfield, Maine where they were tied and then shot or having horses slaughtered. Similarly, obviously, failing to provide sufficient feed for fifteen (or sixteen) horses over a 16-week period is not "substantially" the same as Alexis Ingraham possessing the political clout to avoid arrest or prosecution. Additionally, **and most offensively**, failing to provide sufficient feed for fifteen (or sixteen) horses over a 16-week period is not "substantially" the same as abusing children or elderly persons in the Ingrahams' care.

All of the foregoing are (false) statements made by Defendant against the Ingrahams. None of the foregoing are "substantially" the same as any elements of any offenses to which the Ingrahams pled.

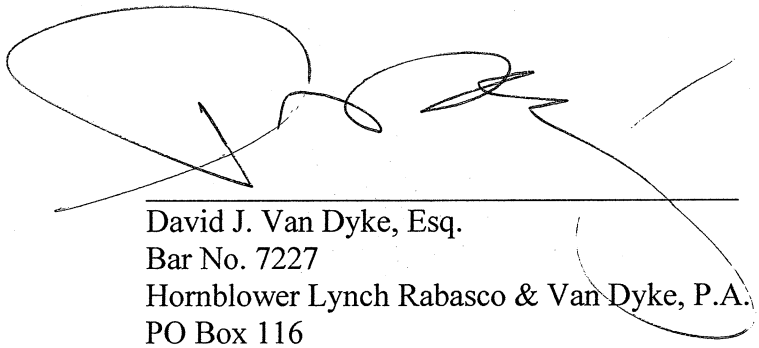
Defendant's mis-reading of the "substantial truth" doctrine – aside from simply being wrong -- is a sterling example of the logical fallacy *reductio ad absurdum*: Such a reading would preclude a plaintiff from suing for defamation if he was alleged to have killed someone by beating them to death when all he was convicted of was simple misdemeanor assault.

CONCLUSION

For the reasons set forth above, genuine issues of material fact exist which are preclusive of summary judgment and Defendant Madeline B. Gray is not otherwise entitled to judgment in her favor as a matter of law.

Accordingly, Defendant Madeline B. Gray's Motion for Summary Judgment should be denied in its entirety.

Dated this 17th day of October, 2011.



David J. Van Dyke, Esq.
Bar No. 7227
Hornblower Lynch Rabasco & Van Dyke, P.A.
PO Box 116
Lewiston, ME 04243-0116
Tel: (207) 786-6641
Attorney for Plaintiffs Alexis Ingraham and Brett Ingraham