IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

RHONDA ABRAHAM,	:	
	:	C.A. No. K11C-08-001 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
DON POST,	:	
	:	
Defendant.	:	

Submitted: June 8, 2012
Decided: September 26, 2012

ORDER

Upon Defendant's Motion for Summary Judgment.
Granted.

James E. Liguori, Esquire of Liguori & Morris, Dover, Delaware; attorney for Plaintiff.

Jeffrey A. Young, Esquire of Young & McNelis, LLC, Dover, Delaware; attorney for Defendant.

WITHAM, R.J.

Upon consideration of Defendant Don Post's Motion for Summary Judgment, Plaintiff's response thereto, and the parties' oral arguments, the Court finds that this is an action for libel predicated upon two letters written by Defendant Don Post (hereinafter "Defendant") to the editor of the *Cape Gazette*.[1] The first letter, dated December 3, 2010 (hereinafter "the December letter"), concerns a November public hearing over which Plaintiff Rhonda Abraham (hereinafter "Plaintiff), a Milton councilwoman, was scheduled to preside. In this letter, Defendant expressed his misgivings about Plaintiff's potential conflicts of interest.[2] Specifically, Defendant wrote that "the council person in question, who was the same person, by ruled decision of the State Public Integrity Commission, [that] could not preside on the public hearing of the chief due to the alleged allocations [sic]" would place the town in a "serious compromising position."[3] Although Plaintiff is unnamed, Defendant

[1]The following facts are set forth in a matter most favorable to Plaintiff Rhonda Abraham, the non-moving party. *See* Super. Ct. Civ. R. 56(c)(when reviewing a motion for summary judgment, the court must view the record in a light most favorable to the nonmoving party).

[2]Defendant served as the mayor of Milton from 2006 until March of 2010. *See* Deposition of Donald Post [hereinafter Post Dep.], E-File 43652840, at 5-6. Defendant did not hold a public office at the time that he wrote the December letter.

[3]Def. Mot. for Summ. J., E-File 43652840, Ex. C. Defendant maintains that Plaintiff was the subject of an advisory opinion issued by the Delaware Public Integrity Commission (hereinafter "the Commission"), which is tasked with promoting and enforcing ethical conduct among state employees. *See* Post Dep. at 8-9; 29 *Del. C.* § 5808(a) (charging the Commission with the enforcement of the state ethics code). Defendant alleges that Mary Schrider-Fox, the town's solicitor at the time, requested that the Commission issue an advisory opinion on whether it was appropriate for Plaintiff to recuse herself from participating in a hearing due to her personal relationship with the police chief. *See* Post Dep. 8-9 (noting the reasons for the request).

concedes that Ms. Abraham was the councilwoman in question.[4]

The parties ascribed different meanings to the word "allegations" as it appears in the December letter. Plaintiff contends that the Defendant was referring to allegations that she was engaged in an extramarital affair with the chief of police of the Milton Police Department,[5] a charge she vehemently denies.[6] Defendant maintains that he neither alluded to nor mentioned the alleged affair in the December letter,[7] and was merely admonishing Plaintiff for participating in a hearing where a potential conflict could arise.

In the second letter (hereinafter "the March letter"), published March 4, 2011 in the *Cape Gazette,*[8] Defendant detailed his grievances with Plaintiff and three other Milton officials. The March letter reads, in pertinent part:

> Councilwoman Abraham, you are well aware of perception, that is why the Public Integrity Commission established its ruling regarding your non-participation in the chief's previous public hearing. Your actions the other night provided me closure on the candidates for the coming election. Councilwoman Abraham, you should not represent the people of Milton. Your actions are too much of a liability for the town.[9]

---

[4]Post Dep. at 7.

[5]Pl. Resp. to Def. Mot. for Summ. J. [hereinafter "Pl. Resp."], E-File 43830352, ¶ 6.

[6]Pl. Resp. ¶ 7.

[7]Post Dep. at 43.

[8]Don Post, Letter to the Editor, *Milton Being Taken Down Road of No Return*, Cape Gazette, Mar. 4, 2011, at 8.

[9]*Id.*

Plaintiff alleges that her husband filed for divorce as a result of the publication of these two letters,[10] and that she lost her bid for re-election.[11]

Plaintiff subsequently commenced this action, alleging that the aforementioned statements were both libelous and in violation of 29 *Del. C.* § 5807(d).[12] Defendant moved for summary judgment on both claims on April 13, 2012.

Summary judgment should be granted only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[13] The facts must be viewed in the light most favorable to the non-moving party.[14] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[15] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.

A. Defamation Claim

Defendant asserts that he is entitled to summary judgment on Plaintiff's defamation claim because Plaintiff has failed to prove that the pertinent statements

---

[10]Compl. ¶ 16.

[11]Compl. ¶ 23.

[12]*See id.* at 1-3.

[13] Super. Ct. Civ. R. 56(c).

[14] *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995).

[15] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

in either the December or March letter were libelous. Rather, Defendant maintains that he was simply expressing his concerns that Plaintiff would not recuse herself from the November hearing in spite of her alleged conflict, and thus the statements are constitutionally protected expressions of opinion. Alternatively, Defendant contends that he is entitled to summary judgment because Plaintiff, as a public official, is unable to demonstrate that a reasonable jury would find clear and convincing evidence of actual malice as required under *New York Times Co. v. Sullivan.*[16]

A statement is defamatory "if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[17] Under Delaware law, a plaintiff in a defamation action must plead and ultimately prove that "1) the defendant made a defamatory statement; 2) concerning the Plaintiff; 3) the statement was published; and 4) a third party would understand the character of the communication as defamatory."[18] Additionally, a plaintiff who is a public figure must also plead and prove that 5) the

---

[16]376 U.S. 254 (1964); *see also Anderson v. Liberty Lobby*, 477 U.S. 242, 254 (1986) (when determining whether a genuine factual issue exists as to actual malice in a libel suit brought by a public figure, "there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence").

[17] *Spence v. Funk*, 396 A.2d 967, 967 (Del. 1978) (quoting Restatement (First) of Torts § 559 (1938)).

[18]*Doe v. Cahill,* 884 A.2d 451, 463 (2005) (citing *Read v. Carpenter*, 1995 WL 945544, at *2 (Del. Super. 1995)). Defendant has conceded that the Plaintiff has met her burden of proof as to the second and third requirements.

statement is false[19] and 6) that the defendant made the statement with actual malice.[20]

At oral argument, Defendant argued that Plaintiff's claim fails chiefly because she did not plead and prove actual malice. But the threshold issue in any libel action is whether the statements are, in fact, defamatory.[21] Whether a statement is defamatory is a question of law that is proper for this Court to resolve.[22] In answering this question, Delaware courts must determine first whether the alleged defamatory statements are expressions of fact or protected expressions of opinion.[23] Generally, a statement must be one of fact to be actionable.[24] In contrast, most expressions of opinion are protected by the First Amendment and are not actionable.[25]

1. Are The Statements Defamatory?

Plaintiff contends that the December and March letters are libelous because they allege that she engaged in an extramarital sexual affair with the chief of police of the Milton Police Department. Although neither letter makes this direct allegation,

---

[19]*Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 776 (1984).

[20]*See New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

[21]*See Riley v. Moyed*, 529 A.2d 248, 251 (Del. 1987) (holding that should a court find that the statements at issue are not defamatory, it need not reach the actual malice issue).

[22]*Id*.

[23]*Doe,* 884 A.2d at 463 (quoting *Riley*, 529 A.2d at 251)).

[24]*Riley,* 529 A.2d at 251.

[25]*Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

Delaware law recognizes a cause of action for libel by implication.[26] However, when alleging libel by implication, a plaintiff must make an especially rigorous showing.[27] To qualify as an actionable statement, "the language must ... be reasonably read to impart false innuendo."[28] Furthermore, to demonstrate the requisite level of intent, the language must "affirmatively suggest that the author intends or endorses the reference."[29] The Court finds there is nothing within the body of either the December or March letter that could impart the defamatory implication that Plaintiff was engaged in an extramarital affair. Defendant never uses the word "affair," nor alludes to the existence of Plaintiff's alleged adultery. The plaintiff has not proved that, when read in context, the "allegations" and "perceptions" to which Defendant alludes refer to rumors of Plaintiff's infidelity.

Nonetheless, the Court finds that these letters are capable of defamatory meaning to the extent that they charge Plaintiff with ethical impropriety. Whether Defendant's statements are, in fact, actionable turns on whether they are in the form of opinions that are absolutely privileged. Only pure expressions of opinion are constitutionally protected.[30] As the Delaware Supreme Court explained in *Riley*, a

---

[26]*Klein v. Sunbeam Corp.*, 94 A.2d 385, 390 (Del. Super. 1985) (citing *Rice v. Simmons*, 2 Harr. 417, 429 (Del. 1839)).

[27]*Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993).

[28]*Id.* at 1092-93.

[29]*Id.*

[30]*Gertz v. Robert Welch, Inc.*, 418 U.S. at 339-40.

pure opinion "is one that is based on stated facts or facts that are known to the parties or assumed by them to exist."[31] Pure opinions are distinguished from "mixed" opinions, which, "while an opinion in form or context ... gives rise to the inference that there are undisclosed facts that justify the forming of the opinion expressed by the defendant."[32] The actionable element of a mixed opinion is not the opinion itself, but rather the underlying factual assertions that support the speaker's opinion.[33]

In *Gannett Co. v. Kanaga,* the Delaware Supreme Court clarified this often blurry distinction.[34] In *Kanaga*, the petitioner, an obstetrician-gynecologist, sued a newspaper, a former patient, and a reporter for libel after the newspaper published an article alleging that the doctor had recommended a course of treatment for pecuniary gain.[35] The article, entitled "Patient feels betrayed-Says proposed hysterectomy wasn't needed," quoted the patient as stating that she "could only conclude that Dr. Kanaga ... chose the treatment plan that was most profitable to her with no concern for me."[36] The trial court granted Defendant's motion for summary judgment on the grounds that the statement was constitutionally protected as an expression of the

---

[31]*Riley,* 529 A.2d at 251.

[32]Restatement (Second) of Torts § 566 cmt. b (1977). For example, to say that a person is a thief without saying why may, depending on the circumstance, imply that the subject of the communication has committed thievery. *Id.*

[33]*Rammuno v. Cawley*, 705 A.2d 1029, 1036 (Del. 1998).

[34]*Gannett Co., Inc.*, v. *Kanaga*, 687 A.2d 173 (Del. 1996).

[35]*Id.* at 173.

[36]*Id.* at 176.

patient's pure opinion.[37] The Supreme Court reversed on the basis that the defamatory material, although expressed as an opinion, implied the existence of undisclosed facts.[38] Since it was not clear that an ordinary reader would conclude that "he or she was being offered pure conjecture," the court held that the issue of whether the article was defamatory was for the jury.[39]

As in *Kanaga*, the statements Defendant made in the December and March letters suggest a defamatory factual basis that is not disclosed by the speaker. The written statements in question disparage Plaintiff's fitness to serve on the town's council on the basis of an apparent ruling from the state Public Integrity Commission. It is unclear from the record whether this ruling was publicly disseminated. In fact, Defendant testified that he was one of only a handful of officials that had received a copy of the alleged ruling from the town's solicitor. Drawing all reasonable inferences in favor of the Plaintiff, an ordinary reader could infer, from Defendant's letters, the existence of undisclosed facts which are capable of being proved true or false. Those facts include a) that Plaintiff was, in fact, the subject of a Commission investigation, and b) that she had violated the state employees's code of conduct. Since it is not "clear to the reader that he is being offered conjecture and not solid

---

[37] *Id.*

[38] *Id.* at 181. The court gave a number of facts that a reader could surmise from the article, including, for example, that "Dr. Kanaga knew or believed that the recommended hysterectomy was not necessary," and that "Dr. Kanaga's motive was the personal gain she would receive, without concern for the patient, by recommending the more expensive hysterectomy rather than [a] myomectomy." *Id.*

[39] *Id.*

information,"[40] the issue of whether the statements in question constitute a mixed or a pure opinion is one for the jury.

2. Were The Statements Made with Actual Malice?

Assuming that a jury could find that the statements in question were libelous, Defendant contends that Plaintiff's libel claim must fail as a matter of law because she has failed to adequately plead that Defendant's statements were made with actual malice. The Court agrees.

Municipal council members are public officials;[41] consequently, they must plead and prove that allegedly defamatory statements were published with actual malice to prevail in a libel action.[42] A defamatory statement is made with actual malice when it is made with actual knowledge that it is false or with reckless disregard as to its truth or falsity.[43] The U.S. Supreme Court has repeatedly held that, at the summary judgment stage, the plaintiff bears the burden of proving the element of malice with

---

[40]*Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 36 (1990) (Brennan, J., dissenting).

[41]*See*, *e.g.*, *Doe v. Cahill,* 884 A.2d 451 (Del. 2005) (Elected town council member is a public figure under the rule set forth in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and thus, must provide clear and convincing proof of "actual malice" to recover damages for a defamatory falsehood relating to his or her official conduct); *see also Rosenblatt v. Baer*, 383 U.S. 75 (1966) (holding that the "public official" designation applies at the very least to those among "the hierarchy of government employees who have, or appear in public to have, substantial responsibility for or control over the conduct of governmental affairs").

[42]*New York Times Co.*, 376 U.S. at 279-80 (1964).

[43]*Ross v. News-Journal Co.*, 228 A.2d 531, 532 (Del. Super. 1967).

"clear and convincing" evidence.[44] Although the quantum of proof with respect to falsity has yet to be addressed by the Delaware Supreme Court, this court has adopted a position consistent with the authority cited herein.[45]

Plaintiff relies on the Delaware Supreme Court's decision in *Doe v. Cahill* to support her assertion that she need not prove the actual malice element to survive a motion for summary judgment. This reliance is misplaced. Although it is true that, in *Doe*, the Delaware Supreme Court eliminated the requirement that public figure plaintiffs plead and prove evidence of actual malice to survive a summary judgment motion, it only did so in the context of those plaintiffs seeking to obtain the discovery of an *anonymous* defendant's identity.[46] *Doe* cannot be read for the proposition that, to survive a summary judgment motion, a public figure plaintiff need not produce evidence on this element of her libel claim. Therefore, since the identity of the defendant in the present case is not at issue, Plaintiff must carry her burden of proof

---

[44]*See Rosenbloom v. Metromedia*, 403 U.S. 29, 30 (1971); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In *Liberty Lobby*, the U.S. Supreme Court noted that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden," namely, the "clear and convincing" standard. *Liberty Lobby*, 477 U.S. at 254.

[45]*See, e.g.*, *Ramada Inns, Inc. v. Dow Jones & Co., Inc.*, 543 U.S. 313, 319-320 (Del. Super. 1987).

[46]*See Doe,* 884 A.2d at 464 (eliminating this pleading requirement in situations where a defamation plaintiff seeks to obtain the identity of an anonymous defendant). The Supreme Court made this exception because "*without discovery of the defendant's identity*, satisfying this element may be difficult, if not impossible." *Id*. (emphasis added). Although dicta, this language suggests that the court intended to cabin its holding in *Doe* to defamation actions against an anonymous defendant.

for this element to survive Defendant's summary judgment motion.

Plaintiff has submitted no proof that Defendant submitted his letter to the *Cape Gazette* with knowledge of, or reckless disregard, of its veracity. Defendant testified that he had received a copy of the Commission's ruling from the town solicitor, and had relied upon it when making the allegedly libelous statements. Plaintiff does not dispute that she was the subject of an investigation by the Commission. Even assuming the non-existence of this ruling, of which neither party has submitted proof, Plaintiff has failed to produce evidence that Defendant entertained serious doubts as to its veracity at the time that he wrote the letters to the *Cape Gazette.* Mere inferences that Defendant harbored personal animosity for Plaintiff are not enough to meet the evidentiary burden she must carry to resist summary judgment. Because Plaintiff has failed to come forward with clear and convincing evidence that supports a finding of actual malice, Defendant is entitled to summary judgment on Plaintiff's defamation claim.

B. Statutory Claim

Defendant also seeks summary judgment as to his alleged statutory breach. Specifically, he argues that he was under no statutorily imposed duty to maintain the confidentiality of state Public Integrity Commission's rulings. In her complaint, Plaintiff alleges that Defendant breached 29 Del. C. § 5807(d) by disclosing that she was the subject of a ruling issued by the state Public Integrity Commission. Section 5807(d) addresses the confidentiality of the Commission's advisory opinions, and states:

(d) Any application for an advisory opinion, any proceedings and any decision

with respect thereto shall be maintained confidential *by the Commission* ... .[47]

Defendant contends that a plain reading of the statute compels the conclusion that the duty of confidentiality imposed by this section of the Code extends only to Commission members.

The rules of statutory construction are well-settled. They are "designed to ascertain and give effect to the intent of the legislators, as expressed in the statute."[48] At the outset, the court must determine whether the provision in question is ambiguous. A statute is ambiguous if it is "reasonably susceptible of two meanings."[49] If it is unambiguous, no statutory construction is required, and the words in the statute are given their plain meaning.[50]

The language of Section 5807(d) is plain and unambiguous. It imposes a duty solely on the members of the Public Integrity Commission to maintain the confidentiality of the advisory opinions, proceedings and decisions issued by the Commission. Even if Defendant received the Commission's findings on Plaintiff's potential conflict by virtue of his mayorship, as Plaintiff alleges, he was under no duty to withhold the findings from the public. Since Plaintiff has not proved that the Code extends this duty of confidentiality to state employees or ordinary citizens,

---

[47]29 *Del. C.* § 5807(d) (emphasis added).

[48]*Chase Alexa, LLC v. Kent County Levy Court,* 991 A.2d 1148, 1151 (Del. 2010).

[49]*Dewey Beach Enter., Inc. v. Bd. of Adjustment of Town of Dewey Beach,* 1 A.3d 305, 307 (Del. 2010).

[50]*Chase*, 991 A.2d at 1151.

Defendant is entitled to judgment as a matter of law on Plaintiff's statutory claim.

For the foregoing reasons, Defendant's motion for summary judgment is hereby ***granted***. IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh