IN THE COURT OF APPEALS OF IOWA

No. 2-1086 / 12-0701
Filed February 13, 2013

ALBERT E. HOLCOMB IV and
HOLCOMB ENTERPRISES, L.L.C.
d/b/a/ CAMP O BEACH RESORT,
Plaintiffs-Appellants,

vs.

TAMMY NEFZGER,
Defendant-Appellee.

Appeal from the Iowa District Court for Dubuque County, Monica Ackley, Judge.

The plaintiffs appeal the district court decision granting summary judgment. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellants.

Darin S. Harmon and Amy E. Wesner of Kintzinger Law Firm, P.L.C., Dubuque, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Albert E. Holcomb IV and Holcomb Enterprises L.L.C. (collectively Holcomb) appeal the district court's grant of summary judgment to Tammy Nefzger, finding the statements Nefzger made in a letter to the editor published in a local newspaper were not libelous as a matter of law because they were substantially true.[1] Holcomb claims there are genuine issues of material fact. Because Nefzger's statements were substantially true, providing a complete defense to the libel claim, we affirm the district court's grant of summary judgment.

I. Background Facts and Proceedings

Holcomb owns a resort on Lake Delhi called the Camp O Beach Resort, which includes the Camp O Bar and Grill (collectively Camp O). Camp O is the only commercial establishment within the Lake Delhi Association—otherwise consisting of residential property owners.[2] During the end of May and beginning of June 2007, there was a report to the Delaware County Sanitarian and to the Iowa Department of Natural Resources (DNR) of a spill of some type coming from Camp O and flowing down the beach into the water. A sample was taken and tested, showing extremely high levels of e.coli organisms. The restaurant was shut down by order of Black Hawk County Health. From its investigation, the DNR found (1) there was "wastewater . . . discharged from the Camp O Bar & Grill sink and flowed to Lake Delhi," (2) the discharge that reached Lake Delhi

[1] The newspaper in which the statements were printed was also originally a defendant in the lawsuit; it was, however, dismissed before the grant of summary judgment to Nefzger and therefore is not part of this appeal.

[2] The events of this case, including filing the petition, occurred before the Delhi Dam failed on July 24, 2010.

contained e.coli bacteria in excess of the maximum water quality standards, and (3) the septic system was not properly permitted by the county and does not comply with the Iowa Administrative Code. Holcomb was required by the DNR to comply with the septic system requirements of 567 Iowa Administrative Code chapter 69[3] and "maintain the plumbing of his property to prevent any future prohibited discharge."

Nefzger's family owns a cabin near the Camp O Beach area. There appears to have been some discord between members of the Lake Delhi Association and Holcomb over the past several years. According to Nefzger, the association attempted to discuss with Holcomb some problems involving the obnoxious and loud behavior of some Camp O patrons. In addition, some members observed the septic system from Camp O would be overloaded on holiday weekends, resulting in some of the septic material overflowing onto the beach.

In late May 2008, Nefzger became aware of a problem on the beach where her children were playing. She claims it "was disgustingly loaded with human waste." Tom McCarthy, a senior environmental specialist with the DNR, was notified, and advised Nefzger to rope off the beach and place signs informing the public of the sewage discharge. After visiting Camp O, McCarthy determined "it appeared that a major release of septic waste has occurred." McCarthy told Holcomb to keep the warning signs up, but approximately one hour after this instruction, Nefzger informed McCarthy that Holcomb had removed them. Dennis Lyons, the Delaware County Sanitarian, also inspected

[3] This chapter provides rules applicable to private sewage disposal systems.

the beach, and determined there was "evidence of a discharge and the presence of sewage." Lyons swore in an affidavit he had personal knowledge of Camp O's septic problems prior to May 2008. He stated it was anticipated by government authorities "the deficiencies would be corrected so as to prevent occurrence[s] well prior to May 2008," and any attempts to correct the problems "were at best temporary 'band aids' and did not adequately or permanently correct the situation."

On June 4, 2008, the *Dyersville Commercial* published a letter to the editor authored by Nefzger. The entirety of Nefzger's letter reads:

> I am writing this letter to inform all residents of Lake Delhi and anyone who may visit the lake in the next few weeks, to stay off of the beach near Camp O Beach Resort due to sewage leaking onto the beach. On May 25, my children went down to the beach to play and we realized they were playing in sewer water. After a phone call to the Delaware County Sheriff Department and the Department of Natural Resources, I was told to have the signs put up until they arrived warning people of this leak so no one else would be contaminated. After the DNR inspected the party responsible for the leak tore down the signs and informed us he would continue to do so. After further investigation, I found out that this is not the first time this type of leak has happened. The responsible party has been told to fix this problem, but continues to "bandage" the leak instead. I feel this person has been given enough time to fix this leak and needs to do so before someone gets sick. I am hoping that by writing this letter, at least one person will be notified of this problem and will keep away from this area until local officials can resolve this problem.

On June 1, 2010, Holcomb filed a defamation action in response to this letter. Nefzger moved for summary judgment claiming the statements were true or substantially true, providing an absolute defense. On October 11, 2011, the district court granted Nefzger's motion, finding all of the facts asserted in her letter to the editor were true or substantially true based on the information known

to her at the time of the drafting of the communication. After a denied motion to enlarge the findings, Holcomb appeals.

II. Standard of Review

Our review of a grant or denial of summary judgment is at law. Iowa R. App. P. 6.907. Generally speaking, summary judgment is appropriate only when the entire record including pleadings, discovery, and affidavits on file shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *McVay v. Nat'l Org. Serv. Inc.*, 719 N.W.2d 801, 803 (Iowa 2006). A "genuine" issue of material fact exists if a reasonable jury could return a verdict for the nonmoving party based on the evidence. *Fees v. Mut. Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992). A fact is "material" only if its determination might affect the outcome of the case. *Baratta v. Polk Cnty. Health Servs.*, 588 N.W.2d 107, 109 (Iowa 1999). When reviewing the grant or denial of a motion for summary judgment, we examine the evidence in a light most favorable to the nonmoving party. *Mewes v. State Farm Auto. Ins. Co.*, 530 N.W.2d 718, 721 (Iowa 1995). We must determine if "reasonable minds would differ on how the issue should be resolved." *Fettkether v. City of Readlyn*, 595 N.W.2d 807, 813 (Iowa Ct. App.1999).

III. Libel and Substantial Truth

Holcomb argues summary judgment was inappropriate because there is a genuine issue of material fact as to whether Nefzger's statements were substantially true—namely whether there was any sewage leaking from Camp O on May 25, 2008, and whether there was any prior incident of leaking sewage. In *Hovey v. Iowa State Daily Publication Board, Inc.*, our supreme court adopted

"the view espoused in Restatement (Second) of Torts, section 581A comment *f*, that if an allegedly defamatory statement is substantially true, it provides an absolute defense to an action for defamation." 372 N.W.2d 253, 256 (Iowa 1985). We do not look at the literal scope of the allegedly libelous statement but the "gist or sting" of the defamatory charge—"the heart of the matter in question." *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 141 (Iowa 1996) (quoting *Behr v. Meredith Corp.*, 414 N.W.2d 339, 342 (Iowa 1987)).

We agree with the district court's determination of the main points of the letter: (1) sewage leaked onto the beach, (2) children were in the contaminated water, (3) the sheriff's office and the DNR were notified, (4) Nefzger was told to put up warning signs, (5) the DNR inspected the area, (6) the party responsible for the leakage tore down the signs, (7) May 2008 was not the first occurrence of sewage leaking on the beach, and (8) the responsible party had previously been told to fix the issue.

Even looking at the facts in the light most favorable to Holcomb—who was not mentioned by name in the article—we agree with the district court that all of the statements in Nefzger's letter to the editor are substantially true. Holcomb argues Nefzger's statement of a previous "leak" was untrue because the 2007 leak was not "sewage." He asserts the affidavits of government officials supporting summary judgment were contradictory to their contemporary incident reports. We find this argument a disingenuous reading of the reports. The reports are consistent with the affidavits, establishing there was a sewage problem in both 2007 and 2008. Even without determining the specifics of the 2007 incident—whether it was only "sink water" causing the contamination or the

faulty septic system as well—e.coli was present both times, making the beach unsafe. Moreover, the homeowner's association attempted to discuss sewage discharge with Holcomb before the 2008 incident, demonstrating in this summary judgment record the association was aware of the ongoing septic problem. As Nefzger's letter to the editor accurately stated, there had been problems with leaks in the past, and Holcomb knew he was instructed to fix the problems.

The district court did, however, misstate the law in determining "if *any* of these facts [from the letter] are true or substantially true, the Plaintiffs' action fails." (Emphasis added). This is an incorrect statement of the law; it should read "if *all* of the facts are true or substantially true the Plaintiffs' action fails." However, the misstatement was harmless as the district court still addressed *all* of the facts and found them to be true or substantially true. The district court was correct in finding there were no remaining questions of material fact: "All of the facts asserted in the Defendant's correspondence and thereafter published letter in the newspaper were true or substantially true based on the information known to her at the time of the drafting of the communication."

IV. Conclusion

The district court did not err in finding all of the facts were substantially true to provide a complete defense to Holcomb's defamation action. The claimed flaws in the statement, even if untrue, do not render the gist of the statement substantially untrue. The district court's grant of summary judgment is affirmed.

AFFIRMED.