

STATE OF MICHIGAN
COURT OF APPEALS

MELVIN BELOVICZ and BELLE-DWELLINGS
VENTURE, INC.,

UNPUBLISHED
June 25, 2002

Plaintiffs-Appellants,

v

CYNTHIA EVANS,

No. 228253
Washtenaw Circuit Court
LC No. 99-010597-CZ

Defendant-Appellee.

Before: Owens, P.J., and Sawyer and Cooper, JJ.

PER CURIAM.

In this defamation action, plaintiffs appeal as of right the trial court's order granting summary disposition for defendant, under MCR 2.116(C)(10), and denying plaintiffs' motion to amend their complaint. We affirm.

This case involves written allegations that defendant made regarding plaintiffs during her tenure as president of the Ford Lake Village Homeowner's Association. These claims were included in a list of alleged homeowner complaints that defendant sent to the Ypsilanti Township Community Development Department and to the Builders Association of Washtenaw County.¹

Plaintiffs initially contend that the trial court improperly granted summary disposition to defendant because the statements in question were clearly libelous. We disagree. A trial court's

¹ In paragraph five of their complaint, plaintiffs alleged that the following statements were defamatory:

- a. The builder uses pipes that "are not of good quality and that this is typical of this Builder."
- b. The builder did not adequately insulate piping causing the piping to burst.
- c. The builder uses plumbing materials which are "not supposed to be used in residential housing."
- d. The builder has improperly graded various lots and has improperly refused responsibility for same.

decision on a motion for summary disposition is subject to review de novo on appeal. *Smith v Globe Life Ins Co*, 460 Mich 446, 454, 597 NW2d 28 (1999).

A motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id.* "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition under MCR 2.116(C)(10) is appropriate only if there no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

"A communication is defamatory if, considering all the circumstances, it tends so 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." *Ireland v Edwards*, 230 Mich App 607, 619; 584 NW2d 632 (1998). Moreover, a statement must be "provable as false" in order to be considered actionable. *Kevorkian v AMA*, 237 Mich App 1, 5-6; 602 NW2d 233 (1999); *Ireland, supra* at 616. To establish a claim of defamation by libel plaintiffs must show: (1) a false and defamatory statement concerning plaintiffs; (2) unprivileged publication to a third party; (3) fault amounting to negligence on the part of the publisher; and (4) actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Kevorkian, supra* at 8-9; see also MCL 600.2911.

After a careful review of the record and the statements at issue, we find that most of the statements are either subjective opinion, hyperbole, or the truth. The alleged "libelous" language in this case is contained in a list of homeowner's complaints and the document itself clearly refers to the problems as being portrayed by the homeowners. Viewed in context, we find that a reasonable reader of defendant's letter would be unlikely to perceive the comments as anything more than a reiteration of homeowner problems and opinions as received by defendant, rather than actual facts concerning plaintiffs. See *Ireland, supra* at 618-619. More importantly, many of the statements are based on the homeowners' repairs. We also note that the opinions concerning the quality of workmanship in this are akin to the opinions in *Ireland* concerning parental fitness.² *Id.* at 617-619.

To the extent that the statements could be proven true or false, they satisfy the "substantial truth doctrine." This doctrine holds that a statement is not considered false unless it would have a different effect on the mind of the reader than the pleaded truth would have produced. *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 33; 627 NW2d 5 (2001). The documentary evidence provided by the parties demonstrates that the plumbers working in the subdivision made comments significantly similar to statements (a), (b), and (c) in plaintiffs' complaint. Furthermore, there was documentary evidence concerning improper drainage and possible grading problems. Plaintiffs have failed to show that any of these claims are necessarily

² In *Ireland, supra* at 617-619, this Court stated that statements such as plaintiff is not a "fit mother" or plaintiff "never spent a moment with the child" were subjective opinion or hyperbole.

false. See *Kevorkian, supra* at 8-9. While the township's letter to defendant claimed that several of the problems were fixed or unrelated to grading, defendant's reply list contested several of these findings and raised additional concerns about these areas. Thus, contrary to plaintiffs' claims, it was not merely a restatement of earlier complaints that defendant knew to be false. Consequently, we find that the trial court properly granted summary disposition.

Furthermore, the trial court did not abuse its discretion when it denied plaintiffs' motion to amend their complaint to add a count of slander. See *Dowerk v Oxford Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). The slander count was based on the same statements as the libel charge. See MCL 600.2911; see also MCR 2.118(D). Because these statements were not defamatory an amendment to the pleadings would have been futile. A trial court does not abuse its discretion in denying a futile amendment to the pleadings. *Dowerk, supra* at 75-76.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jessica R. Cooper