# STATE OF MICHIGAN

# COURT OF APPEALS

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DANIEL ALLEN,

Plaintiff-Appellant,

v

RICHARD MACH,

Defendant-Appellee.

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UNPUBLISHED
April 27, 2004

No. 245049
Genesee Circuit Court
LC No. 96-046798-NO

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) with regard to plaintiff's slander claim. We affirm.

This case arises from an altercation between plaintiff, a Flint Police Officer, and defendant, a motorist, at an accident investigation scene. During the encounter, plaintiff issued defendant a citation for ignoring a police barricade at the scene. Defendant, who is a licensed clinical psychologist, later wrote a letter on his professional letterhead to the Flint Police Chief and sent copies to other Flint officials complaining about plaintiff's conduct. After recounting his version of the incident, defendant stated in the letter that plaintiff "is a danger both to the community at large and to the people he serves," that "he should be taken off the street," and that he "should be sent into counseling where he can work out his issues with misplaced aggression before he hurts or kills someone with cause." Defendant contested his citation and was subsequently found not responsible for ignoring a police barricade.

Plaintiff thereafter filed this action against defendant for slander based on the letter defendant wrote to the Flint Police Chief. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), based on three separate grounds. First, defendant argued that the challenged communication was absolutely privileged. Second, defendant argued that the letter was not actionable because it contained only opinions and nonactionable rhetorical hyperbole. Third, defendant argued that the challenged communication was subject to a qualified privilege and that there was no genuine issue of material fact whether the statements were made with malice so as to overcome the privilege. Following a hearing, the trial court disagreed with defendant's claim that the statements were absolutely privileged, but granted summary disposition on the basis that defendant's statements were expressions of opinion that were not actionable.

On appeal, plaintiff argues that the trial court erred in determining that the statements in defendant's letter were mere opinions, unprovable as true or false, and therefore protected by the First Amendment. We disagree.

We review a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id*. This Court must consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

To establish a claim of libel or slander, a plaintiff must show: (1) that the defendant made a statement about the plaintiff that was false and defamatory in some material respect; (2) that the statement was communicated to a third person without privilege; (3) fault amounting to at least negligence; and (4) that the statement is actionable regardless of special harm or had a tendency to cause special harm to the reputation of the plaintiff. *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 323; 539 NW2d 774 (1995). "A communication is defamatory if, under all the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or deters others from associating or dealing with the individual." *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000), citing *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999), and *Ireland v Edwards*, 230 Mich App 607, 619; 584 NW2d 632 (1998).

We conclude that the trial court did not err in granting summary disposition to defendant with regard to plaintiff's slander claim because defendant's statements regarding plaintiff were not provable as false, and thus not actionable. In *Ireland, supra* at 616-617, this Court observed:

> One of the difficulties in addressing defamation issues lies in determining whether specific statements are actionable. The United States Supreme Court has rejected the idea that all statements of "opinion" are protected. Instead, the Court has directed that a statement must be "provable as false" to be actionable. *Milkovich* [*v The Lorain Journal*, 497 US 1, 17-20; 110 S Ct 2695; 111 L Ed 2d 1 (1990)]. By way of example, the Court suggested that the statement "In my opinion Mayor Jones is a liar" would be potentially actionable, while the statement "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin" would not be actionable. *Id*. at 20. The Court apparently intended these examples to illustrate the difference between an objectively verifiable event, such as lying, and a subjective assertion like "shows his abysmal ignorance. . . . " See *id*. at 21-22.
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> After reviewing the alleged defamatory statements in this case, we conclude that several of them are not provable as false. The question whether someone is a "fit mother," like the question whether someone is abysmally ignorant, is necessarily subjective. Thus, defendant's statements regarding plaintiff's fitness as a mother are not actionable.

As in *Ireland*, a review of defendant's statements indicates that defendant expressed opinions about plaintiff, and that his comments amounted to subjective assertions that are not actionable.

Although plaintiff claims that defendant used his status as a clinical psychologist to "imply the assertion of facts" that plaintiff was a danger to himself and the community at large and that "Defendant made statements that he intended to be understood as authoritative fact," the trial court properly found "that the complained-of statements attributed to [defendant] are plainly his personal impression of [plaintiff] with respect to the incident . . . ." See also *Turner v Devlin*, 174 Ariz 201; 848 P2d 286 (1993) (holding that statements in a letter written by a school nurse complaining about the treatment of a student by police officers did not constitute defamation because the nurse's statements were not provable as false); *Angelo v Brenner*, 84 Ill App 3d 594; 406 NE2d 38 (1980) (finding that the statement by the angry defendant that "as a psychiatrist, Officer Angelo is unfit to be a policeman," could not be interpreted as a professional opinion).

Finally, contrary to what plaintiff asserts, defendant's statements are not "provable as false" just because plaintiff retained a psychologist, Dr. Terence Campbell, who disagreed with defendant's assessment of plaintiff's psychological profile. Indeed, Dr. Campbell's disagreement with defendant actually supports the position that defendant's statements are not actionable. As Dr. Campbell stated in his report, "Dr. Mach's opinions regarding Officer Allen ultimately amount to no more than his personal opinions as a private citizen."

Because the trial court properly granted summary disposition to defendant on the basis that defendant's statements were not actionable, we need not consider plaintiff's other issues on appeal.

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald