STATE OF MICHIGAN

COURT OF APPEALS

A-MAC SALES & BUILDERS,

Plaintiff-Appellant,

v

DETROIT NEWS, INC., CHARLES HURT and MELVIN CLAXTON,

Defendants-Appellees.

UNPUBLISHED
September 30, 2004

No. 247582
Wayne Circuit Court
LC No. 00-038695-CZ

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition and dismissing its complaint with prejudice. We affirm.

This case stems from the Detroit Public School's Capital Improvement Program (hereinafter CIP). Plaintiff was the program manager for at least a portion of the CIP. Given the extensive size of the CIP[1], defendant, Detroit News, started an extensive investigation lasting months. As a result of the investigation, defendants published a series of articles entitled: "Wasted Dollars, Broken Buildings" dealing with the CIP. This series of articles appeared in the newspaper from October 1999 to December 1, 1999. Plaintiff took exception to some of the information contained in these articles, claiming that they were false and defamatory. On appeal, plaintiff claims that the lower court incorrectly found that twelve challenged statements in the article that appeared on November 29, 1999, did not meet the requisite standard for libel, and thus, incorrectly granted summary disposition in defendants' favor.

This Court reviews an order granting summary disposition de novo. A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. After the trial court reviews the evidence in a light most favorable to the nonmoving party, it may grant summary disposition if no genuine issue concerning a material fact exists and the moving party is entitled to judgment as a matter of law. *Ireland v Edwards*, 230 Mich App 607, 612-613; 584

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[1] In 1994, Detroit voters approved a $1.5 billion bond issue to fund the CIP.

NW2d 632 NW2d (1998). Whether the evidence presented in a defamation claim is sufficient to support a finding of actual malice is a question of law. This Court must consider whether the evidence is sufficient for a rational finder of fact to find actual malice by clear and convincing evidence. *Id.* at 622.

Summary disposition is an essential tool courts must use to protect First Amendment rights. *Id.* at 613. A communication is defamatory if it tends to lower plaintiff's reputation in the community or deters third parties from associating or dealing with plaintiff. *Id*. at 614. Plaintiff can establish a defamation claim by showing:

> (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). [*Id*.]

In addition to establishing these common law requirements, plaintiff must also comply with constitutional requirements. *Rouch v Enquirer & News of Battle Creek, Michigan (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992). One such constitutional requirement holds that if plaintiff is a public figure, the plaintiff must establish by clear and convincing evidence, that defendants published the defamatory statements with actual malice. *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 32; 627 NW2d 5 (2001). Courts define actual malice as actual knowledge of falsity or reckless disregard of whether the statement is false. *Id*. at 32-33 (quotation omitted). Plaintiff concedes on appeal that it is a limited-purpose public figure in this case. The parties do not dispute the fact that defendants published the contested statements.

1. Statements related to the hiring of O'Brien-Kreitzberg, Inc.

It is undisputed that plaintiff entered into a contract with O'Brien-Kreitzberg, Inc., a New York firm, which categorized the latter as a consultant. Plaintiff's relationship with this firm and the comments about that relationship in the November 29, 1999, article forms a major portion of plaintiff's claim of libel.

A

The first statement from the article that plaintiff challenges is: "The company in charge [plaintiff] apparently breached its contract last spring when it hired an outside firm to handle several of its most important duties." Andrew McLemore, Sr., stated at his deposition that O'Brien-Kreitzberg helped plaintiff prepare the master plan, an operation manual, and the master schedule. The third statement is directly related to the first, and plaintiff offers the same argument concerning two statements. The third statement was: "[Plaintiff] is prohibited from subcontracting any of its management duties 'without the prior written consent of the board,' says its contract with the school district." Plaintiff claims that these statements are patently false and that defendants possessed evidence establishing that plaintiff did not hire any outside firm to handle any of its most important work and that any relation with the outside firm did not violate the contract. We disagree.

Although plaintiff contends that the services performed by O'Brien-Kreitzberg were not "its most important duties," these duties are specifically mentioned in the scope of services section of the program management services agreement between plaintiff and the Detroit Public Schools. Raymond McLemore (identified as a principal of plaintiff) testified at his deposition that plaintiff's most important duties included scheduling the project and planning with the architects. He also stated that O'Brien-Kreitzberg worked on the master schedule and the operation manual. He admitted that these activities were program management services. Ralph Boyd (identified by defendants as a Senior Project Manager for O'Brien-Kreitzberg, which is not disputed by plaintiff) stated at his deposition that O'Brien-Kreitzberg prepared the program management and procedures manual, developed a program level master schedule, a program management master plan, and reviewed the cost management system. These facts support the truth and accuracy of the statements that plaintiff had O'Brien-Kreitzberg handling some of its "most important duties." Plaintiff has failed to meet its burden to demonstrate the falsity of these statements inasmuch as plaintiff's own principals' statements support the truth of the challenged statement.

The remaining question is whether plaintiff proved falsity of the portion of the statement that claims plaintiff's agreement with O'Brien-Kreitzberg violated the program management services agreement. The parties dispute whether O'Brien-Kreitzberg was a subconsultant or a subcontractor under their contract. Interpretation of a contract is a question of law, reviewed de novo by this Court. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). The primary goal in construing a contract is to honor the intent of the parties. *Liggett Rest Group, Inc v City of Pontiac*, 260 Mich App 127, 136; 676 NW2d 633 (2003). This Court achieves this goal by applying the contract language as written. *Id*.

Viewing together the two contract sections identified by the parties, we find that, at the very least, a subcontract occurs when plaintiff enters into an agreement for the provision of any of the services or additional services listed in the agreement. The deposition testimony indicates that O'Brien-Kreitzberg performed those services. Therefore, a fair interpretation of the contract indicates that plaintiff violated the contract by not receiving prior written approval of O'Brien-Kreitzberg's involvement in the work before entering into an agreement with them. Plaintiff has failed to prove the statements false, as is required. Given that plaintiff has failed to establish falsity of challenged statements one and three, it has not established the requisite constitutionally required malice and has not established libel.

B

Plaintiff also challenges the statement: "[Plaintiff], a Detroit firm, violated its contract when it quietly hired national construction management firm O'Brien-Kreitzberg of New York to perform aspects of the construction effort that [plaintiff] hadn't handled." Plaintiff takes issue with use of the term "quietly."

The record supports the finding that the statement is true. Raymond McLemore indicated that plaintiff did not inform the Board of its intentions before entering the contract with O'Brien-Kreitzberg. Kifah Jayyousi, Assistant Superintendent for Facilities Management and Capital Improvements for DPS, wrote in a letter to Andrew McLemore, Sr., that he had not received any detailed information on O'Brien-Kreitzberg. Plaintiff only points to three letters written *after* it

entered into its agreement with O'Brien-Kreitzberg to support its argument that it did not "quietly" hire O'Brien-Kreitzberg; these letters do not reveal anything regarding the hiring process. They merely indicate that plaintiff's relationship with O'Brien-Kreitzberg was not kept quiet *after* the contract was entered. Therefore, we find that plaintiff has failed to demonstrate that the claim that it "quietly" hired O'Brien-Kreitzberg is false and has failed to establish libel.

C

The next statement challenged by plaintiff is: "Shortly after hiring O'Brien-Kreitzberg, a master schedule, a program management master plan and a procedures manual was produced for [plaintiff], said Ralph Boyd, a senior project manager with O'Brien-Kreitzberg. Further, Boyd said in a deposition earlier this month, [plaintiff] passed the work off as its own." Plaintiff takes exception to the "passing off the work as its own" contention.

The only evidence that plaintiff points to in order to establish that this statement is false is the testimony of Raymond McLemore. He stated that no documents were produced indicating that O'Brien-Kreitzberg was working on the project until the operations manual was released with both companies' logos. He indicated that the schedule did not include such a logo. Basically, plaintiff offers no evidence to support falsity besides its own partial denial. This is insufficient to establish clear and convincing evidence of actual falsity. *Locricchio v Evening News Ass'n*, 438 Mich 84, 122, 128; 476 NW2d 112 (1991).

Plaintiff argues that defendants recklessly disregarded the falsity of the statement by not investigating Boyd's statement further. Plaintiff repeatedly makes claims in this argument without any documentary support. Plaintiff claims that defendants should have known that the relationship between plaintiff and O'Brien-Kreitzberg had soured, but offers no explanation of why or how defendants would have this knowledge. Plaintiff claims that documents and witnesses exist contradicting Boyd's statement, but attached none of this evidence to its brief in opposition to summary disposition. Plaintiff claims that defendants knew of these documents, but again fails to document why or how defendants would know of these mysterious documents. Plaintiff implies that Boyd is not a credible witness, but fails to support this beyond its own accusation and fails to document how defendants would know of this lack of credibility. In short, plaintiff has failed to offer any proof that the statement was false or that defendants acted in reckless disregard of falsity. Plaintiff has simply failed to meet its clear and convincing burden.

D

The next section of the article challenged by plaintiff states: "According to a contract that took effect April 6, 1999, [plaintiff] was to pay O'Brien-Kreitzberg for a variety of program management services, including a master schedule and a master plan." There is also a second statement in an editorial on December 1, 1999, which states: "The News has now discovered that last April, [plaintiff] hired O'Brien-Kreitzberg, a national management firm[,] to perform such key tasks as developing a master plan for the program." Plaintiff has two objections to these sentences. First, it argues that it is false that it hired O'Brien-Kreitzberg to develop a master plan. Second, plaintiff claims that O'Brien-Kreitzberg was hired only to provide assistance and advice.

The project description in the agreement between O'Brien-Kreitzberg and plaintiff states that O'Brien-Kreitzberg will provide program and project management services work on the CIP. Work authorizations attached to the agreement state that O'Brien-Kreitzberg would provide personnel to develop a program procedure manual and to work on the master schedule. Andrew McLemore, Sr., stated that O'Brien-Kreitzberg helped plaintiff prepare the master plan, an operation manual, and the master schedule. Raymond McLemore stated that O'Brien-Kreitzberg worked on the master schedule and the operation manual. He admitted that these activities were program management services. Boyd stated in his deposition that O'Brien-Kreitzberg prepared the program management and procedures manual, developed a program level master schedule, a program management master plan, and reviewed the cost management system. These facts support the finding that defendants' statements are true.

Libel does not exist where the "gist" or the "sting" of the statement is substantially true. *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press*, 213 Mich App 317, 325; 539 NW2d 774 (1995) (quotation omitted). Substantial truth is an absolute defense to a defamation claim. *Collins*, *supra*, at 33. Therefore, plaintiff failed to articulate a valid claim based on these statements. The trial court correctly granted summary disposition.

2. Statements Regarding Conflict of Interest.

The next statements challenged by plaintiff stem from the following:

> Other issues include [plaintiff's] refusal to file a form disclosing any conflict of interest, such as any business relationships the company has with the construction firms it is supposed to be managing for the bond program. Such relationships could cloud a program manager's loyalty to the district. But one such conflict of interest was put into place by the contract the old elected school board drafted. That contract put [plaintiff] in a supervisory position over the remaining projects included under a previous bond program. [Plaintiff] is the construction firm for at least one of those unfinished jobs, a renovation of the Schools Center Building, the district's administrative headquarters.

Plaintiff contends that these statements are untrue because no conflict of interest existed to report, and the School Center project was not a bond project creating a conflict of interest.

Despite plaintiff's contention, it seems that a conflict of interest existed. The program management service agreement states that plaintiff would act as the program manger for various projects including the 1986 Bond Series Projects. Andrew McLemore, Jr., testified that, in fact, the 1986 Bond Series funded part of the School Center project with which plaintiff was involved. Plaintiff admits that it never filed a conflict of interest report. Therefore, there is adequate support for the finding that the contested statements were true. Substantial truth is an absolute defense to a defamation claim. *Id.* at 33. Plaintiff has failed to prove by clear and convincing evidence that these statements were false, and as such, its claim must fail.

3. Statement Concerning Plaintiff's Performance.

Next, plaintiff contests a statement regarding a memorandum to it from Detroit Public Schools official, Jayyousi. The article stated:

> Less than two months later [than December 1998], Jayyousi wrote a confidential memo to [plaintiff] executives, telling them: "I am very concerned about your company's performance as program manager on the Capital Improvement program. . . . to date we have missed all target dates in terms of program management activities."

Plaintiff contends that this statement is false because it had not even entered into the agreement making it the sole program manager at the time of the letter.

Plaintiff seems to argue that this statement implied the libel that plaintiff was not completing projects when it should have been. Plaintiff does not contend that it was in fact performing the work, just that it was excused from performing the work by lack of a contract. This argument is disingenuous. The agreement itself states that it was effective retroactively to January 1, 1999. This language clearly implies that plaintiff should have been active at least during the months of January and February 1999. Further, it is undisputed that plaintiff had a previous contract from 1996 which made plaintiff a co-program manager on the project. Raymond McLemore admitted at his deposition that plaintiff continued to work under this contract until the new contract was signed. Under the circumstances, we find that plaintiff has failed to carry its burden of providing clear and convincing evidence that the statement was false.

4. Statements Concerning Plaintiff's Experience and Qualifications.

Plaintiff also challenges statements about its experience and qualifications. The article stated: "[Plaintiff] . . . was hired by the board despite having no experience managing such a large building project." Plaintiff contends that it, in fact, had project management experience and that the article implied the project controlled by plaintiff was larger than it was because the CIP was actually divided into six parts.

At his deposition, counsel asked Raymond McLemore "Up until that time, you [plaintiff] have never been involved in such a large project, correct, either in dollar volume or the number of individual components to the project, correct." Raymond McLemore admitted that this was true. He also admitted that plaintiff had never worked as a program manager prior to this project. Andrew G. McLemore testified that plaintiff's internal construction specialist group together or individually had never served as a program manager to a project of the scope or size of the CIP. In essence, plaintiff admitted that it did not have experience managing a project of this size or character. Given these admissions, we must accept those facts as true. Substantial truth is an absolute defense to a defamation claim. *Collins*, *supra*, at 33.

5. Statement About Political Contributions.

Plaintiff challenges characterization of it as a "heavy contributor to the campaigns of former elected school board members." Plaintiff contends that it was merely an average contributor to the board members' campaigns. The parties do not dispute the fact that plaintiff contributed to the campaigns. They merely debate the characterization of the amount of these contributions. Basically, the only issue is the word "heavy." Following the guidance of the United States Supreme Court, this Court has stated that not all expressions of opinion are actionable as defamation. Instead, a statement must be provably false to constitute defamation. *Ireland*, *supra*, at 616. A subjective assertion, on the other hand, is not actionable. *Id.* The disputed term in this case is such a subjective assertion. The understanding of the term "heavy" can differ from person to person, mind to mind. It is not the type of term that can be proven false. Therefore, we find that the statement cannot amount to defamation. *Id.*

6. Statement About Suspension of the Project.

The final statement challenged by plaintiff involves the suspension of the project. The article stated:

> The new school administration, put in place after the state Legislature sidelined the elected school board, has suspended the 15-year building program approved by the city voters in 1994 until it can be reviewed. [Plaintiff's] role in the program is included in that review, district chief operational officer Nate Taylor said earlier this month.

Plaintiff claims that this statement is untrue because the bulk of its projects were not put on hold.

Plaintiff again quibbles over the use of an adjective. This time it argues that the article implied the term "bulk," that is, it implied that the bulk of plaintiff's activities or projects were suspended. The term "bulk," like "heavy," is a subjective term that cannot be objectively proven. Therefore, it cannot be libel. *Id.* at 616. Further, plaintiff admits that all new projects were suspended. This is exactly what the challenged statement says. Again, substantial truth is an absolute defense to a defamation claim. *Collins*, *supra*, at 33.

7. Conclusion.

The challenged statements were either true or plaintiff failed to demonstrate falsity by clear and convincing evidence. Therefore, they do not meet the established standard for libel against a public figure. We find that the trial court correctly granted summary disposition in defendants' favor as they were entitled to judgment as a matter of law.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey