STATE OF MICHIGAN

COURT OF APPEALS

DERITH SMITH,

Plaintiff-Appellee,

v

ANONYMOUS JOINT ENTERPRISE, GEORGE PRESTON, MARY BARROWS, VILLAGE OF SUTTONS BAY, CHARLES STEWART, NOEL FLOHE, and JOHN STANEK,

Defendants,

and

DONALD BARROWS,

Defendant-Appellant.

UNPUBLISHED
February 3, 2009

No. 275297
Leelanau Circuit Court
LC No. 05-006952-CZ

DERITH SMITH,

Plaintiff-Appellee,

v

ANONYMOUS JOINT ENTERPRISE, GEORGE PRESTON, DONALD BARROWS, MARY BARROWS, VILLAGE OF SUTTONS BAY, CHARLES STEWART, and NOEL FLOHE,

Defendants,

and

JOHN STANEK,

Defendant-Appellant.

No. 275316
Leelanau Circuit Court
LC No. 05-006952-CZ

DERITH SMITH,

Plaintiff-Appellee,

v

No. 275463
Leelanau Circuit Court
LC No. 05-006952-CZ

DONALD BARROWS and JOHN STANEK,

Defendants,

and

NOEL FLOHE,

Defendant-Appellant.

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right from a jury verdict in favor of plaintiff. We reverse.

This action arises from a dispute between political opponents. Plaintiff alleged that Charles Stewart, village manager, wrongfully terminated her during her employment with the Village of Suttons Bay. However, she did not file suit against the village because she obtained other employment as the elected supervisor of Elmwood Township. On May 17, 2005, plaintiff received an anonymous mailing while serving as Elmwood Township supervisor. This mailing consisted of a document written by Stewart that was contained in her personnel file, but was never brought to her attention or discussed during her employment. This document raised various issues regarding plaintiff's employment such as whether she inappropriately paid herself a higher wage and whether she misrepresented her status as an employee when she was in fact an independent contractor. Someone added a caption to the document that provided, "Attention: Suttons Bay Villagers Alledged (sic) Misuse of Village Taxpayer Funds?" and "Subject: Personnel meeting scheduled for August 10, 2004 Derrick [sic] Smith". Plaintiff alleged that the mailing defamed her, invaded her privacy, constituted an injurious falsehood, and was a violation of her free speech rights. Initially, plaintiff filed suit against the Village of Suttons Bay, Stewart, and an individual who contacted Stewart about the memo, George Preston, in her complaint. After stipulated orders and court rulings, a single claim of defamation proceeded against three defendants – Barrows, Stanek, and Flohe, the three men who mailed the Stewart memorandum with the added caption regarding alleged misuse of taxpayer funds by plaintiff. The trial court denied defendants' motion for summary disposition and directed verdict, and the jury rendered a monetary award in favor of plaintiff with the additional requirement that defendants provide a public apology to plaintiff. Defendants appealed, asserting as a matter of law that defamation could not be established, and we agree.

MCL 600.2911 governs libel and slander actions and provides in pertinent part with regard to public officials:

> (6) An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.

When addressing a defamation action, the appellate court must conduct an independent examination of the record to prevent forbidden intrusions into the field of free expression. *Faxon v Michigan Republican State Central Comm*, 244 Mich App 468, 473; 624 NW2d 509 (2001). A libel case challenging the constitutionality of public discourse must be carefully examined with regard to falsity to ensure that precious liberties established and ordained by the Constitution are followed. *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 253; 487 NW2d 205 (1992). Thus, an independent examination of the whole record is designed to ensure that the judgment does not constitute a forbidden intrusion into the field of free expression. *Id*. at 254. This independent review is premised on the fear that juries might give "short shrift to important First Amendment rights," and reflects the inherent doubt that juries will recognize the line between unconditionally guaranteed speech and legitimately regulated speech. *Id*. at 253-254, 258.

All statements are not actionable. A defendant need not prove that the publication is "literally and absolutely accurate in every minute detail." *Rouch, supra* at 258. A slight inaccuracy is immaterial if the charge is true in substance. *Id*. at 258-259. Additionally, a statement must be "provable as false" in order to be actionable. *Ireland v Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998). Thus, an objectively verifiable event may be actionable, while a subjective assertion is not. *Id*. Furthermore, certain types of speech are protected. "[C]ertain statements although factual on their face, and provable as false, could not be interpreted by a reasonable listener or reader as stating actual facts about the plaintiff." *Id*. at 617. Examples of such statements include parodies, political cartoons, and satires. *Id*. "Speech that can reasonably be interpreted as communicating 'rhetorical hyperbole,' 'parody,' or 'vigorous epithet' is constitutionally protected." *In re Chmura*, 464 Mich 58, 72; 626 NW2d 876 (2001). However, by protecting hyperbole, parody, epithet, and expressions of opinion, political speech by its nature may have unpalatable consequences and therefore, even potentially misleading or distorted statements may be protected. *Id*. at 72-73. These rules demonstrate the national commitment to the principle that debate on public issues should be "uninhibited, robust, and wide-open." *Id*.

Additionally, some statements, when read in context, are not capable of defamatory interpretation. *Ireland, supra* at 618. Therefore, a characterization of bargaining leverage as "blackmail" was not libel when reported or slander when spoken because even the most careless of reader would perceive the word as merely "rhetorical hyperbole." *Id*. at 617-618, citing *Greenbelt Cooperative Publishing Ass'n, Inc v Bresler*, 398 US 6; 90 S Ct 1537; 26 L Ed 2d 6 (1970). The court may decide as a matter of law whether a statement is capable of defamatory meaning. *Ireland, supra* at 619. "Punctuation marks, like words, have many uses," and quotation marks do not necessarily reflect that the speaker actually said or wrote the quoted

material. *Masson v New Yorker Magazine, Inc*, 501 US 496, 512; 111 S Ct 2419; 115 L Ed 2d 447 (1991).

"A communication is defamatory if, under all of the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or it deters others from associating or dealing with the individual." *Mino v Clio School Dist*, 255 Mich App 60, 72; 661 NW2d 586 (2003) quoting *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000). "The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication 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 publication." *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

A jury verdict in a defamation case involving a public figure may only be founded upon clear and convincing evidence of actual malice. Whether there was sufficient evidence in the record to support a finding of actual malice presents a question of law that is reviewed de novo on appeal. *Faxon, supra* at 473-474. Thus, to survive a motion for summary disposition, the nonmoving party must demonstrate actual malice by clear and convincing evidence rather than by mere preponderance. *Kefgen, supra* at 625. Actual malice is defined as:

> … [K]nowledge that the published statement was false or as reckless disregard as to whether the statement was false or not. Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. 'Reckless disregard' is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published. [*Ireland, supra* at 622 quoting *Grebner v Runyon*, 132 Mich App 327, 332-333; 347 NW2d 741 (1984) (citations omitted).]

Actual malice is not merely reckless disregard.

> Reckless disregard for the truth necessary to prove actual malice is not established by showing merely that a defendant acted with preconceived objectives or acted upon insufficient investigation. In determining whether a defendant acted with actual malice, the question is not whether a prudent person would have published or would have investigated before publishing, but instead is whether the publisher entertained serious doubts regarding the truth of the statements published. [*Kefgen, supra* at 627 (internal citation omitted).]

Our Supreme Court has concluded that evidence is clear and convincing when it:

> "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." . . . Evidence may be uncontroverted, yet not be "clear and convincing." . . . Conversely, evidence may

> be "clear and convincing" despite the fact that it has been contradicted. [*In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) quoting *In re Jobes*, 108 NJ 394, 407-408; 529 A2d 434 (1987).]

In the present case, defendants disseminated a memorandum that was prepared by plaintiff's then supervisor, Stewart, the manager of the Village of Suttons Bay. This memorandum was placed in plaintiff's personnel file and was subject to the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. There was no allegation that defendants illegally obtained or secreted the information from plaintiff's personnel file. The document contained Stewart's concerns that plaintiff was not an employee of the village, was not entitled to employee benefits, and was receiving more compensation than approved for the position held. The personnel committee voted to terminate plaintiff from her employment, and she applied for unemployment benefits. Stewart recommended that the village fight the request for benefits. However, the village withdrew its objection to the benefits after learning that plaintiff was an employee, was issued a W-2 form, was entitled to health benefits, and was submitting her time sheets with her rate of compensation approved by Stewart. Thus, the memorandum at issue was not prepared by defendants and contained Stewart's subjective and erroneous view of the status of plaintiff's employment. Defendants cannot be held liable for the reliance on this written memorandum and the failure to investigate the allegations contained within the document does not constitute the reckless disregard that underlies actual malice. *Faxon, supra* at 476.[1]

The document contained a handwritten caption added to the document that provided, "Attention: Suttons Bay Villagers Alledged (sic) Misuse of Village Taxpayer Funds?" and "Subject: Personnel meeting scheduled for August 10, 2004 Derrick [sic] Smith". Defendants claimed to be unaware of the author of the handwritten caption added to the memorandum. However, irrespective of authorship, as a matter of law, the statement alone is incapable of defamatory meaning. *Ireland, supra*. The handwritten caption acknowledges that any misuse of village taxpayer funds was only alleged and was followed by a question mark as punctuation. Thus, the writer of the caption did not definitively conclude that plaintiff had engaged in illegal or criminal wrongdoing, and the caption served as an expression of opinion. See *Masson, supra*;

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[1] We note that the trial court, in allowing the case to proceed to the jury, cited the testimony by defendants that was essentially deemed unbelievable. For example, defendant Flohe acknowledged assisting in the preparation of the mailing, but indicated that he had no idea what he was mailing. However, this case does not hinge on the credibility of the witnesses, but on the speech at issue and the protection afforded political speech. Furthermore, plaintiff asserted that the actual malice to support the defamation claim was established by the investigation of a third party, retired police officer George Preston, who opined that he advised defendants before the mailing that Stewart's assertions in the memorandum were unfounded. However, to support the actual malice requirement, reckless disregard is not established by whether a reasonably prudent man would have published or would have investigated before publishing. *Ireland, supra* at 622. Rather, the standard is whether the publisher in fact "entertained serious doubts concerning the truth of the statements published." *Id.* In the present case, defendants clearly declined to entertain any opinion regarding the content of the memorandum in light of the fact that the document was obtained from plaintiff's personnel file by the village treasurer.

Chmura, supra. As noted above, political speech by its nature may have unpalatable consequences and therefore, misleading or distorted statements are subject to protection to ensure uninhibited, robust, and wide-open debate. *Chmura, supra*.[2]

Reversed and remanded for entry of a judgment of no cause of action. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

[2] In light of our disposition of this issue, we need not address the remaining issues raised on appeal.