IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DAWN CALLAWAY, et al., *Plaintiffs/Appellants*,

v.

TOWN OF PARADISE VALLEY, et al., *Defendants/Appellees*.

No. 1 CA-CV 22-0087

FILED 10/24/2023

Appeal from the Superior Court in Maricopa County
No. CV2018-014903
The Honorable M. Scott McCoy, Judge

AFFIRMED

COUNSEL

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Wendy Dittbrenner, Prescott
Defendant/Appellee

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Vice Chief Judge Randall M. Howe and Judge D. Steven Williams joined.

C A T T A N I, Judge:

¶1 Dawn Callaway and Brian Stole ("Plaintiffs") appeal the superior court's ruling granting summary judgment against them on their breach of contract, defamation, civil conspiracy, and civil rights claims against the Town of Paradise Valley ("Town") and their defamation and civil conspiracy claims against Wendy Dittbrenner. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Plaintiffs leased a single-family house in Paradise Valley beginning in 2010. The house was destroyed in a 2015 fire. The remnants of the house remained on the property for years thereafter as Plaintiffs and the prior owner litigated ownership of the property and distribution of fire insurance proceeds. Plaintiffs eventually settled their dispute with the prior owner and purchased the property.

¶3 Plaintiffs kept various animals on the property, and in late 2013 or early 2014, Callaway began acquiring alpacas. Callaway spoke with Town code enforcement official Tina Brindley beforehand to determine whether she could keep the animals on the property; Brindley initially told her she could. The record is unclear as to how many alpacas were on the property at any given time, but Plaintiffs testified that the total ranged between 30 and 110.

¶4 In August 2017, Dittbrenner, an alpaca rancher, contacted the Humane Society expressing concerns about the alpacas' living conditions. Dittbrenner also contacted Paradise Valley police.

¶5 Brindley visited the property with a Humane Society livestock investigator and two others on August 18, 2017. Six days later, the Town notified Callaway that she was in violation of several provisions of the Paradise Valley Municipal Code ("Town Code") based on:

- the "[l]arge number of Alpacas" on the property;

- use of the property in a manner "not compliant with residential use";
- a "[l]arge mound of garbage located on the east side of the burned structure";
- "[i]mproper removal of animal waste"; and
- "[d]emolition and building without a permit."

The Town initially demanded that Callaway bring the property into compliance by September 13, 2017. After an October 17, 2017 meeting, the Town gave Callaway five additional months to remove the alpacas.

¶6 Brindley inspected the property again two months later and reported that 50 or more alpacas were still there. Two days later, the Town filed a criminal complaint against Callaway alleging violations of § 7-2-3 of the Town Code, which governs "animal noises," and § 502 of the Paradise Valley Zoning Ordinance, which limits uses within single-family residential districts. The Town also filed an abatement action in municipal court.

¶7 In March 2018, the Town moved to defer Callaway's prosecution for six months, during which Callaway was to (1) "not reintroduce or otherwise keep any alpacas or other livestock on the propert[y]," (2) remove all alpaca waste and feed, (3) remediate odors within seven days, and (4) allow regular inspections by Town code inspectors. Plaintiffs contend, however, that they already had removed the alpacas the month before. The Town voluntarily dismissed the criminal complaint in September 2018.

¶8 Three months later, Plaintiffs sued the Town, Dittbrenner, and three other defendants who are not parties to this appeal. As against the Town, Plaintiffs alleged breach of contract, defamation, civil conspiracy, malicious prosecution, intentional infliction of emotional distress, and due process violations. In their breach of contract claim, Plaintiffs alleged the Town's decision to "allow . . . five (5) months, at a minimum, to reduce the number of alpaca" constituted a contract that the Town breached by filing the criminal complaint against Callaway. Plaintiffs' defamation claim against the Town hinged on a local news interview in which the town manager, Kevin Burke, stated that Callaway did not have permission to keep alpacas on the property. As for the due process claim, Plaintiffs alleged that (1) various Town officials had exchanged emails expressing displeasure with the extension Callaway received in the criminal case, and

(2) many of those officials attended her arraignment and other court appearances "to intimidate [Plaintiffs] into succumbing to the . . . pressure campaign."

¶9 Plaintiffs asserted a defamation claim against Dittbrenner based on her reports to the Humane Society and the Paradise Valley police that Plaintiffs' alpacas were suffering "cruel neglect" and lived under "deplorable conditions." Plaintiffs also alleged that both Dittbrenner and the Town were part of a civil conspiracy that led to a "pressure campaign" against them.

¶10 The Town and Dittbrenner moved for summary judgment, and Plaintiffs moved for partial summary judgment on their breach of contract claim against the Town and their defamation claims against the Town and Dittbrenner. The superior court granted the Town's and Dittbrenner's motions, denied Plaintiffs' motion, and awarded the Town attorney's fees under A.R.S. § 12-341.01(A). The court entered a final judgment in favor of the Town, and we construe its certification of that judgment under Arizona Rule of Civil Procedure 54(c) as an acknowledgment that the summary judgment ruling in favor of Dittbrenner was final and appealable as well. Plaintiffs timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

I. Evidentiary Objections.

¶11 Plaintiffs contend the superior court did not properly address their objections to numerous paragraphs in the Town's and Dittbrenner's statements of facts. We do not disturb evidentiary rulings unless the court abused its discretion and the objecting party suffered prejudice. *Golonka v. Gen. Motors Corp.*, 204 Ariz. 575, 580, ¶ 9 (App. 2003).

¶12 Plaintiffs object to the court's statement in its summary judgment ruling that it had "modified the Town's Statement of Facts . . . to reflect the Court sustaining in part certain evidentiary objections, for clarity, or both" and ask this court to direct the superior court to further clarify its ruling. Plaintiffs cite no authority, however, requiring the superior court to enter specific findings or conclusions when ruling on evidentiary objections in summary judgment proceedings. Moreover, the court's disposition of Plaintiffs' objections sufficed under the circumstances. Plaintiffs asserted a boilerplate hearsay objection to most of the paragraphs they have identified in the opening brief, but then relied on some of the same documents they argued were inadmissible. Plaintiffs asserted a Rule 404(b) objection to two

paragraphs regarding Callaway's real estate license, *see* Ariz. R. Evid. 404(b)(1), but the court did not address any issues relating to Callaway's license and did not cite or mention those paragraphs in its ruling.

¶13 Plaintiffs asserted the same type of boilerplate hearsay or Rule 404(b) objections to Dittbrenner's statement of facts, so their challenges on appeal fail for the same reasons. Plaintiffs also objected that Dittbrenner "was never disclosed as an expert witness," but nothing in the court's ruling suggests it considered Dittbrenner to be an expert witness. The court merely found that Dittbrenner (1) owned a ranch that houses fiber animals, including alpacas, (2) "reported the presence of sick appearing alpacas living in poor conditions to the Arizona Humane Society and Paradise Valley Police Department," and (3) "believe[d] that Plaintiffs had abused and neglected the alpaca"—facts that Plaintiffs did not dispute.

¶14 Moreover, Plaintiffs on appeal offer only a conclusory assertion that if the superior court had ruled differently, "the collective sustaining of just a few of [the Town's] or Dittbrenner's Statement of Facts, would have resulted in genuine disputes as to those material facts." But they do not point to any specific objections that, if sustained, would have changed the result of either motion. Accordingly, Plaintiffs failed to show either that the superior court erred or that they suffered any resulting prejudice.

II. Summary Judgment.

¶15 Plaintiffs contend the superior court erred by granting summary judgment in favor of the Town and Dittbrenner on their contract, defamation, civil conspiracy, and § 1983 claims; they do not challenge the court's rulings on their claims of malicious prosecution and intentional infliction of emotional distress. Summary judgment is proper if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). A defendant may show entitlement to summary judgment "if the facts produced in support of [a] claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Orme Sch. V. Reeves*, 166 Ariz. 301, 309 (1990). We review a grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party. *Normandin v. Encanto Adventures, LLC*, 246 Ariz. 458, 460, ¶ 9 (2019).

A. Breach of Contract – Town.

¶16 Plaintiffs contend they had a contract with the Town under which they would have five months to "reduce the number of alpaca [on the property] to three." The superior court found that the alleged contract failed for lack of consideration. We agree.

¶17 As the superior court correctly reasoned, the Town Code already required Plaintiffs not to create or maintain a public nuisance in the first instance and to abate any nuisance that did arise, and "[a] promise to do something which a party is already legally obliged to do is no consideration for a contract." *J. D. Halstead Lumber Co. v. Hartford Acc. & Indem. Co.*, 38 Ariz. 228, 235 (1931). Plaintiffs assert that they were not legally obligated to remove the alpacas because the Town Code does not expressly limit the number of alpacas on a property. But the Town Code prohibits public nuisances, which include acts that "are contrary to community standards" or "are offensive to the senses." Town Code § 8-4-1. Plaintiffs do not contend that keeping between 30 and 110 alpacas on a residential lot is consistent with the Town's community standards, and they do not dispute that the alpacas attracted flies and would generate multiple four- to twelve-foot-wide dung piles that caused unpleasant odors. Maintaining animals "in such a manner as to cause flies, insects, vermin, rodent harborage, or to allow odors, ponded water or other liquid, the accumulation of manure, garbage, refuse or other noxious materials" can constitute a public nuisance under Town Code § 8-6-2(K). The Town cited this provision, among others, in its notice of violation.

¶18 Plaintiffs contend that Town witnesses testified that any nuisance had been abated by September 2017 (before the alleged contract), so the agreement was necessarily related to something other than a pre-existing legal obligation. Plaintiffs cite no factual support for this premise, and the only record evidence that might arguably support their contention is a document written by a Humane Society representative (not a Town representative) reflecting that the alpacas showed "no signs of possible distress" during a September 21, 2017 visit (which is not relevant to the public nuisances identified in the Town's notice of violation).

¶19 Plaintiffs further contend that their agreement to remove the alpacas would save the Town from paying abatement-related costs, which they urge establishes adequate consideration. But the Town could have recovered its abatement costs from Plaintiffs in any case under Town Code § 8-5-2(C) if Plaintiffs refused to come into compliance with the Code. Plaintiffs nevertheless contend the Town wanted to avoid the additional

time and expense of paying and then recovering abatement costs, suggesting that Burke and Deputy Town Manager Dawn Buckland testified as much. But Burke testified only that while reaching a resolution with Callaway would have been beneficial to the Town, "[i]t would have been better if [she] would have moved the violation, would have done her end of the violation and come back into compliance." And Buckland said only that reaching an agreement with Callaway would have been beneficial in part because the Town wanted to proceed "in a way that preserves taxpayer dollars whenever possible." Moreover, Plaintiffs cite to a Buckland email sent three months after the alleged contract came into existence and one month after the Town filed the criminal complaint against Callaway, which cannot support Plaintiffs' contention that the Town contracted with Callaway months earlier to avoid having to recover abatement costs.

¶20 Accordingly, the superior court did not err by determining that the Town's decision to grant Callaway five months to comply with the Town Code did not form a contract and was "at best a courtesy."

B. Defamation.

¶21 Every Arizonan has a right to free speech under the Arizona Constitution. Ariz. Const. art. 2, § 6. When ruling on a motion for summary judgment in a defamation case, the superior court's role is that of gatekeeper seeking to protect free speech rights from meritless litigation. *Sign Here Petitions LLC v. Chavez*, 243 Ariz. 99, 102, ¶ 1 (App. 2017). The court "must determine whether the plaintiff's proffered evidence is sufficient to establish a prima facie [defamation] case with convincing clarity." *Read v. Phoenix Newspapers, Inc.*, 169 Ariz. 353, 356 (1991). "To support a claim for defamation, a statement about a private figure on a matter of private concern 'must be false' and must bring the subject of the statement 'into disrepute, contempt, or ridicule' or impeach the subject's 'honesty, integrity, virtue, or reputation.'" *Takieh v. O'Meara*, 252 Ariz. 51, 57, ¶ 14 (App. 2021) (quoting *Turner v. Devlin*, 174 Ariz. 201, 203–04 (1993)).

1. Town.

¶22 Plaintiffs contend the Town defamed them when Burke said during a news interview that (1) they did not have permission to keep alpacas on their property and (2) doing so violated the Town Code. The superior court found these statements did not impeach Plaintiffs' honesty or bring them into disrepute. *See id.*

¶23 Plaintiffs argue that because Burke said they did not have permission to have alpacas on the property while Plaintiffs said they did,

Burke's statement was, in essence, "calling [Plaintiffs] liars on the local news" and was thus actionable. But Burke's statement, according to Plaintiffs' own evidence, was that the Town did not give them permission to have "this many animals," not that it did not give them permission to have animals at all. And in any event, Plaintiffs presented no evidence to suggest they ever publicly declared that they did have permission. Burke's statement thus cannot be construed to be an accusation that Plaintiffs were lying.

¶24 Moreover, the Town did not contend that the Town Code contains a specific limit on alpacas but rather that the alpacas' noise, waste, and odor constituted a public nuisance. Indeed, Brindley testified that even one alpaca could create a public nuisance if not properly cared for and allowed to "run wild." Plaintiffs therefore did not establish a prima facie defamation case against the Town. *See Read*, 169 Ariz. at 356.

2. Dittbrenner.

¶25 Plaintiffs' opening brief identifies two categories of Dittbrenner's statements that they contend were defamatory: first, comments regarding Callaway's treatment of animals, and second, comments about Callaway herself.

¶26 The first category included statements that Callaway was abusing and neglecting animals, that she was criminally culpable of "serious animal cruelty," and that Dittbrenner had "information on Callaway and her history of neglect and wrongful treatment of alpaca." These statements come from Dittbrenner's reports to Paradise Valley police and the Humane Society. Her report to the police, which includes the statement that Callaway was guilty of "cruel neglect," is protected by an absolute privilege. *See generally Ledvina v. Cerasani*, 213 Ariz. 569 (App. 2006).

¶27 As for the statement regarding "information on Callaway and her history of neglect and wrongful treatment of alpaca," Dittbrenner told the police in her initial report she became concerned when Callaway told her she had five alpaca babies die in one week. Dittbrenner also provided contact information for an alpaca groomer who reportedly witnessed "sick alpacas, overcrowding, filthy deplorable conditions, and a baby with a serious eyeball problem that [Callaway] was neglecting." Plaintiffs did not present any evidence that these statements were false when Dittbrenner made them.

¶28 Plaintiffs also presented no evidence that Dittbrenner's January 2018 statement regarding "new information from a former volunteer" at Callaway's property who reportedly observed "animal deaths, the great numbers of livestock brought in and kept emaciated" was false. They instead rely on a subsequent police report to contend that Dittbrenner's allegations were "unsubstantiated." They do not show, however, that Dittbrenner was aware of the subsequent police report when she made the statement in January 2018, and they thus failed to show Dittbrenner knew or should have known her statements were false when she made them.

¶29 The superior court found Dittbrenner's report to the Humane Society was subject to a qualified privilege, but even if not privileged, the report does not support a defamation claim. The internal Humane Society email on which Plaintiffs rely states only that Dittbrenner said she "ha[d] been trying to get someone to investigate this for a year" and that the "person that responds to this home for grooming the alpacas said he will also confirm these guys need help." The email does not indicate that Dittbrenner told the Humane Society that Callaway was "abusing, neglecting, and criminally culpable of 'serious animal cruelty'" as Plaintiffs now contend.

¶30 The second category of allegedly defamatory statements included Dittbrenner's comments that Callaway had "Munchausen Disease," was "sick," a "delusional individual," and "pathological." Dittbrenner testified, and Plaintiffs do not dispute, that these statements were opinion statements. Opinion statements are not actionable if they reflect "'loose, figurative, or hyperbolic language' that cannot reasonably be interpreted as stating or implying facts 'susceptible of being proved true or false.'" *Takieh*, 252 Ariz. at 57, ¶ 15.

¶31 Plaintiffs do not contend that any reasonable person would believe upon reading Dittbrenner's statements that Callaway actually had Munchausen's syndrome. And Dittbrenner's statements that Callaway was "sick," a "delusional individual," and "pathological" were hyperbolic statements that are not actionable. *See, e.g.*, *Tech Plus, Inc. v. Ansel*, 793 N.E.2d 1256, 1267 (Mass. App. Ct. 2003) (concluding statements that the plaintiff was "sick" and "mentally ill" "could not reasonably have been understood as assertions of actual fact . . . as distinct from 'rhetorical hyperbole'"); *Scialdone v. DeRosa*, 148 A.D.3d 741, 741–42 (N.Y. App. Div. 2017) (concluding statements describing the plaintiff as "quixotic," "self-absorbed," "narcissistic," "ungrateful," and "delusional" constituted "expressions of opinion, which are not actionable, rather than statements of

fact"); *Greene v. State ex rel. Dep't of Corrs.*, 21 So.3d 348, 352 (La. Ct. App. 2009) (concluding a statement that plaintiff was a "pathological liar," while insulting, was "nothing more than an expression of [defendant's] opinion"). Plaintiffs therefore did not establish a prima facie defamation case against Dittbrenner. *See Read*, 169 Ariz. at 356.

C. Civil Conspiracy.

¶32 To establish liability for civil conspiracy, a plaintiff must show by clear and convincing evidence that two or more people (1) agreed to accomplish an unlawful purpose or a lawful purpose by unlawful means, (2) accomplished the underlying tort, and (3) caused damages. *Dawson v. Withycombe*, 216 Ariz. 84, 103, ¶ 53 (App. 2007). A conspirator is liable for any tortious act committed in furtherance of the conspiracy, including acts he or she did not personally commit. *Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Tr. of Phx., Inc.*, 197 Ariz. 535, 542, ¶ 31 (App. 2000).

1. Town.

¶33 Plaintiffs contend Town councilmembers communicated among themselves "on how to apply more pressure [on Plaintiffs] 'now,'" which Plaintiffs say was wrongful because of the alleged contract discussed above. Even if a contract existed, any breach of that contract would not support a civil conspiracy claim. *See Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, 498, ¶ 99 (2002) ("[L]iability for civil conspiracy requires that two or more individuals agree and thereupon accomplish 'an underlying *tort* which the alleged conspirators agreed to commit.'") (quoting *Baker*, 197 Ariz. at 545, ¶ 42) (emphasis added); *see also Aspell v. Am. Cont. Bridge League of Memphis, Tenn.*, 122 Ariz. 399, 402 (App. 1979) ("A breach of contract is not a tort unless the law imposes a duty on the relationship created by the contract which exists apart from the contract.").

¶34 Plaintiffs also contend the Town "interfered with [their] rights in the Superior Court Case" by sending a January 2018 notice of violation to the former property owner alleging the same Town Code violations as the notice sent to Callaway. But they acknowledge that ownership of the property was still disputed at that time. Indeed, they did not dismiss their claims against the former property owner in this case until August 2020. They offer no basis for their premise that sending a similar notice of violation to the other potential property owner was wrongful. Plaintiffs likewise fail to identify what tort the Town allegedly committed by sending the notice, and they offer no evidence to support their theory that the Town

sent the notice to "influence the Superior Court Case in [the former property owner's] favor."

2. Dittbrenner.

¶35 Plaintiffs contend Dittbrenner was part of a larger conspiracy "to unlawfully remove alpacas and/or [Plaintiffs] from the Property," alleging without citing any evidence that Dittbrenner "would be benefiting by taking possession" of the alpacas. First, abatement of a public nuisance is not unlawful. *See* A.R.S. § 9-240(B)(21)(a). Second, Dittbrenner presented evidence that she never offered to take the alpacas. Plaintiffs did not dispute this evidence and instead contended only that Dittbrenner was "in communication with the Town . . . regarding the needs and costs associated with an abatement." But the sole email on which Plaintiffs relied for this proposition—which Dittbrenner neither wrote nor received—only indicates that "a board member of the Alpaca Breeders of Arizona" was helping identify other "potential boarding locations throughout the western United States."

¶36 Plaintiffs also contend their defamation claim against Dittbrenner is an underlying tort that supports a civil conspiracy claim. But their defamation claim failed as a matter of law. *See supra* ¶¶ 25–31. And in any event, although Plaintiffs argue (without citation to the record) that Dittbrenner's allegedly defamatory statements were part of the same ambiguous "pressure campaign" as the Town councilmembers' internal communications, they offered no evidence to show Dittbrenner was a party to any of those communications or that she conspired with anyone to defame Plaintiffs.

D. § 1983 Claim – Town.

¶37 "A plaintiff bringing a § 1983 claim must prove: (1) the deprivation of a specific constitutional right, and (2) the deprivation was actionable." *Yanes v. Maricopa County*, 231 Ariz. 281, 283, ¶ 11 (App. 2012).

¶38 Plaintiffs contend Town councilmen and employees (1) asked in emails who the judge was for Callaway's arraignment and (2) showed up at hearings in her criminal case. Plaintiffs say these actions deprived Callaway of due process because they "frustrate[d] [Plaintiffs'] opportunity to be heard" and "intimidate[d] them into succumbing to the [Town's] pressure campaign." They do not, however, show any actual due process deprivation, as Callaway sought and received a continuance before the Town voluntarily dismissed the criminal complaint. The superior court did not err in granting summary judgment on this claim.

E. Attorney's Fees Award in Superior Court.

¶39 Plaintiffs challenge the superior court's award of attorney's fees in favor of the Town, but only on the basis that their appeal, if successful, would eliminate the basis for the award. Because we affirm the merits judgment in favor of the Town, we likewise affirm the fee award.

III. Attorney's Fees and Costs on Appeal.

¶40 Plaintiffs request their attorney's fees and costs on appeal but cite no legal authority other than ARCAP 21, which is not a substantive basis for a fee award. *See* ARCAP 21(a)(2). We therefore deny Plaintiffs' request.

¶41 The Town requests its attorney's fees on appeal under A.R.S. § 12-341.01(A), which permits a discretionary award to the successful party in an action arising out of a contract, and under 42 U.S.C. § 1988(b), which allows the prevailing party in a § 1983 action to recover reasonable fees. After consideration and in an exercise of our discretion, we deny the Town's attorney's fees request. As the prevailing party, however, the Town is entitled to its costs on appeal upon compliance with ARCAP 21.

CONCLUSION

¶42 We affirm.

AMY M. WOOD • Clerk of the Court
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