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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARC MAUSETH and MARY HOFFMAN, husband and wife; COME TO TUBAC, LLC; GARY A. and CYNTHIA GAY ROSE, husband and wife, d/b/a TURQUOISE ANGEL ART GALLERY; CARLTON TROY, a single man; CATHERIN TROY, a single woman; and LOS GATOS LOCO, LLC, Plaintiffs/Appellants, v. KATHLEEN and BRIAN VANDERVOET, a married couple; CAROL CULLEN and BRUCE PHENEGER, a married couple; MANUEL and JANE DOE COPPOLA, a married couple; THOMAS and JANE DOE DAVIS, a married couple; PAMELA K. and JOHN DOE MOX, a married couple;WICK COMMUNICATIONS CO.,d/b/a The Nogales International; THE GREEN VALLEY NEWS, LLC, d/b/a the Santa Cruz Valley Sun; TUBAC CHAMBER OF COMMERCE, INC.; and DAVIS & EPPSTEIN, P.C., an Arizona corporation, Defendants/Appellees.	2 CA-CV 2010-0108 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV080714

Honorable Stephen M. Desens, Judge

AFFIRMED

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and Davis & Eppstein, P.C.

B R A M M E R, Presiding Judge.

¶1 Marc Mauseth and other Tubac business owners (collectively, "the owners") appeal from the trial court's grant of summary judgment against them in their defamation action against appellees: the author and publishers of allegedly defamatory newspaper articles (collectively, "the newspaper defendants"); and the Tubac Chamber of Commerce, its executive director, and the Chamber's attorney (collectively, "the chamber defendants"). The owners argue the court erred in determining that the alleged

defamatory statements were substantially true, that the owners were limited public figures, and that there was insufficient evidence of malice. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered, drawing all justifiable inferences in its favor. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). The Tubac Chamber of Commerce operates an annual arts festival. The festival is the largest commercial event occurring during the year in Tubac and attracts thousands of visitors annually. As part of the festival, the Chamber provides booth space for artists, food vendors, and others. After obtaining a permit from Santa Cruz County, the Chamber held the festival from Wednesday, February 7, 2007, through Sunday, February 11, 2007.

¶3 Shortly before the festival was to begin, organizers marked areas where participants were to place their booths. The marked area was in the county right-of-way between the paved public road and property on which the private businesses were located. The owners sued the Chamber seeking damages and an injunction prohibiting the Chamber from placing booths or conducting any activities "that would be disruptive to [the owners'] businesses within 15 feet of [their] property lines." The trial court denied the owners' request for injunctive relief and granted summary judgment in the Chamber's favor. We affirmed the court's decision on appeal. *Mauseth v. Tubac Chamber of Commerce, Inc.*, No. 2 CA-CV 2008-0031 (memorandum decision filed Sep. 19, 2008).

¶4 The newspaper defendants authored and published two virtually identical articles about the owners' lawsuit that appeared in two publications that were placed in the mailboxes of Tubac residents and those living in the surrounding area. The articles, inter alia, attributed comments regarding the lawsuit to the Chamber's executive director and attorney and stated the owners had attempted to obtain "an injunction to stop the entire festival, which draws tens of thousands of visitors."

¶5 The owners then filed this defamation action against the newspaper and chamber defendants, asserting several statements in the articles were defamatory, including statements attributed to the Chamber's executive director and attorney. The trial court granted the newspaper and chamber defendants' motions for summary judgment. The court concluded that the owners were limited public figures because they had "voluntarily and intentionally placed themselves into a local but public controversy," and that the owners had failed to "produce clear and convincing evidence of actual malice." The court further determined each of the allegedly defamatory statements was substantially true, a substantially correct account of a judicial proceeding, privileged because it had been made in a judicial context, or not defamatory. This appeal followed.[1]

[1]The owners filed their notice of appeal on May 4, 2010, approximately four weeks after the trial court's judgment granting the chamber and newspaper defendants' motions for summary judgment. That judgment, however, did not address several counterclaims brought by the chamber defendants. On June 14, the court granted the chamber and newspaper defendants' request that it enter a final judgment pursuant to Rule 54(b), Ariz. R. Civ. P. Although the owners' notice of appeal technically was premature, we nonetheless have jurisdiction over this appeal in these circumstances. *Snell v. McCarty*, 130 Ariz. 315, 317, 636 P.2d 93, 95 (1981); *Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 9, 83 P.3d 56, 58 (App. 2004).

Discussion

¶6 Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1); *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). "On appeal from a summary judgment, we must determine de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998). A trial court should grant a motion for summary judgment only "if the facts produced in support of the claim or defense 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 or defense." *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶7 "On a defense motion for summary judgment in a defamation case, the trial court must determine whether the plaintiff's proffered evidence is sufficient to establish a prima facie case with convincing clarity." *Read v. Phoenix Newspapers, Inc.*, 169 Ariz. 353, 356-57, 819 P.2d 939, 942-43 (1991). When a publication addresses a matter of public concern, the First Amendment requires that the plaintiff bear the burden of demonstrating the statements were false. *See Phila. Newspapers, Inc., v. Hepps*, 475 U.S. 767, 776-77 (1986) ("To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."); *Dombey v. Phoenix Newspapers Inc.*, 150 Ariz. 476, 481, 724 P.2d

562, 567 (1986) ("[I]n cases involving matters of public concern . . . the plaintiff [has] the burden of proving falsity."). And if the plaintiff is a public official or figure, he or she must show that the defendant exhibited actual malice when publishing the false remark. *Id.* But if the plaintiff is a private individual, he or she need only show the defendant made the remark negligently. *Id.*

¶8 We first address the question whether the alleged defamatory statements addressed a matter of public concern because resolution of that question determines whether the owners have the burden of demonstrating the statements' falsity, or the newspaper and chamber defendants must prove their truth. Whether a statement addresses a matter of public concern is a question of law we review de novo. *Quigley v. Rosenthal*, 327 F.3d 1044, 1057-58 (10th Cir. 2003); *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118, 1121 (Colo. Ct. App. 1992).

¶9 To determine whether a publication addresses a matter of public concern, we examine its "'content, form, and context . . . as revealed by the whole record.'" *Turner v. Devlin*, 174 Ariz. 201, 205, 848 P.2d 286, 290 (1993), *quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985). In *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004), the Supreme Court defined a matter of public concern as "something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." Although *Roe* was not a defamation case, but addressed instead protected speech by public employees, *id.* at 80, we are guided by the Court's definition of public concern because both areas of law address permissible restrictions on First Amendment rights.

For example, in *Dun & Bradstreet*, 472 U.S. at 761, a defamation case, the Supreme Court relied on *Connick v. Myers*, 461 U.S. 138 (1983), a case that addressed protected speech by a public employee, to define "public concern." *See also Roe*, 543 U.S. at 80 ("A government employee does not relinquish all First Amendment rights . . . just by reason of his or her employment."); *Dombey*, 150 Ariz. at 481, 724 P.2d at 567 (constitutional protections in defamation law based on First Amendment).

¶10 Applying those principles here, there is little question the allegedly defamatory statements addressed a matter of public concern. The newspaper articles discussed a lawsuit against Tubac's Chamber of Commerce that sought an injunction affecting an event of significant economic importance to the residents and business owners of Tubac. As the owners acknowledged, the festival is "well and away the largest commercial event in the Tubac area bringing in tens of thousands of visitors and customers for the [owners'] businesses and other local business owners." The community-wide significance of the festival makes its successful operation a matter of public concern as it is "a subject of general interest and of value and concern to the public." *See Roe*, 543 U.S. at 83-84. Thus, the statements about the lawsuit address a matter of public concern, and the owners therefore have the burden to prove their falsity. *See Dombey*, 150 Ariz. at 481, 724 P.2d at 567.

¶11 For the owners' claim to survive summary judgment, they needed to have presented evidence from which a trier of fact reasonably could conclude the statements were false. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. A statement need not be "literal[ly] true [in] every detail" but only must be substantially true. *Read*, 169 Ariz. at

355, 819 P.2d at 941. On appeal, the owners identify only one statement in the newspaper article that they allege is defamatory—that the owners sought "an injunction to stop the entire festival, which draws tens of thousands of visitors." The owners argue the trial court erred in concluding that statement was substantially true because the court "cho[se] to believe one side's interpretation of the facts over another's." We disagree.

¶12 The trial court relied on the Chamber's executive director's statement in her affidavit, submitted with the newspaper defendant's statement of facts, that if the injunction had been granted, "it would have been difficult if not impossible to run the Festival without doing something within 15 feet of [the owners'] businesses that [they] could claim disrupted their businesses." "Where the party moving for summary judgment makes a prima facie showing that no genuine issue of material fact exists, the burden shifts to the opposing party to produce sufficient competent evidence to show that there is an issue." *GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990).

¶13 The owners insist they did not "attempt[] to enjoin the entire Festival of the Arts," and conclusorily assert the director's interpretation of the injunction is "[f]acially . . . ridiculous," based on the language of the requested injunction. The injunction's language, however, merely describes the relief the owners requested. It does not describe the practical effect granting that relief might have had on the festival. Without additional evidence explaining the proposed injunction's effect, the bare language of the injunction, which would have prohibited the Chamber from placing booths or conducting any activities "that would be disruptive to [the owners'] businesses within 15 feet of [their]

property lines," does not create a material factual dispute whether the injunction would have made it "difficult if not impossible to run the Festival." The owners, who bore the burden of proving falsity, identify no evidence that would support a conclusion the injunction would not have interfered significantly with the festival's operation. Nor do they acknowledge the evidentiary basis for the trial court's ruling or suggest any reason it could not rely on the director's description of the proposed injunction's effect on the festival to evaluate whether the articles' statements that the business owners sought to "stop the entire festival" were substantially true.[2] Thus, the court did not err in implicitly concluding there was no disputed material fact. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶14 "When the underlying facts are undisputed, the determination of substantial truth is a matter for the court." *Read*, 169 Ariz. at 355, 819 P.2d at 941. "'Slight inaccuracies will not prevent a statement from being true in substance, as long as the gist or sting of the publication is justified.'" *Id., quoting Heuisler v. Phoenix Newspapers, Inc.*, 168 Ariz. 278, n.4, 812 P.2d 1096, 1103 n.4 (App. 1991). The issue is whether the difference "would have made a material difference to a reader had the newspaper published the literal truth." *Id.* Owners have not shown that a statement that the

[2]For the first time in their reply brief, the owners argue the trial court erred by "draw[ing] conclusions about the [owners'] subjective intent" regarding the injunction's effect on the festival. But the court properly could infer the owners would attempt to enforce the injunction had they obtained it, and the owners have identified no evidence suggesting otherwise. In any event, because this argument is raised for the first time in their reply brief, we need not address it further. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005) (issue raised for first time in reply brief waived on appeal).

proposed injunction would have made it "difficult if not impossible to run the Festival" would have made a material difference to the reader from a statement that the owners sought to "stop the entire festival" by seeking the injunction. Thus, the gist or sting of the articles plainly would have been the same—that the injunction, if granted, would have disrupted the festival's operation significantly.[3]

¶15 To the extent the owners argue the articles incorrectly stated the owners "had the subjective intent to stop the entire festival," we question whether such a statement could be proven false without improperly requiring a factfinder to make an "intensely subjective evaluation" of the statement. *Turner v. Devlin*, 174 Ariz. 201, 207-08, 848 P.2d 286, 292-93 (1993) (statement of subjective impression not actionable unless it can "reasonably [be] interpreted as stating actual facts"). In any event, the owners did not attempt to prove the statement was false. They identify no evidence in the record demonstrating their actual intent. Thus, even assuming the articles' imputation of the owners' intent would be actionable as defamation, the owners failed to meet their burden of proving that imputation was false.

¶16 As we have explained, because the alleged defamatory statements addressed a matter of public concern, it was the owners' burden to demonstrate that those statements were false. The owners failed to present any relevant evidence to show the

[3]The owners state they have "provided affidavits from Tubac residents who are not parties," stating the articles portrayed the owners in a negative light. But they have not identified where in the record these affidavits may be found. *See* Ariz. R. Civ. App. P. 13(a)(6). In any event, even assuming the affidavits are as the owners describe, they do not suggest the statements in the articles were inaccurate or that the true article would not have had the same sting. That the articles portrayed the owners in a negative light does not necessarily make them false.

articles' statements were not substantially true. We therefore find no error in the trial court's determination that they were. The owners do not identify on appeal any other allegedly defamatory statements made by the newspaper defendants. And, although the court discussed in its summary judgment ruling other statements attributed to the chamber defendants, the owners do not argue the court erred in granting summary judgment against the owners as to those statements. Because we find no error in the court's determination the articles' statements were substantially true, we need not address whether the owners were limited public figures or whether they had presented sufficient evidence of actual malice.

Disposition

¶17 We affirm the trial court's grant of summary judgment in favor of the newspaper and chamber defendants. We grant the chamber defendants' request for costs pending their compliance with Rule 21, Ariz. R. Civ. App. P., but reject their request for attorney fees pursuant to A.R.S. § 12-341.01(C). The chamber defendants have not demonstrated the owners' appeal "constitutes harassment, is groundless and is not made in good faith." § 12-341.01(C).

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge