IN THE COURT OF APPEALS OF IOWA

No. 2-845 / 12-0318
Filed December 12, 2012

GARY CRAIG,
Plaintiff-Appellant,

vs.

CITY OF CEDAR RAPIDS, IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Linn County, Nancy A. Baumgartner, Judge.

A plaintiff appeals the grant of summary judgment on three tort claims. **AFFIRMED.**

Michael K. Lahammer of Lahammer Law Firm, P.C., Cedar Rapids, and Robert F. Wilson, Cedar Rapids, for appellant.

Chad D. Brakhahn, Robert S. Hatala, and Kerry A. Finley of Simmons Perrine Moyer Bergman PLC, Cedar Rapids, and Mohammad H. Sheronick of City of Cedar Rapids Attorney Office, Cedar Rapids, for appellee.

Heard by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Gary Craig appeals the grant of summary judgment on his three tort claims—malicious prosecution, false arrest, and defamation—against his former employer, the City of Cedar Rapids. Craig claims there is at least one disputed fact question for each claim, which should have precluded summary judgment. The City contends the district court was correct on all grounds. We affirm.

I. Background Facts and Proceedings

On appeal, Craig accepts the district court's findings of fact by copying them almost verbatim[1] into his brief and we find no evidence in the record to depart from these findings:

> Gary Craig was hired on August 31, 1998, as the Building Supervisor for the Cedar Rapids Veterans Memorial Commission (the "Commission"). On January 13, 2003, by resolution of the Commission, signed by Peter Welch, then-Chairperson of the Commission, Craig's job title was changed from Building Supervisor to Memorial Director.
>
> It is Craig's position that beginning in 2005 he experienced hostility and verbal intimidation from Welch and the Mayor. In August 2007, the Commission hired the Iowa State Auditor's Office to conduct an audit of city payroll records as they related to Craig's work for the Commission and his work for a private entity, Valor, Inc. This investigation was initiated as a result of a letter to the Commission from Welch after Welch learned Craig was providing paid services to Valor. The Iowa State Auditor's Office began an audit in November 2007.
>
> During the audit, in mid-November 2007, Welch made direct e-mail correspondence with Jennifer Campbell, one of the Iowa State Auditors' Office auditors, in which he discussed the Mayor inquiring about the matter and the desire to "dismiss the employee."

[1] Craig's statement of facts on appeal is nearly a verbatim recitation of the district court's factual findings in its initial summary judgment ruling. The only changes in the text are: (1) the deletion of "American Heritage" before "Dictionary definition" and (2) the addition of "(emphasis added)" and "at his own discretion" regarding the 2000 Resolution allowing him to take administrative leave for hours worked over forty per week.

One e-mail correspondence from Welch made the statement: "Thanks for your help in dealing with this 'blivet'!!!!! (tee hee!)."[2]

. . . .

Craig was placed on paid administrative leave from his employment as Memorial Director in October 2007, but this leave was changed by the Commission at times to unpaid administrative leave throughout the fall and winter months. During this same period, Craig requested and received medical leave due to health problems he was having related to stress and anxiety. It is Craig's position that he was "essentially forced to resign after his medical leave expired and he was without income due to the unpaid leave status."

For a period of time during the investigation, Welch was not the chair of the Commission; Jim Bruner was the acting Chair. There is no evidence in the record as to the exact period during which Bruner served as Chair.

On June 13, 2000, Resolution No. 06-19-2000 was passed by the Commission in which "The Cedar Rapids Veterans Memorial Commission has determined that the Memorial Director in the performance of his duties does work in excess of 40 hours per week. NOW, THEREFORE, BE IT RESOLVED by the Cedar Rapids Veterans Memorial Commission, that the Memorial Director at his discretion may take Administrative Leave as described in the above mentioned City of Cedar Rapids Policy to compensate for the excess hours accumulated in the performance of his assigned duties to be approved and adopted." The Resolution was signed by the five members of the Commission. Welch did not sign the Resolution and there is no indication that he was a Commissioner at the time the Resolution was passed. During his deposition, Welch stated that he was not aware of the Resolution passed by the Commission in 2000. Craig asserts that as Memorial Director he was an Overtime Exempt Employee, exempt from the Fair Labor Standards Act, and as such he was allowed to take a form of comp time entitled "administrative leave" for hours worked over 40 hours per week.

On January 22, 2009, the Office of David A. Vaudt, CPA, Iowa State Auditor, issued a "News Release" announcing the release of the report by his office on a special investigation of the Cedar Rapids Veterans Memorial Commission and Valor, Inc. for the period of January 1, 2006, through October 31, 2007. The State Auditor's report found that Craig received $5,021 in city income and payroll taxes due while receiving pay from a private

---

[2] The term can be spelled "blivit" or "blivet." Because Welch used the latter spelling, that is the spelling which will be used except when quoting the district court or other authority.

entity, Valor, Inc., during hours that he was paid by the city as Memorial Director. The Auditor's report additionally found numerous accounting irregularities regarding the Valor, Inc. accounts that Craig maintained. The Auditor's News Release reported that the special investigation performed by the office "identified $15,280.18 of improper disbursements and improper payroll." The balance of the News Release identifies in specific detail the manner in which the report concluded that Craig was responsible for those improper disbursements. The State Auditor issued a "Report on Special Investigation of the Cedar Rapids Veterans Memorial Commission and Valor, Inc. for the Period January 1, 2006 through October 31, 2007," which detailed the improprieties and consisted of 36 pages of text, exhibits, and appendices. It is Craig's position that he used numerous hours that he had accrued in Administrative Leave or comp time for the time the auditors found improper disbursements. The State Auditor's Office was not informed of the June 13, 2000 resolution passed by the Commission. Craig avers that at an October 1, 2007 special meeting he and his attorney reminded the Commission of this fact, but that the Commission ignored the fact.

On or about March 25, 2009, as a result of the Auditor's findings, a complaint was filed in the Iowa District Court for Linn County captioned "State of Iowa v. Gary Lynn Craig, FECR82392-0309" in which Craig was charged with Felonious Misconduct in Office in violation of Iowa Code § 721.1(3).[3] On March 27, 2009, the Cedar Rapids Gazette published a news story on the charge and arrest. On April 21, 2009, Craig was charged by trial information with Felonious Misconduct in Office, a violation of Iowa Code § 721.1, for "unlawfully and willfully, while serving as Director of the Cedar Rapids Veteran Memorial Commission. . . [submitting] false payroll records to the City of Cedar Rapids." A Bill of Particulars was filed in the case on August 27, 2009, detailing the allegations of alleged misconduct. Craig alleges he was arrested, handcuffed, taken to Linn County Jail, stripped, and searched (including body cavities), and placed in an orange jumpsuit. He bonded out a short time later. In November 2009, the State of Iowa filed a Motion to Dismiss stating: "Because of information discovered during depositions of both State and defense witnesses, the State cannot now prove beyond a reasonable doubt each and every element of the crime charged. It is therefore in the interest of justice that this charge be dismissed." On November 23, 2009, the Court granted the State's Motion to Dismiss. Craig alleges that because of the negligent or reckless withholding of critical leave

[3] While the State Auditor's report contained information regarding irregularities of Valor's accounts as well as the false payroll reports, the criminal charges were only for submitting the false payroll records.

> policy information from the State Auditor's Office during the course of their audit, and due to the erroneous felony charges lodged against Craig, he has suffered both medical and mental problems including weight loss, anxiety, and depression.

Craig filed a petition against the City of Cedar Rapids, on January 13, 2010, and amended on June 17, 2011. The amended petition sought damages as a result of the alleged "untrue and false" statement made by Peter Welch on March 27, 2009, to the Cedar Rapids *Gazette* as well as the email correspondence with a state auditor, and the improper arrest and incarceration that resulted from the allegedly untrue statements. The City filed a motion for summary judgment on April 6, 2011, and refiled on July 15, 2011, to address the issues in the amended petition.

The district court originally granted the City summary judgment on the malicious prosecution claim, the false arrest claim, and the defamation claim for the statement in the *Gazette*, but not for the "blivet" comment. However, after the City filed a timely motion to reconsider, the district court found the "blivet" comment could not support an actionable defamation claim as a matter of law and dismissed that claim as well. This appeal follows.

II. Standard of Review

Appellate review of a summary judgment ruling is for correction of errors of law. *Shriver v*. *City of Okoboji*, 567 N.W.2d 397, 400 (Iowa 1997). To uphold the district court's summary judgment rulings, we must confirm that no disputed issues of material fact existed to render summary judgment inappropriate and that the district court correctly applied the law to those undisputed facts. *Royce v*. *Hoening*, 423 N.W.2d 198, 200 (Iowa 1988). The burden is upon the

defendant to show the nonexistence of material facts and to prove they are entitled to judgment as a matter of law. *Knapp v. Simmons*, 345 N.W.2d 118, 121 (Iowa 1984). Every legitimate inference that can be reasonably deduced from the evidence must be afforded the party resisting the summary judgment motion, and a question of fact is generated if reasonable minds could differ on how the issue should be resolved. *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 195 (Iowa 1985). But entry of summary judgment is proper if the conflict in the record concerns only the legal consequences flowing from undisputed facts. *Royce*, 423 N.W.2d at 200. In ruling on a motion for summary judgment, the court considers the record as it then exists. *Prior v. Rathjen*, 199 N.W.2d 327, 331 (Iowa 1972). A resisting party may not rely on the hope of subsequent appearance of evidence of a genuine issue of fact. *Id.* "Opposing affidavits are not required, but [a] party who does not file affidavits in response takes the risk of standing on the record established by the moving party." *In re Estate of Eickman*, 291 N.W.2d 308, 312 (1980). Finally, the court must keep in mind that the purpose of a summary judgment is to avoid a useless trial. *AMCO Ins. Co. v. Stammer*, 411 N.W.2d 709, 712 (Iowa Ct. App. 1987).

The role of summary judgment in defamation cases is unique and the court's role as gatekeeper is expanded. *See Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996). In deciding whether the City's summary judgment motion was properly granted, we must determine whether any facts have been presented over which a reasonable difference of opinion could exist that would affect the outcome of the case and whether the district court correctly

applied the law to the undisputed facts. *See Behr v. Meredith Corp.*, 414 N.W.2d 339, 341 (Iowa 1987).

III. Summary Judgment for Malicious Prosecution

Craig argues the district court erred in granting the City's motion for summary judgment on the claim of malicious prosecution. There are six elements of a malicious prosecution claim: (1) a previous prosecution; (2) instigation or procurement thereof by defendant; (3) termination of the prosecution by an acquittal or discharge of plaintiff; (4) want of probable cause; (5) malice in bringing the prosecution on the part of the defendant; and (6) damage to the plaintiff. *Sarvold v. Dodson*, 237 N.W.2d 447, 448 (Iowa 1976). Craig claims there are material issues of fact to support each element of the tort such that his claim does not fail as a matter of law. However, the district court found the second, fourth, and fifth elements were not satisfied, which prevented the claim from surviving summary judgment.

As Craig has adopted the district court's statement of facts the only question presented is whether the district court reached the correct legal consequences flowing from those undisputed facts. Neither party disputes the district court's finding that elements one, three, and six were satisfied. We will consider the remaining contested elements in turn.

A. Instigation of Prosecution by the City

On the question of instigating the prosecution, the district court held: "While Mr. Welch's e-mail correspondence to Ms. Campbell discusses charges, there is no evidence in the record that he ever discussed the need to bring

charges with anyone in the State Attorney General's Office." Craig disputes this conclusion, arguing instead that Welch, by failing to provide the 2000 Resolution to the auditor's office, which in turn gave its findings to the assistant attorney general, caused "false information" to be provided, which led to the instigation of the prosecution.

The district court, sorting through the sequence of events, minimized Craig's assertion by noting no evidence suggested that the decision to prosecute was made by anyone other than the Iowa Attorney General's office, through the independent exercise of its discretion. *See Lukecart v. Swift & Co.*, 130 N.W.2d 716, 723–24 (Iowa 1964) (holding that making an accusation does not constitute procurement if the institution of criminal charges is left to the uncontrolled choice of a third person). The assistant attorney general who brought the charge swore in his affidavit that the decision to charge Craig "was made in [his] sole discretion based upon [his] conclusion that probable cause existed." He also swore

> the decision to bring a criminal charge was entirely [his] own and was based upon [his] investigation of the facts as presented to [him] by the State Auditor's Office and the Linn County Sheriff through the Linn County Attorney. No one on behalf of the City of Cedar Rapids tried to influence or persuade [him]. . . . [He] was not acting at the behest, direction, or on behalf of the City of Cedar Rapids.

A helpful discussion of this element of malicious prosecution can be found in the comments to the Restatement (Second) of Torts

> When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this Section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The

> exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.

Restatement (Second) of Torts § 653 cmt. g, at 409 (1977) (adopted by the Iowa Supreme Court in *Rasmussen Buick-GMC v*. *Roach*, 314 N.W.2d 374, 376 (Iowa 1982)). Craig argues the following part of this comment supports his position:

> If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information. In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution, or that the information furnished by him upon which the official acted was known to be false.

Id.

First, neither party addressed the issue that comment g only applies to "a private person" and the City is clearly not a private person. Even assuming comment g applies to the City, the problem with Craig's argument is that his actual position is two steps removed from the position in the comment. First, the only entity Welch or the City provided information to was the State Auditor's Office, which in turned provided its findings to the Iowa Attorney General's office.[4] There are two entities that had the responsibility to investigate—the auditor's office and the attorney general's office—and both had the discretion in making their final determinations.

[4] It is unclear in the record if the county attorney had the information and turned it over to the attorney general's office, or the attorney general took the case straight from the auditor's information.

Second, Craig does not contend any of the information provided was "false" as noted in the comment, but rather that Welch's omission of information satisfies the requirement. While the City emphasizes that the record, including a concession from Craig in his statement of undisputed facts as well as his appeal brief, shows that Welch did not have actual knowledge of the 2000 Resolution,[5] the City is the named defendant. Therefore, whether Welch had actual knowledge of the 2000 Resolution is irrelevant as the City would clearly have imputed knowledge of its own resolutions. The City's argument that it was not a "knowing" omission fails.

The City directs us to a case from the Third Circuit Court of Appeals in which the court recognized that a person may face liability if he did not have a good faith belief in the suspect's guilt, but the duty falls on the investigating bodies, not on the individual supplying information, to determine what facts are significant in an investigation. *Griffiths v*. *CIGNA Corp*., 988 F.2d 457, 466 (3d Cir. 1993) *overruled on other grounds by Miller v*. *CIGNA Corp*., 47 F.2d 586 (1995). The *Griffiths* court found:

> [When] a person supplies accurate information to the police [or prosecuting authorities], that person, regardless of her motives and her actions in withholding other information, cannot be regarded as being responsible for the institution of criminal proceedings, so long as the police [or prosecuting authorities] retain the complete discretion in determining whether to prosecute, and so long as that person does not conceal additional information requested by the police [or prosecuting authorities].

[5] Craig claimed in his affidavit that at a special commission meeting held on October 1, 2007, which was attended by the full commission and the mayor of the City, his attorney reminded the Commission of the 2000 Resolution and the Commission "chose to ignore [his] responses." However, because we find Welch would have imputed knowledge of the resolution and the City would have actual knowledge of its own resolution, whether the resolution was brought up at the October 2007 meeting is irrelevant.

Id. at 467.

We agree with the Third Circuit's reasoning. Even considering the City had knowledge of the 2000 Resolution, the attorney general's office retained the complete discretion in determining whether to prosecute, and there is no evidence in the record that the City purposely concealed this information or acted without good faith throughout the process. What is also significant is the auditor's office attempted to contact Craig, thereby giving him the opportunity to assist in the investigation by providing this allegedly exonerating information. With no response, the auditor then noted in his report that Craig "did not return the calls."

To create a jury question, Craig was required to provide at the summary judgment stage at least some evidence that the City's failure to provide the auditor's office all information that could possibly exonerate Craig amounted to giving false information. Craig failed to do so and his claim must therefore fail as a matter of law.

B. Want of Probable Cause

The City also is entitled to judgment as a matter of law on the want-of-probable-cause element of malicious prosecution. The district court ruled against Craig on this ground in part because of the attestation at the bottom of the trial information signed by Assistant Attorney General Kivi: "I have made a full and careful investigation of the facts upon which this information is based and have determined under the authority of section 13.4 of the Code of Iowa and pursuant to rule 2.5(1) of the Rules of Criminal Procedure that a criminal prosecution is

warranted in this matter." Craig claims Assistant Attorney General Kivi's conclusion that probable cause existed to charge Craig must be examined in light of the thoroughness of his investigation leading to that conclusion. "Probable cause" for the purpose of a malicious prosecution action is described as follows:

> Probable cause exists when "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed." *Brinegar v*. *United States*, 338 U.S. 160, 175-76, (1949). In the context of a civil action for malicious prosecution the existence of probable cause is determined under the following standard:
>
> > One who initiates or continues criminal proceedings against another has probable cause for doing so if [the accuser] correctly or reasonably believes
> >
> > a) that the person [accused] has acted or failed to act in a particular manner, and
> > b) that those acts or omissions constitute the offense that [the accuser] charges against the accused, and
> > c) that [the accuser] is sufficiently informed as to the law and the facts to justify [the accuser] in initiating or continuing the prosecution.

Sisler v. *City of Centerville*, 372 N.W.2d 248, 251 (Iowa 1985) (citing Restatement (Second) of Torts § 662, at 423 (1977)). "Even in a malicious prosecution claim probable cause does not depend upon the guilt or innocence of the accused party. Rather it depends upon the honest and reasonable belief of the party causing the prosecution." *Sundholm v*. *City of Bettendorf*, 389 N.W.2d 849, 852 (Iowa 1986). Assistant Attorney General Kivi had independently reviewed the auditor's special investigation report and the Linn County Sheriff's investigations. Thereafter, a district court judge approved the trial information. Iowa R. Crim. P. 2.5(4) (requiring approval by a judge prior to

filing that the information, if unexplained, would warrant a conviction). Moreover, an arrest warrant was issued, denoting that not only did the prosecutor believe probable cause existed but a district court judge also approved the warrant application. *See* Iowa Code § 804.1 (2011) (providing that when "it appears from the complaint or from affidavits filed with it that there is probable cause to believe an offense has been committed and a designated person has committed it, the magistrate shall, except as otherwise provided, issue a warrant for the arrest of such person"). We find as a matter of law, the charge by the State, although later dismissed, was at the time of the filing of the trial information, supported by probable cause. The district court was correct in finding this element of malicious prosecution also fails.

C. Malice in Bringing the Prosecution

On the element of malice, the district court determined:

> [Craig] has not offered any evidence of malice on Mr. Welch's part. [Craig] continuously argues that at the time of these incidents Mr. Welch was no longer the 'Chair' of the Commission and accordingly did not have any authority, while at the same time arguing it is this 'authority' that led to his prosecution.

"Malice means any wrongful act which has been willfully and purposely done to the injury of another." *Brown v. Monticello State Bank*, 360 N.W.2d 81, 87 (Iowa 1984). The act must be done with an improper purpose or motive. *Id.* When the defendant is not a public official, malice may be inferred from the lack of probable cause. *See Vander Linden v. Crews*, 231 N.W.2d 904, 906 (Iowa 1975).

The district court noted that neither party discussed nor provided any evidence regarding whether Craig was a public official. Even assuming he was

not a public official and the presumption of malice can be gleaned from a lack of probable cause, Craig still did not prove the existence of a fact question as to whether the City—the only named defendant—acted with malice. As stated above, there was probable cause supporting the trial information leading to the arrest. Because the record supports a finding of probable cause, no inference of malice is available. No disputed issue of material fact exists concerning Welch or the City's motive in relaying the information to the auditors who in turn relayed it to the prosecutor.

Because the summary judgment record contains nothing from which a jury could reasonably infer that the City instigated the criminal proceeding against Craig without probable cause and with malice, we affirm the district court's dismissal of the malicious prosecution claim.

IV. Summary Judgment for False Arrest

Craig next claims the district court erred in granting the City's motion for summary judgment on the false arrest claim asserting there are either material fact issues regarding all four elements of the claim or those elements are clearly satisfied: (1) the plaintiff was detained or restrained against his will; (2) the detention or restraint was done by the defendant; (3) the detention or restraint was a proximate cause of plaintiff's damage; and (4) the amount of damage. *Kraft v*. *City of Bettendorf*, 359 N.W.2d 465, 469 (Iowa 1984). The district court found because Craig could not establish the restraint was done by the City, the second element had not been satisfied and summary judgment was proper. The

district court also held that because Craig was arrested after a finding of probable cause, there is a complete defense to the claim of false arrest.

Craig asserts there are two ways that the second element is satisfied: (1) since he was taken into custody by a peace officer employed by the City, the officer's actions could be imputed to the City and therefore the City could be found to have detained or restrained him, and (2) the City's malicious prosecution of Craig resulted in his false arrest so that the City would be seen as having directly detained and/or restrained him.

We find the district court was correct in rejecting both arguments. As discussed above, the City had nothing to do with, as the district court put it, "Craig's introduction into the criminal justice system." The only involvement of the City was that it was a City peace officer that arrested Craig, under the authority of an arrest warrant. When an officer acts with probable cause, the offer is protected even though the person arrested turns out to be innocent. *Children v*. *Burton*, 331 N.W.2d 673, 679 (Iowa 1983). In dealing with civil damage actions for false arrest, courts apply a probable cause standard, which is less demanding than the constitutional probable cause standard in criminal cases. *Id.* at 680.

As discussed above, both Assistant Attorney General Kivi and the district court judge who approved the charging information and issued the arrest warrant believed there was sufficient probable cause. Any officer taking Craig into custody would have had a reasonable and good faith belief that Craig had committed the crime based on the warrant and supporting information supplied

by the prosecuting attorney. Therefore, the actions of the officer could not provide the basis for liability on the part of the City for false arrest.

Craig's second theory that the City's malicious prosecution of Craig resulted in his false arrest is not applicable to this case as we have already affirmed the district court's finding there was no malicious prosecution. While the Restatement (Second) of Torts § 45A at page 69 (1965) provides "one who instigates or participates in the unlawful confinement of another is subject to liability to the other for false imprisonment," we have already determined that because there was probable cause, there was no unlawful confinement. Looking at the undisputed facts in the light most favorable to Craig, he is not able to satisfy the elements of false imprisonment as a matter of law.

V. Summary Judgment for Defamation

Craig's final claim is that the district court erred in granting the motion for summary judgment on the defamation claim. Defamation is the invasion of another person's interest in his or her reputation or good name. "Defamation is composed of the twin torts of libel and slander. Libel involves written statements, while slander involves oral statements." *Kiesau v. Bantz*, 686 N.W.2d 164, 174 (Iowa 2004). When the allegedly defamed person is a public official, proof that the statement was made with actual malice is required for the public official to recover. A public official or figure cannot recover damages for a defamatory statement except upon proof that the statement was made with actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964*); Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996).

To establish a prima facie case of libel, Craig must show the City "(1) published a statement that (2) was defamatory (3) of and concerning the plaintiff, and (4) resulted in injury to [him]." *Keisau*, 686 N.W.2d at 175. "There are two kinds of libel: libel per se and libel per quod. In statements that are libelous per se, falsity, malice, and injury are presumed and proof of these elements is not necessary." *Id.* Libel per se includes statements that have "a natural tendency to provoke the plaintiff to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse." *Schlegel v. Ottumwa Courier, a Div. of Lee Enterps., Inc.*, 585 N.W.2d 217, 222 (Iowa 1998) (citations omitted). Libel per quod simply means that one must refer to facts or circumstances beyond the words actually used to establish the defamation. *Id.*

If the language is capable of two meanings including the one ascribed by the complainant, it is for the jury to say whether such meaning was the one conveyed. *Berger v. Freeman Tribune Publishing Co.*, 132 Iowa 290, 295, 109 N.W. 784, 786 (Iowa 1906). This rule is distinct from the rule that words which require extrinsic evidence to show their defamatory meaning are not defamatory per se. *See Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 116 (Iowa 1984) (holding words that are defamatory per se do not need an innuendo, and words that need an innuendo are not defamatory per se).

An employer may be liable for the defamatory conduct of its employees when the defamer, at the time he uttered the words complained of, was acting within the scope of his employment, and in the actual performance of his duties

touching the subject matter of the negotiations or transactions. *Vowles v*. *Yakish*, 179 N.W. 117, 119 (Iowa 1920)

We begin our discussion by first assuming without deciding that Craig is a private figure and was therefore only required to prove the City was negligent through the actions of its employee, Welch. *See Jones v*. *Palmer Commc'ns Inc*., 440 N.W.2d 884, 889 (1989) (holding that private figure need only prove negligence in defamation action against news media defendant), *overruled on other grounds by Schlegel*, 585 N.W.2d at 224.

Craig's defamation claim was based on two allegedly libelous statements attributed to Welch as an employee of the City: (1) the quote reported and printed in the *Gazette* article: "It is a disappointment when you put a person in a position of public trust and they don't handle themselves in an absolutely trustworthy manner," and (2) the last sentence in Welch's email to Iowa State Auditor Jennifer Campbell on November 14, 2007, "Thanks for your help in dealing with this 'blivet.'!!!!! (tee hee!)." Craig argues the district court was incorrect in finding that both statements are protected statements of opinion.

A trial court's initial task in a defamation action is to decide whether the challenged statement is "capable of bearing a particular meaning, and whether that meaning is defamatory." *Yates v*. *Iowa W*. *Racing Ass'n*, 721 N.W.2d 762, 771-72 (Iowa 2006) (citing Restatement (Second) of Torts § 614(1) (1977)).

> In carrying out this task, a court should not, however, indulge far-fetched interpretations of the challenged publication. The statements at issue should . . . be construed as the average or common mind would naturally understand [them]. If the court determines that a statement is indeed capable of bearing a defamatory meaning, then whether that statement is in fact

> "defamatory and false [is a question] of fact to be resolved by the jury."

Id. (citing *Guilford Transp*. *Indus*. *Inc*. *v*. *Wilner*, 760 A.2d 580, 594 (D.C. 2000)). Because the degree to which alleged defamatory statements have real factual content can vary greatly, courts should analyze the totality of the circumstances in which such statements are made to decide whether they merit the absolute First Amendment protection enjoyed by opinion. *Id. at* 769. Our supreme court adopted a four-factor test to determine whether a statement is defamatory or opinion: (1) whether the alleged defamatory statement has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous; (2) the degree to which the alleged defamatory statements are objectively capable of proof or disproof; (3) the context in which the alleged defamatory statement occurs; (4) the broader social context into which the alleged defamatory statement fits. *Yates*, 721 N.W.2d at 770. The second factor is closely related to the first factor and noted that "if a statement is precise and easy to verify, it is likely the statement is fact." *Palmer Commc'ns*, *Inc*., 440 N.W.2d at 891.

Turning to the Welch comments, we agree with the district court that the statement in the *Gazette* is a statement of opinion; whether someone acts in an absolutely trustworthy manner, or fails to act in said manner, is subjective and therefore not sufficiently factual to be susceptible of being proved true or false. *See Iowa Supreme Ct*. *Attorney Disciplinary Bd*. *v*. *Weaver*, 750 N.W.2d 71, 82 (Iowa 2008).

We also come to the same conclusion regarding the term "blivet." In its initial summary judgment order, the district court found the term could not be an opinion because it was capable of being proven true or false. However, the district court changed its findings in its order on the City's motion to reconsider and found that the declaration was a statement of opinion, not a statement of fact. We agree and affirm the court's second finding.

The parties have proposed multiple definitions of the word "blivet" as well as multiple theories as to what context it was used in this particular instance. Craig claims "this statement is clearly used as an adverb [sic] to describe Mr. Craig" while the City claims the term is referring to the audit situation as a whole. The district court incorporated the following definitions into its opinion:

> The American Heritage Dictionary defines blivet (or blivit) as follows:
> [bliv-it]
> -noun *Slang*.
> 1. something annoying, ridiculous, or useless.
> 2. something for which one cannot find a word; something difficult to name.
> 3. an unpleasant or unsolvable situation or problem.
>
> Also, bliv-et.
> Slang Dictionary
> 1. n. someone or something annoying and unnecessary: *Don't be a blivit*. *Just calm down*.
>
> Computing Dictionary
> /bliv'*t/ [allegedly from a World War II military term meaning 'ten pounds of manure in a five-pound bag']
> 1. An intractable problem.
> 2. A crucial piece of hardware that can't be fixed or replaced if it breaks.
> 3. A tool that has been hacked over by so many incompetent programmers that it has become an unmaintainable issue of hacks.
> 4. An out-of-control but unkillable development effort.
> 5. An embarrassing bug that pops up during a customer demo.

> 6. In the subjargon of computer security specialists, a denial-of-service attack performed by hogging limited resources that have no access controls (for example, shared spool space on a multi-user system).
>
> This term has other meanings in other technical cultures; among experimental physicists and hardware engineers of various kinds it seems to mean any random object of unknown purpose (similar to hackish use of frob). It has also been used to describe an amusing trick-the-eye drawing resembling a three-pronged fork that appears to depict a three-dimensional object until one realizes that the parts fit together in an impossible way.
> American Heritage Dictionary. "Blivit". 2006. available at. http://dictionary.reference.com/browse/blivet

A statement is not defamatory per se if it is susceptible to two reasonable constructions or meanings, one not defamatory. Normally, in that case the jury must decide if the statement is defamatory. *Vinson*, 360 N.W.2d 116. However, when looking at the totality of the circumstances, when the only possible defamatory statement is wholly unreasonable to the point that no reasonable juror could find it offending, it may still be decided upon as a matter of law. For example, the Supreme Court has held a statement that an individual was "blackmailing" a city did not support a defamation action by holding "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable." *Greenbelt Coop*. *Publ'g Ass'n v*. *Bresler*, 398 U.S. 6, 14 (1970). In *Greenbelt*, the Court found "the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with [the] crime [of blackmail]." Here, a trier of fact could never specifically find that Craig is literally any one of the physically impossible meanings of the term. Under any reasonable definition that

could possibly be accepted by a juror, the reference to him, or perhaps the situation, being a "blivet" is distinguishable from an actionable claim in that the descriptive word used in this instance does not involve a possible allegation of specific fact. It was "rhetorical hyperbole," whether describing the general situation passed on to the auditor or Craig himself. It is therefore an opinion and we affirm the district court's conclusion it is not actionable as a defamation claim.

VI. Conclusion

Even when looking at the evidence in the light most favorable to Craig, there are no questions of disputed fact regarding any of the three tort claims that would survive summary judgment. There was clearly probable cause for the arrest, foreclosing the malicious prosecution claim and the false arrest claim. Moreover, the City had no part in introducing Craig to the criminal justice system. Lastly, the allegedly defaming statements were opinion and therefore protected speech. The district court was correct in granting summary judgment and we affirm on all grounds.

AFFIRMED.