

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-625

Filed: 19 May 2015

Wake County, No. 12 CVS 16656

BETH DESMOND, Plaintiff,

v.

THE NEWS AND OBSERVER PUBLISHING COMPANY, MCCLATCHY NEWSPAPERS, INC., MANDY LOCKE, JOSEPH NEFF, JOHN DRESCHER, and STEVE RILEY, Defendants.

Appeal by defendants from order entered 14 March 2014 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 18 November 2014.

DeMent Askew, LLP, by James T. Johnson, for plaintiff-appellee.

Stevens Martin Vaughn & Tadych, PLLC, by C. Amanda Martin and Hugh Stevens, for defendants-appellants.

The John Bussian Law Firm, PLLC, by John A. Bussian, for amicus curiae the North Carolina Press Association, Inc.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mark J. Prak and W. Michael Dowling, for amicus curiae the North Carolina Association of Broadcasters, Inc.

STROUD, Judge.

The News and Observer Publishing Company (“N&O”), McClatchy Newspapers, Inc. (“McClatchy”), and Mandy Locke (collectively “defendants”) appeal from the trial court’s order denying their motion for summary judgment as to libel

Opinion of the Court

claims brought by Beth Desmond (“plaintiff”). We affirm in part, reverse in part, and remand the case to the trial court.

I. Factual Background

The alleged defamation arose out of defendants’ newspaper articles regarding plaintiff’s testimony in two criminal trials. Both of the criminal defendants in those cases appealed their convictions to this Court, and we will first review briefly the facts of those underlying cases, as previously described by this Court.

A. Underlying Criminal Cases

[In Pitt County, North Carolina, during] the afternoon of 19 April 2005, Loretta Strong and several of her female cousins and friends (collectively, the “Haddock girls”) were socializing in a vacant lot across the street from the home of Strong’s grandmother, Lossie Haddock. [Vonzeil Adams] drove by the lot with a group of her girlfriends. A verbal altercation arose between the two groups of women. [Adams] was angry with the Haddock girls because [Adams’s] sister had complained to [Adams] that the Haddock girls had assaulted the sister in the presence of [Adams’s] children. During the exchange, [Adams] said she would return and that she had “something” for the Haddock girls.

Later that afternoon, some of the Haddock girls drove by [Adams’s] house where another verbal altercation occurred. The Haddock girls returned to and congregated on Lossie Haddock’s porch.

Around 6:00 p.m. or 7:00 p.m., [Adams] traveled to Lossie Haddock’s house in a reddish Chevrolet Caprice driven by her boyfriend, Jemaul Green. [Adams’s] sister and several girlfriends were in the car as well. A car full of [Adams’s] girlfriends followed shortly behind. [Green] parked the car across from Lossie Haddock’s house. [Adams] exited the vehicle and walked toward the house,

Opinion of the Court

exchanging words with the women on the porch. The other women exited the vehicle, but stayed behind [Adams]. Strong stepped off the porch and began to approach [Adams], but stopped before she reached the street.

[Adams] stopped in the middle of the road. She then exclaimed that someone should get a firearm and shoot the Haddock girls. . . . [Green] exited the vehicle and fired a gun into the air. [Green] then pointed the gun in the direction of Lossie Haddock's house and fired several shots. Jasmine Cox, who was on the porch, began running into the house after she saw [Green] point the gun in the air. She was the first person to get into the house, and testified that, after she got in, she heard more gunfire following the first shots.

Ten-year-old Christopher Foggs, who had been playing in the area, was found face down next to the Haddock house. When he was turned over, a gunshot wound to his chest was discovered. He died from the wound at the hospital later that evening.

State v. Adams, 212 N.C. App. 235, 713 S.E.2d 251, slip op. at 2-4 (2011) (unpublished). Police never recovered a gun. *Id.*, 713 S.E.2d 251.

On 25 April 2005, a grand jury indicted Green for first-degree murder, among other charges. *State v. Green*, 187 N.C. App. 510, 653 S.E.2d 256, slip op. at 1 (2007) (unpublished), *appeal dismissed and disc. review denied*, 362 N.C. 240, 660 S.E.2d 489 (2008). During the summer 2006 trial, plaintiff, a North Carolina State Bureau of Investigation ("SBI") forensic firearms examiner, opined to a scientific certainty that eight cartridge cases, which were found at the site of the shooting, were all fired from the same gun, a High Point 9 millimeter semiautomatic pistol. Plaintiff further opined that two bullets, which were found at the site of shooting, were fired from the

Opinion of the Court

same *type* of gun, a High Point 9 millimeter semiautomatic pistol, but that she could not conclusively determine whether the bullets were fired from the same gun. On voir dire, plaintiff testified she was absolutely certain as to her findings. In a lab report, plaintiff stated that the two bullets “exhibit class characteristics that are consistent with ammunition components that are fired by firearms that are manufactured by or known as: Hi-point (Model C)[.]”

At trial, Green testified that, during the confrontation, a person shot a gun at him. He testified that he shot back at the person but that the person ran away. On 2 August 2006, a jury found Green guilty of second-degree murder, among other offenses. *Id.*, 653 S.E.2d 256, slip op. at 1.

A grand jury also indicted Adams for first-degree murder, among other charges. *Adams*, 212 N.C. App. 235, 713 S.E.2d 251, slip op. at 1-2. During the spring 2010 trial, plaintiff gave the same opinion about the cartridge cases and bullets. *Id.*, 713 S.E.2d 251, slip op. at 5. A jury found Adams guilty of voluntary manslaughter, under an aiding-and-abetting theory, among other offenses. *Id.*, 713 S.E.2d 251, slip op. at 7.

During Adams’s trial, her lawyer, David Sutton, arranged for Frederick Whitehurst, who had previously worked as a forensic chemist in a Federal Bureau of Investigation (“FBI”) crime laboratory, to take photographs of the two bullets butt-to-butt with his microscope.

Opinion of the Court

B. Newspaper Articles

In March 2010, Locke, an investigative reporter for N&O, became interested in the *Green* and *Adams* cases. Locke interviewed plaintiff; Sutton; Whitehurst; Liam Hendrikse, a firearms forensic scientist; Stephen Bunch, a firearms forensic scientist and former FBI scientist; William Tobin, a forensic material scientist and metallurgist; Adina Schwartz, a professor at the John Jay College of Criminal Justice; Clark Everett, the Pitt County district attorney during the *Green* and *Adams* cases; and Jerry Richardson, the SBI laboratory director.

On 14 August 2010, N&O published an article written by Locke and Joseph Neff, which was entitled, “SBI relies on bullet analysis critics deride as unreliable[.]” In the 14 August article, Locke and Neff are highly critical of plaintiff’s bullet analysis and testimony in the *Green* and *Adams* cases and include one of Whitehurst’s photographs of the two bullets. In September or October 2010, Everett engaged Bunch to conduct an outside examination of the eight cartridge cases and two bullets. Bunch agreed with plaintiff that the eight cartridge cases were fired from the same firearm. Bunch also concluded that it is *likely*, but not certain, that the two bullets were fired from the same type of gun, a High Point 9 millimeter semiautomatic pistol. Bunch further concluded that the two bullets *could* have been fired from the same gun. On 31 December 2010, N&O published a follow-up article, written by Locke and Neff, which was entitled “Report backs SBI ballistics[.]” In the 31 December article,

Opinion of the Court

Locke and Neff discussed Bunch's results but emphasized that, unlike plaintiff, Bunch refused to ascribe absolute certainty to his finding that the two bullets were likely fired from the same type of gun.

II. Procedural Background

On 1 September 2011, plaintiff brought libel claims against N&O, McClatchy, N&O's parent company, Locke, Neff, John Drescher, N&O's executive editor, and Steve Riley, N&O's senior editor of investigations, among other defendants who were later dismissed from this action. On 27 June 2013, plaintiff filed her first amended complaint. On or about 22 January 2014, plaintiff moved to amend her first amended complaint. On 27 January 2014, N&O, McClatchy, Locke, Neff, Drescher, and Riley moved for summary judgment. On or about 5 March 2014, the trial court allowed plaintiff's motion, and plaintiff filed her second amended complaint. On 14 March 2014, the trial court granted Neff, Drescher, and Riley's motion for summary judgment but denied N&O, McClatchy, and Locke's motion for summary judgment. On 4 April 2014, defendants gave timely notice of appeal.

III. Interlocutory Appeal

As an initial matter, we note that the trial court's order denying defendants' motion for summary judgment was interlocutory. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). But "immediate appeal

Opinion of the Court

is available from an interlocutory order or judgment which affects a substantial right.” *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted). Defendants contend that the trial court’s order misapplied the actual malice standard, which adversely affected their rights to free speech and freedom of the press as guaranteed by the First Amendment to the U.S. Constitution and article I, section 14 of the North Carolina Constitution. *See* U.S. Const. amend. I; N.C. Const. art. 1, § 14. “Our Courts have recognized that because a misapplication of the actual malice standard when considering a motion for summary judgment would have a chilling effect on a defendant’s right to free speech, a substantial right is implicated.” *Boyce & Isley, PLLC v. Cooper*, 211 N.C. App. 469, 474, 710 S.E.2d 309, 314 (quotation marks omitted) (“Boyce II”), *disc. review denied*, 365 N.C. 365, 718 S.E.2d 403 (2011), *cert. denied*, ___ U.S. ___, 182 L. Ed. 2d 1018 (2012). Accordingly, we hold that this appeal is properly before us.

IV. Standard of Review

We review a trial court’s summary judgment order *de novo* and view the evidence in the light most favorable to the non-movant. *Erthal v. May*, ___ N.C. App. ___, ___, 736 S.E.2d 514, 517 (2012), *appeal dismissed and disc. review denied*, 366 N.C. 421, 736 S.E.2d 761 (2013). We engage in a two-part analysis of whether:

- (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact;

Opinion of the Court

and (2) the moving party is entitled to judgment as a matter of law.

Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party.

Id. at ___, 736 S.E.2d at 517 (citations and quotation marks omitted).

V. Libel

Defendants argue that the trial court erred by denying their motion for summary judgment as to plaintiff's libel claims. "In North Carolina, the term defamation applies to the two distinct torts of libel and slander." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 898 (2002) ("Boyce I"), *appeal dismissed and disc. review denied*, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 540 U.S. 965, 157 L. Ed. 2d 310 (2003). In order to recover for defamation, a plaintiff generally must show that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person. *See id.*, 568 S.E.2d at 897. This statement must be a statement of fact, not opinion, but "an individual cannot preface an otherwise defamatory statement with 'in my opinion' and claim immunity from liability." *Lewis v. Rapp*, 220 N.C. App. 299, 306, 725 S.E.2d 597, 603 (2012) (quotation marks and brackets omitted).

Whether a statement constitutes fact or opinion is a question of law for the trial court to decide. Like all questions of law, it is subject to *de novo* review on appeal. .

Opinion of the Court

. . . In determining whether a statement can be reasonably interpreted as stating actual facts about an individual, courts look to the circumstances in which the statement is made. Specifically, we consider whether the language used is loose, figurative, or hyperbolic language, as well as the general tenor of the article.

Id. at 304-05, 725 S.E.2d at 602 (citation and quotation marks omitted). “[T]he court must view the words within their full context[.]” *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899.

Moreover,

[w]here the plaintiff is a public official and the allegedly defamatory statement concerns his official conduct, he must prove that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. The rule requiring public officials to prove actual malice is based on First Amendment principles and reflects the Court’s consideration of our national commitment to robust and wide-open debate of public issues.

When a defamation action brought by a public official is at the summary judgment stage, the appropriate question for the trial judge is whether the evidence presented is sufficient to allow a jury to find that actual malice had been shown with convincing clarity.

It is important to acknowledge that evidence of personal hostility does not constitute evidence of actual malice. Additionally, reckless disregard is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

Opinion of the Court

Lewis, 220 N.C. App. at 302-03, 725 S.E.2d at 601 (citations, quotation marks, and brackets omitted). Plaintiff stipulates that she is a public official.

Plaintiff contends that the following 12 statements in the 14 August 2010 article are false, defamatory statements of or concerning her, which defendants published with actual malice. We number the statements for clarity:

1. They asked Desmond, an SBI firearms analyst, to determine whether the two bullet fragments had passed through the same gun, a Hi-Point 9 mm she had already linked to a cluster of casings at the crime scene.
2. Desmond would turn to firearms and toolmark identification . . . to harness these clues into proof that Green was the only gunman.
3. The day after getting the request from prosecutors, [Desmond] testified that she was absolutely certain both bullets were fired from a Hi-Point 9 mm Model C handgun, the same type she had matched to casings scattered about the ground where Green stood that day. Her report eliminated doubt about another shooter.
4. She scribbled down the measurements of the lands and grooves[.]
5. This spring, Sutton asked a former FBI crime lab analyst to photograph the bullets under a microscope. Butt to butt, amplified several times, the bullets look starkly different.
6. Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted.

Opinion of the Court

7. “This is a big red flag for the whole unit,” said William Tobin, former chief metallurgist for the FBI, who has testified about potential problems in firearms analysis. “This is as bad as it can be. It raises the question of whether she did an analysis at all.”

8. Experts, therefore, can’t provide probability of error.

9. [A]ssuring a jury of a match is risky.

10. The independent analysts say the widths of the lands and grooves on the two bullets are starkly different, which would make it impossible to have the same number.

11. “You don’t even need to measure to see this doesn’t add up,” said Hendrikse, the firearms analyst from Toronto. “It’s so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice.”

12. Other firearms analysts say that even with the poor photo lighting and deformed bullets, it’s obvious that the width of the lands and grooves are different.

Plaintiff further contends that the following 4 statements in the 31 December 2010 article are also false, defamatory statements of or concerning her, which defendants published with actual malice:

13. However, agent’s courtroom certainty that bullets came from one gun in question.

14. But SBI ballistics analyst Beth Desmond went beyond the finding of her lab report when she testified under oath that she was certain the bullets were fired from the same make of gun. The report’s findings undermined the certainty of her testimony.

15. The photo, taken under a microscope by a former FBI scientist, showed bullet fragments with dissimilar

Opinion of the Court

markings.

16. Ballistics experts who viewed the photographs, including a second FBI scientist who wrote the report released Thursday, said the bullets could not have been fired from the same firearm.

We will address these 16 statements in four groups: (1) statements about expert opinions; (2) statements about plaintiff's testimony in the *Green* and *Adams* cases; (3) statements about Whitehurst's photographs; and (4) any remaining statements. For each, before we consider the question of actual malice, we will address whether the statements as alleged are actually false, defamatory statements of or concerning plaintiff.

A. Statements About Expert Opinions

Statements 6, 7, 10, 11, 12, and 16 discuss the opinions of various experts that Locke consulted about plaintiff's analysis of the bullets:

6. Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted.

7. "This is a big red flag for the whole unit," said William Tobin, former chief metallurgist for the FBI, who has testified about potential problems in firearms analysis. "This is as bad as it can be. It raises the question of whether she did an analysis at all."

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Opinion of the Court

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12. Other firearms analysts say that even with the poor photo lighting and deformed bullets, it’s obvious that the width of the lands and grooves are different.

16. Ballistics experts who viewed the photographs, including a second FBI scientist who wrote the report released Thursday, said the bullets could not have been fired from the same firearm.

We first note that defendants argue that “[m]any of the statements identified in [plaintiff’s] Complaint are simply expressions of opinion” by various experts whom Locke interviewed, not assertions of fact, and thus not actionable. Defendants contend that “[t]he Supreme Court consistently has held that such statements cannot form the basis for a defamation claim.” *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L. Ed. 2d 1 (1990). But in *Milkovich*, the U.S. Supreme Court did not create “an artificial dichotomy between ‘opinion’ and fact” and noted that “expressions of ‘opinion’ may often imply an assertion of objective fact.” *Id.* at 18-19, 111 L. Ed. 2d at 17-18. The Supreme Court gave this example:

If a speaker says, “In my opinion John Jones is a liar,” he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the

Opinion of the Court

statement, “In my opinion Jones is a liar,” can cause as much damage to reputation as the statement, “Jones is a liar.” As Judge Friendly aptly stated: “It would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct simply by using, explicitly or implicitly, the words ‘I think.’”

Id., 111 L. Ed. 2d at 17-18 (brackets omitted). Thus, the Supreme Court held that “where a statement of ‘opinion’ on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth.” *Id.* at 20, 111 L. Ed. 2d at 19.

In this case, which involves mostly Locke’s reports of opinions of experts regarding Desmond’s work, fact and opinion are difficult to separate. Some of the allegedly defamatory statements, though stated as expressions of opinion from experts, may be factually false because Locke reported that the experts expressed opinions regarding Desmond’s work that they actually did not express. In some instances, the evidence indicates that Locke asked the experts a hypothetical question, and they answered on the assumption that the facts of the hypothetical question were true, while the facts were actually false and Locke either knew the facts were false or she asked the question with reckless disregard for the actual facts. The experts’ opinions were then stated in the article as opinions which the experts gave about Desmond’s actual work, instead of in response to a hypothetical question.

Opinion of the Court

Thus, the statements, even as opinions, “imply a false assertion of fact” and may be actionable under *Milkovich*. *See id.* at 19, 111 L. Ed. 2d at 18.

With regard to Statement 6, Locke stated in her deposition that her sources who questioned whether plaintiff “knows anything” about firearms analysis and who suspected that plaintiff “falsified the evidence” were Tobin, Hendrickse, and Bunch. Each of these experts denied making these comments to Locke. In their brief, defendants attribute the source of this statement to Locke’s interview with Schwartz. But even assuming *arguendo* that Schwartz was Locke’s source for this statement, defendants ignore the fact that the article clearly attributes this statement to multiple experts. Therefore, Schwartz’s interview with Locke could not fully support this statement. In the light most favorable to plaintiff, this evidence creates a genuine issue of material fact as to whether Locke wrote Statement 6 “with knowledge that it was false or with reckless disregard of whether it was false or not.” *See Lewis*, 220 N.C. App. at 302, 725 S.E.2d at 601; *Cochran v. Piedmont Publishing Co.*, 62 N.C. App. 548, 550, 302 S.E.2d 903, 904-05 (holding that the publication of a statement attributed to a source, which that source denied making, created a genuine issue of material fact as to whether the statement was published with actual malice), *appeal dismissed and disc. review denied*, 309 N.C. 819, 310 S.E.2d 348 (1983), *cert. denied*, 469 U.S. 816, 83 L. Ed. 2d 30 (1984).

Opinion of the Court

With regard to Statement 7, in his deposition, Tobin disputed that he made those comments. He specifically denied that he questioned whether plaintiff had done an analysis at all. Additionally, he stated that that his comments regarding “a big red flag” and the analysis being “as bad as it can be” were only made in response to a hypothetical question posed by Locke that assumed an error had been made and that those comments were never intended to apply to plaintiff’s actual work in the *Green* and *Adams* cases. Tobin further stated that, after the 14 August article was published, he contacted the SBI and told Richardson that he had never intended any of the comments he provided to Locke to apply specifically to plaintiff’s work. In the light most favorable to plaintiff, Tobin’s deposition testimony created a genuine issue of material fact as to whether Locke acted with actual malice when she published Statement 7, because Tobin either denied making these comments or he explained that the material meaning of his comments had been deliberately altered. *See Cochran*, 62 N.C. App. at 550, 302 S.E.2d at 904-05; *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 115 L. Ed. 2d 447, 473 (1991) (“[A] deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement.”).

Defendants respond that Tobin testified several times that he did not recall everything he told Locke, and that, based on Locke’s notes, the statement attributed to Tobin was accurate. But Tobin’s deposition testimony and Locke’s notes, at best,

Opinion of the Court

create a contradiction in the evidence, which must be resolved by the jury, not the trial judge. *See Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 395, 651 S.E.2d 261, 265 (2007) (“Contradictions or discrepancies in the evidence even when arising from plaintiff’s evidence must be resolved by the jury rather than the trial judge.”).

With regard to Statements 10 and 12, defendants assert that these statements are factually accurate and thus cannot be defamatory. *See Letter Carriers v. Austin*, 418 U.S. 264, 284, 41 L. Ed. 2d 745, 761 (1974) (“Before the test of reckless or knowing falsity can be met, there must be a false statement of fact.”).

There was much deposition testimony about the differences between an analysis based upon a physical examination of the actual bullets and an analysis of Whitehurst’s photographs, particularly considering how the bullets were oriented in the photographs. Defendants correctly assert that even plaintiff acknowledges that, in Whitehurst’s photographs, the bullets look different. In her deposition, plaintiff admitted this:

[Defendants’ lawyer:] . . . [I]s it accurate to say that butt to butt and amplified seven times, the bullets look starkly different? . . .

[Desmond:] I agree.

. . . .

[Desmond:] All right. The statement itself, if you take the statement by itself, essentially it’s based on truth, because Sutton did ask Whitehurst to photograph the bullets and he—and Whitehurst did photograph them butt to butt.

Opinion of the Court

And the photograph itself does look—and the bullets in the photograph do look different.

But the potentially defamatory, and allegedly false, portion of Statements 10 and 12 is the report of the opinions of various experts about the photographs of the bullets. Viewed in context, Statements 10 and 12 indicate that, after examining the photographs, independent analysts concluded that plaintiff's analysis was incorrect. *See Lewis*, 220 N.C. App. at 305, 725 S.E.2d at 602 (“[C]ourts look to the circumstances in which the statement is made.”); *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899 (“[T]he court must view the words within their full context[.]”). But in their depositions, Tobin, Hendrikse, and Bunch stated that they told Locke that they could not give an opinion based on the photographs alone. Additionally, Bunch, the only one of the three to physically examine the actual bullets, concluded that it was likely that the two bullets were fired from the same type of gun, a High Point 9 millimeter semiautomatic pistol.

Defendants also claim that these statements are either not defamatory of Desmond or not “of and concerning” Desmond, but this argument requires that we take the statements entirely out of context, which we cannot do. *See Lewis*, 220 N.C. App. at 305, 725 S.E.2d at 602; *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899. In context, all the statements are criticizing Desmond's analysis of the bullets, and therefore are “of and concerning her” and potentially defamatory of her. In the light most favorable to plaintiff, we hold that there is a genuine issue of material fact as to

Opinion of the Court

whether Locke acted with actual malice when she published Statements 10 and 12. *See Cochran*, 62 N.C. App. at 550, 302 S.E.2d at 904-05; *Masson*, 501 U.S. at 517, 115 L. Ed. 2d at 473.

With regard to Statement 11, Hendrikse averred that his comments were “taken out of context.” He admitted that he said, “You don’t even need to measure to see this doesn’t add up.” But he averred that his full comment “was something to the effect that you don’t even need to measure to see that a second opinion was warranted, again, making it clear to Ms. Locke that only by physically examining the evidence can you determine whether [plaintiff] was right or wrong.” He also averred that he commented that plaintiff may have accidentally measured the same bullet twice only in response to a hypothetical question that assumed plaintiff had made an error. Thus, in the light most favorable to plaintiff, we hold that there is a genuine issue of material fact as to whether Locke acted with actual malice when she published Statement 11. *See Cochran*, 62 N.C. App. at 550, 302 S.E.2d at 904-05; *Masson*, 501 U.S. at 517, 115 L. Ed. 2d at 473.

With regard to Statement 16, Bunch, the “second FBI scientist who wrote the report released Thursday,” did not conclude that the two bullets could not have been fired from the same gun; on the contrary, he concluded that the two bullets *could* have been fired from the same gun. Additionally, he, Tobin, and Hendrikse stated that they could not give an opinion based on the photographs alone. We also note

Opinion of the Court

that plaintiff never testified that the bullets were fired from the same gun; rather, she testified that the bullets were fired from the same *type* of gun. Thus, in the light most favorable to plaintiff, we hold that there is a genuine issue of material fact as to whether Locke acted with actual malice when she published Statement 16. *See Cochran*, 62 N.C. App. at 550, 302 S.E.2d at 904-05; *Masson*, 501 U.S. at 517, 115 L. Ed. 2d at 473.

In summary, we hold that the trial court properly denied defendants' motion for summary judgment as to the statements about expert opinions, specifically Statements 6, 7, 10, 11, 12, and 16.

B. Statements About Plaintiff's Testimony

Statements 1, 2, 3, 9, 13, and 14 discuss plaintiff's testimony in the *Green* and *Adams* cases:

1. They asked Desmond, an SBI firearms analyst, to determine whether the two bullet fragments had passed through the same gun, a Hi-Point 9 mm she had already linked to a cluster of casings at the crime scene.
2. Desmond would turn to firearms and toolmark identification . . . to harness these clues into proof that Green was the only gunman.
3. The day after getting the request from prosecutors, [Desmond] testified that she was absolutely certain both bullets were fired from a Hi-Point 9 mm Model C handgun, the same type she had matched to casings scattered about the ground where Green stood that day. Her report eliminated doubt about another shooter.

Opinion of the Court

9. [A]ssuring a jury of a match is risky.

13. However, agent's courtroom certainty that bullets came from one gun in question.

14. But SBI ballistics analyst Beth Desmond went beyond the finding of her lab report when she testified under oath that she was certain the bullets were fired from the same make of gun. The report's findings undermined the certainty of her testimony.

Defendants contend that the fair report privilege protects them from a defamation claim as to these statements, because the articles report on North Carolina's judicial system generally and the criminal trials of Green and Adams in particular. Defendants note that this Court has held that the press has a privilege to report on such judicial proceedings, provided the reporting offers a substantially accurate account. *See LaComb v. Jacksonville Daily News Co.*, 142 N.C. App. 511, 512-13, 543 S.E.2d 219, 220-21, *disc. review denied*, 353 N.C. 727, 550 S.E.2d 778 (2001). Plaintiff's brief fails to address this privilege.

The fair report privilege flows from the absolute privilege which attaches to statements made in the due course of a judicial proceeding. Official statements made in a judicial proceeding will not support a civil action for defamation. This privilege includes statements made in arrest warrants. Statements in pleadings and other papers filed in a judicial proceeding which are relevant or pertinent to the subject matter in controversy are cloaked with this absolute privilege.

Id. at 513, 543 S.E.2d at 221 (citations, quotation marks, and brackets omitted).

Under the fair report privilege, "[t]he law does not require absolute accuracy in

Opinion of the Court

reporting. It does impose the word ‘substantial’ on the accuracy, fairness and completeness. It is sufficient if it conveys to the persons who read it a substantially correct account of the proceedings.” *Id.* at 512, 543 S.E.2d at 220.

With respect to Statement 1, plaintiff contends that she did not testify that a High Point 9 millimeter gun was linked to the cartridge cases. But plaintiff testified that the cartridge cases were all fired from the same gun, a High Point 9 millimeter semiautomatic pistol. We thus hold that Statement 1 is substantially accurate. *See id.*, 543 S.E.2d at 220.

With respect to Statement 2, plaintiff contends that she never testified that Green was the only shooter. But neither party disputes that the State in the *Green* and *Adams* cases proffered plaintiff’s testimony as evidence supporting the State’s theory that Green was the only shooter, and that when considered along with the rest of the evidence, a jury might reasonably infer that Green was the only shooter. We thus hold that Statement 2 is substantially accurate. *See id.*, 543 S.E.2d at 220.

With respect to Statement 3, plaintiff asserts that (1) she did not testify that the bullets were fired from the same gun; (2) her report did not eliminate doubt about another shooter; and (3) she did not testify with absolute certainty before a jury. First, we acknowledge that plaintiff did not testify that the bullets were fired from the same gun; rather, she testified that the bullets were fired from the same *type* of gun. Although Statement 3 is ambiguous about whether plaintiff testified that the

Opinion of the Court

bullets were fired from the same gun or same type of gun, we hold that this statement is substantially accurate given that plaintiff testified that both bullets were fired from the same type of gun, a High Point 9 millimeter semiautomatic pistol. Second, as noted above, neither party disputes that the State proffered plaintiff's testimony as evidence supporting the State's theory that Green was the only shooter, and that when considered along with the rest of the evidence, a jury might reasonably infer that Green was the only shooter. Finally, plaintiff admits that, on voir dire, outside the presence of the jury, she testified that she was absolutely certain as to her findings:

[Green's counsel:] Can you tell with absolute certainty that these came from a 9 mm weapon?

[Plaintiff:] Yes.

[Green's counsel:] As opposed to being consistent with a 9 mm weapon?

[Plaintiff:] I am with absolute certainty saying that it's a 9 mm High Point firearm.

Sworn testimony presented in court, whether before the judge on voir dire or to the jury, is undoubtedly made "in the due course of a judicial proceeding." *See id.* at 513, 543 S.E.2d at 221. Plaintiff has not presented any authority for her seeming assertion that there is a difference between testimony presented on voir dire or testimony presented to a jury. As demonstrated by the quoted testimony above, plaintiff did testify with absolute certainty that the bullets came from the same type

Opinion of the Court

of gun. We thus hold that Statement 3 is substantially accurate. *See id.* at 512, 543 S.E.2d at 220.

With regard to Statement 9, plaintiff asserts that she did not assure a jury of a match. But Locke did not make this claim. We must examine Statement 9 in context. *See Lewis*, 220 N.C. App. at 305, 725 S.E.2d at 602; *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899. The 14 August article states:

Experts say they can use smaller markings on a bullet to pinpoint a particular gun.

The use of those finer markings can be inexact, too. One study suggests that up to 20 percent of guns of the same model produce identical markings on fired bullets. In other words, assuring a jury of a match is risky.

The article does not state that plaintiff “assur[ed]” a jury, as plaintiff suggests in her complaint. Accordingly, we hold that Statement 9 is not actionable.

With regard to Statement 13, plaintiff contends that she never testified that the bullets were fired from the same gun. Again, plaintiff is correct but plaintiff did testify that both bullets were fired from the same *type* of gun, a High Point 9 millimeter semiautomatic pistol. While Statement 13 is not absolutely accurate, we hold that, under the fair report privilege, this statement is *substantially* accurate and thus not actionable. *See LaComb*, 142 N.C. App. at 512, 543 S.E.2d at 220; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 41 L. Ed. 2d 789, 805-06 (1974) (“Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to

Opinion of the Court

guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.”).

With regard to Statement 14, plaintiff contends that she did not testify with absolute certainty before a jury and that her lab report did not undermine the certainty of her testimony. As noted above, the articles correctly state that plaintiff testified with absolute certainty that the bullets were fired from the same type of gun, a High Point 9 millimeter semiautomatic pistol. In contrast, in her lab report, plaintiff did not ascribe absolute certainty to her findings; rather, she stated that the two bullets “exhibit class characteristics that are *consistent* with ammunition components that are fired by firearms that are manufactured by or known as: Hi-point (Model C)[.]” (Emphasis added.) She also noted: “Do not use this list to eliminate any suspect firearm of similar caliber and class characteristics.” Accordingly, we hold that Statement 14 is substantially accurate. *See LaComb*, 142 N.C. App. at 512, 543 S.E.2d at 220.

With respect to Statements 1, 2, 3, 9, 13, and 14, defendants are protected by the fair report privilege. Accordingly, we hold that the trial court should have granted summary judgment in favor of defendants as to these statements.

C. Statements About Whitehurst’s Photographs

Statements 5 and 15 discuss Whitehurst’s photographs:

5. This spring, Sutton asked a former FBI crime lab analyst to photograph the bullets under a microscope. Butt

Opinion of the Court

to butt, amplified several times, the bullets look starkly different.

15. The photo, taken under a microscope by a former FBI scientist, showed bullet fragments with dissimilar markings.

Defendants contend that these statements are factually accurate and thus not actionable. *See Austin*, 418 U.S. at 284, 41 L. Ed. 2d at 761 (“Before the test of reckless or knowing falsity can be met, there must be a false statement of fact.”). We agree.

Plaintiff contends that Whitehurst is not a qualified expert and that his photographs are misleading. But there is no genuine dispute as to the truth of Statements 5 and 15. First, Whitehurst was in fact a “former FBI crime lab analyst[,]” regardless of his qualifications to review plaintiff’s analysis. Second, Sutton asked Whitehurst to photograph the bullets under a microscope, and he did. As noted above, even plaintiff admitted that the bullets look different in the photographs. Thus, there is no genuine issue as to the factual accuracy of Statements 5 and 15. Accordingly, we hold that the trial court should have granted summary judgment in favor of defendants as to these statements.

D. Remaining Statements

We finally address the remaining statements, Statements 4 and 8:

4. She scribbled down the measurements of the lands and grooves[.]

Opinion of the Court

8. Experts, therefore, can't provide probability of error.

With regard to Statement 4, plaintiff contends that this statement is either libel *per se* or libel *per quod*. To be libelous *per se*, a statement “must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that [it] tend[s] to disgrace and degrade the party or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided.” *Skinner v. Reynolds*, ___ N.C. App. ___, ___, 764 S.E.2d 652, 655 (2014). To be libelous *per quod*, a statement must be defamatory “when considered in conjunction with innuendo, colloquium, and explanatory circumstances[.]” *Id.* at ___, 764 S.E.2d at 657. Plaintiff essentially contends that she does not “scribble” her notes and the assertion that she did is defamatory. But even if the statement that plaintiff “scribbled” is false, we hold that it does not “tend to disgrace and degrade [plaintiff] or hold [her] up to public hatred, contempt, or ridicule, or cause [her] to be shunned and avoided.” *See id.* at ___, 764 S.E.2d at 655. We further hold that Statement 4 does not become defamatory “when considered in conjunction with innuendo, colloquium, and explanatory circumstances[.]” *See id.* at ___, 764 S.E.2d at 657. Because Statement 4 is neither libelous *per se* nor libelous *per quod*, we hold that the trial court should have granted summary judgment in favor of defendants as to that statement.

With regard to Statement 8, plaintiff contends that this statement is false, because “[f]orensic firearms examiners have established and recognized error rates

Opinion of the Court

that stem from proficiency tests and validation studies.” But defendants proffer academic literature from the National Academy of Sciences, which states: “[T]he decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates.” We must examine Statement 8 in context. *See Lewis*, 220 N.C. App. at 305, 725 S.E.2d at 602; *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899. The 14 August article states:

As forensic science goes, firearm and toolmark analysis stands on shaky legs. It’s built on the idea that every tool leaves a unique mark.

Unlike with DNA, there is no statistical foundation. Experts, therefore, can’t provide probability of error. Every bullet identification boils down to a subjective evaluation by an analyst.

Viewed in context, Statement 8 represents an opinion that firearm and toolmark analysis lacks a statistical foundation for error rates similar to those used for DNA analysis. Unlike the opinions of experts whom Locke interviewed, discussed in section A above, Statement 8 refers to the reliability of firearm and toolmark analysis in general. Experts differ on the reliability of firearm and toolmark analysis, so Statement 8 is not incorrect. Plaintiff has failed to show how this statement makes a false assertion of objective fact. *See Milkovich*, 497 U.S. at 19, 111 L. Ed. 2d at 18. In addition, the statement is not directly of or concerning plaintiff herself, but is more of a criticism of firearm and toolmark analysis generally. Accordingly, we hold that

Opinion of the Court

the trial court should have granted summary judgment in favor of defendants as to Statement 8.

In summary, we hold that there is a genuine issue of material fact as to whether Statements 6, 7, 10, 11, 12, and 16 are false and defamatory and whether Locke acted with actual malice when she attributed those statements to firearms experts, as they either denied making those statements or claim that those statements were made in a different context that materially changed their meaning. In the light most favorable to plaintiff, the evidence is “sufficient to allow a jury to find that actual malice [has] been shown with convincing clarity.” *See Lewis*, 220 N.C. App. at 303, 725 S.E.2d at 601. But we hold that defendants were entitled to summary judgment as to Statements 1, 2, 3, 9, 13, and 14, which discussed plaintiff’s testimony in the *Green* and *Adams* cases; Statements 5 and 15, which discussed Whitehurst’s photographs; and Statements 4 and 8, the remaining statements.

Moreover, [i]t is well settled that all who take part in the publication of a libel or who procure or command libelous matter to be published may be sued by the person defamed either jointly or severally.” *Taylor v. Press Co.*, 237 N.C. 551, 552, 75 S.E.2d 528, 529 (1953). Defendants do not argue otherwise, so plaintiff’s surviving claims should proceed against all three defendants.

VI. Conclusion

Opinion of the Court

Taking the evidence presented in the light most favorable to plaintiff, there were genuine issues of material fact as to whether defendants published defamatory statements of or concerning plaintiff with actual malice. The trial court properly denied defendants' motion for summary judgment as to the statements identified above as

6. Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted.

7. "This is a big red flag for the whole unit," said William Tobin, former chief metallurgist for the FBI, who has testified about potential problems in firearms analysis. "This is as bad as it can be. It raises the question of whether she did an analysis at all."

10. The independent analysts say the widths of the lands and grooves on the two bullets are starkly different, which would make it impossible to have the same number.

11. "You don't even need to measure to see this doesn't add up," said Hendrikse, the firearms analyst from Toronto. "It's so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice."

12. Other firearms analysts say that even with the poor photo lighting and deformed bullets, it's obvious that the width of the lands and grooves are different.

16. Ballistics experts who viewed the photographs, including a second FBI scientist who wrote the report released Thursday, said the bullets could not have been fired from the same firearm.

Opinion of the Court

As to the remaining statements which were addressed above as “statements about plaintiff’s testimony” or “statements about Whitehurst’s photographs” or “the remaining statements,” the trial court erred in failing to grant defendants’ motion for summary judgment. Accordingly, we affirm the trial court’s order in part, reverse it in part, and remand the case to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges CALABRIA and McCULLOUGH concur.