

STATE OF MICHIGAN
COURT OF APPEALS

ANDREW RACZKOWSKI,

Plaintiff-Appellant,

v

GARY PETERS and MARK BREWER,

Defendants-Appellees.

UNPUBLISHED

November 13, 2012

No. 302606

Oakland Circuit Court

LC No. 2010-113632-NZ

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court order granting defendants' motions for summary disposition in this defamation action. We affirm.

In September 2010, plaintiff was the Republican candidate for the United States House of Representatives in the 9th Congressional District of Michigan running against defendant Peters, the Democratic incumbent. At that time, defendant Brewer was the chairman of the Democratic Party in Michigan. Defendants aired a television commercial ("the ad") throughout the 9th Congressional District viewing area. The commercial stated that plaintiff was "being sued by his former business partners for theft, fraud, and conspiracy," and that he "bilked his partners out of six million dollars." The commercial asked of plaintiff, "if he's ripped off his business partners how can we trust him[?]" The commercial claimed that plaintiff "set up a concert ticket scheme" to "bilk" his partners and that witnesses stated that plaintiff lied about and destroyed evidence to cover up the scheme. Defendants claimed that the statements made in the ad were supported by a South Dakota lawsuit. Defendant Brewer appeared at a press conference to unveil the ad. Defendant Brewer sponsored the ad, stating that the contents of the ad were true and that plaintiff had engaged in unlawful and unethical conduct.

Plaintiff filed a complaint for defamation against defendants alleging that the claims made against plaintiff in the ad were false and that defendants knew the statements were false when they made them. He alleged that the South Dakota lawsuit did not support, but in fact contradicted, the ad's false and defamatory statements. Plaintiff asserted that the South Dakota lawsuit did not allege that he had any dealings with business partners or that he had defrauded a business partner. Plaintiff denied that any testimony had ever been taken in the case. Therefore, no witnesses could have testified that plaintiff destroyed evidence. He alleged that defendants made the false and defamatory statements in an attempt to mislead and defraud the voters in the

9th Congressional District and to gain an advantage in a congressional race that defendant Peters was losing.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), asserting that plaintiff could not establish that the ad contained defamatory statements or that they acted with malice by authorizing the ad. Defendants asserted that, as a public figure, plaintiff had to prove that defendants made the statements with actual malice, which he could not do. Any failure to investigate the allegations contained in the lawsuit did not constitute actual malice. They further contended that the trial court should dismiss plaintiff's complaint because the alleged defamatory statements were protected under the substantial truth doctrine, an absolute defense to a defamation claim. Defendants argued that, while plaintiff's relationship to the South Dakota plaintiffs may have been that of participants in a joint venture, as a vendor, or an independent contractor, it did not change the sting of the charge that plaintiff had used fraud and deceit to take millions of dollars away from the people with whom he was dealing. Contrary to plaintiff's assertion that there was no testimony taken in the case, and therefore no witnesses, an affidavit of one witness was filed.

In opposition to the dispositive motion, plaintiff asserted that the plaintiffs in the South Dakota lawsuit were not his business partners, but rather his customers. He contended that the bond and fiduciary duty between business partners made the charge that he defrauded his business partners much worse in the eyes of the voters than if the ad alleged that he had defrauded his customers. Plaintiff further argued that any decision on malice was premature because there had not been any discovery. He alleged that, because it was a factual issue, the question should go to a jury.

The trial court first noted that there were additional constitutional protections of speech because a public figure was involved in this defamation case. The trial court stated that a public figure must prove by clear and convincing evidence that the publication contained a defamatory falsehood that was made with actual malice — that is knowledge of the falsity and reckless disregard for the truth. The trial court also stated that the question of whether the evidence in the record in a defamation case was sufficient to support actionable malice was a question of law for the court to decide. Regarding the relationship between the parties in the South Dakota lawsuit, the trial court found that “in the common parlance business partners are people who engage in a joint venture,” and this was a joint venture between people engaged in putting on and promoting a concert. Therefore, the court opined that the term “business partners” was not inappropriate. The trial court concluded that plaintiff had been unable to prove that a defamatory statement had been made and granted defendants' motions for summary disposition, but denied defendants' request for sanctions.

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(8) and (C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5). In reviewing a motion under MCR 2.116(C)(10), the evidence submitted by the parties is evaluated in a light most favorable to the nonmoving party to determine if the evidence establishes a genuine issue of material fact. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

Although plaintiff alleges on appeal that the trial court decided defendants' motions pursuant to MCR 2.116(C)(8), both defendants and plaintiff submitted documentary evidence in support of their positions, and the record indicates that the trial court considered that evidence in deciding the motions. When the court looked beyond the pleadings in deciding the motion, this Court will review the motion as having been decided pursuant to MCR 2.116(C)(10), *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 31; 627 NW2d 5 (2001), and the trial court properly granted this motion. However, summary disposition was also proper pursuant to MCR 2.116(C)(8) because the claim was unenforceable as a matter of law. *Maiden*, 461 Mich at 119.

On appeal, plaintiff first alleges that the trial court's grant of defendants' motions for summary disposition was premature because plaintiff could have offered evidence that, in the view of the public, there was a considerable difference in the sting of the ad if the words "business partners" had been replaced with the word "customers." Plaintiff argues that he would have presented evidence that a substantial number of voters did not vote for him because they thought he had been sued by his partners and that they would have voted for him if they thought he had been sued by his customers.

First, regarding plaintiff's argument that the trial court's decision was premature, this Court has acknowledged that, because of "the constitutional privilege of free expression secured by the First and Fourteenth Amendments, the courts . . . have recognized the need for affording summary relief to defendants in order to avoid the 'chilling effect' on freedom of speech and press." *Ireland v Edwards*, 230 Mich App 607, 613 n 4; 584 NW2d 632 (1998), quoting *Lins v Evening News Ass'n*, 129 Mich App 419, 425; 342 NW2d 573 (1983). Summary disposition is especially appropriate in the early stages of a case where defamation claims involve matters of public interest and concern. *Ireland*, 230 Mich App at 613. Accordingly, summary disposition is an essential tool in the protection of First Amendment rights, and the trial court properly addressed and decided defendants' motions.

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

All statements are not actionable. A defendant need not prove that the publication is "literally and absolutely accurate in every minute detail." *Rouch*, 440 Mich at 258. A slight inaccuracy is immaterial if the charge is true in substance. *Id.* at 258-259. Additionally, a statement must be "provable as false" in order to be actionable. *Ireland*, 230 Mich App at 616. Thus, an objectively verifiable event may be actionable, while a subjective assertion is not. *Id.* Furthermore, certain types of speech are protected. "[C]ertain statements although factual on

their face, and provable as false, could not be interpreted by a reasonable listener or reader as stating actual facts about the plaintiff.” *Id.* at 617. Examples of such statements include parodies, political cartoons, and satires. *Id.* “Speech that can reasonably be interpreted as communicating ‘rhetorical hyperbole,’ ‘parody,’ or ‘vigorous epithet’ is constitutionally protected.” *In re Chmura (After Remand)*, 464 Mich 58, 72; 626 NW2d 876 (2001). However, by protecting hyperbole, parody, epithet, and expressions of opinion, political speech by its nature may have unpalatable consequences, and therefore, even potentially misleading or distorted statements may be protected. *Id.* at 72-73. These rules demonstrate the national commitment to the principle that debate on public issues should be “uninhibited, robust, and wide-open.” *Id.*

Some statements, when read in context, are not capable of defamatory interpretation. *Ireland*, 230 Mich App at 618. For example, a characterization of bargaining leverage as “blackmail” was not libel when reported or slander when spoken because even the most careless of reader would perceive the word as merely “rhetorical hyperbole.” *Id.* at 617-618 (citation omitted). Therefore, the court may decide as a matter of law whether a statement is capable of defamatory meaning. *Id.* at 619. “A communication is defamatory if, under all of the circumstances, it tends to so harm the reputation of an individual that it lowers the individual’s reputation in the community or it deters others from associating or dealing with the individual.” *Mino v Clio School Dist*, 25 Mich App 60, 72; 661 NW2d 586 (2003) (citation omitted.) “The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.” *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

It was undisputed that plaintiff was a public figure running for public office. The First Amendment is most fully and urgently applied to speech during a campaign for political office. *In re Chmura*, 464 Mich at 67. A plaintiff pursuing a defamation claim must show the falsity of a statement. *Id.* at 71. In addition, the public figure plaintiff must prove by clear and convincing evidence that the defendant published the defamatory statement with actual malice — with knowledge that it was false or with reckless disregard for whether or not it was false. MCL 600.2911(6); *Collins*, 245 Mich App at 32. When approaching the question of falsity in a defamation case, this Court overlooks minor inaccuracies and concentrates on the substantial truth of the statement. *Chmura*, 464 Mich at 74. Minor inaccuracies do not amount to falsity as long as the gist or the sting of the communication is true. *Id.* In testing the statement, this Court looks to the sting of the ad to determine its effect on the viewer. *Rouch*, 440 Mich at 260. If the literal truth would have produced the same effect, minor differences are deemed immaterial. *Id.*

The terms “bilked” and “ripped off” were used in the ad in place of “theft, fraud and conspiracy,” the actual words used in the lawsuit. However, in this case the literal truth would have produced the same effect. Viewing these words in context, it is clear that defendants used them to summarize the allegations in the lawsuit and that they amounted to “rhetorical hyperbole,” or a “vigorous epithet” used by defendants to describe the actions for which plaintiff was being sued. *Ireland*, 230 Mich App at 618-619. As the Michigan Supreme Court stated in *Chmura*, 464 Mich at 82, “this is the language of the rough-and-tumble world of politics.”

Under these circumstances, these restatements of the terms used in the actual lawsuit are not actionable. *Ireland*, 230 Mich App at 619.

Plaintiff's primary argument focuses on defendants' use of the words "business partners" to describe the relationship that plaintiff had with the plaintiffs in the South Dakota lawsuit because the words "business partners" were never used in the complaint. Plaintiff argues that the word "customers" was the more appropriate word to describe the relationship. Plaintiff also argues that it is far worse to defraud a business partner than it is to defraud a customer, and therefore he lost votes because of the ad's false impression that he defrauded business partners, instead of customers. However, despite plaintiff's argument, the South Dakota plaintiffs did not describe themselves as plaintiff's "customers." In the South Dakota complaint, which was the basis for the ad, the South Dakota plaintiffs alleged that, after several contacts with plaintiff, they entered into a written contract for Star Tickets, with plaintiff as the Chief Executive Officer, to sell the tickets to the Sturgis Motorcycle Rally music concerts for the plaintiffs. The plaintiffs alleged breach of contract, intentional misrepresentation, deceit and civil conspiracy against Star Tickets and plaintiff. The complaint does not define or explain the relationship between the South Dakota plaintiffs and plaintiff Raczkowski beyond asserting that they entered into a written contract.

As previously noted, in a defamation case minor inaccuracies do not amount to falsity as long as the gist or the sting of the communication is true. *Chmura*, 464 Mich at 74. If technical rendering and common parlance yield different interpretations of the same word, the constitutionally required "breathing space" affords protection of the writer's choice of words. *Rouch*, 440 Mich at 263 n 25. Plaintiff describes the relationship of the South Dakota plaintiffs to himself as that of a customer. In the ad, defendants described the relationship as a business partnership. A review of the complaint reveals that the South Dakota plaintiffs explain they entered into a written contact with plaintiff. Since the nature of the relationship yielded three different interpretations and the context of defendants' interpretation was a political commercial, the constitutionally required "breathing space" affords protection to defendants' choice of words. *Rouch*, 440 Mich at 263 n 25.

The sting or gist of the ad was that plaintiff had been sued for defrauding people and companies, with whom he had entered into a contract, out of millions of dollars. That is an accurate portrayal of the allegations contained in the South Dakota lawsuit. The question whether the entities who sued plaintiff were his business partners, his customers, or just companies with whom he had entered into a contractual relationship — like the question whether he bilked or defrauded them — did not affect the ad's substantial truth. *Rouch*, 440 Mich at 271. The words that plaintiff argues should have been used would have produced the same effect on the viewers of the ad. Accordingly, the differences in the words used from the actual words in the South Dakota lawsuit were immaterial. Thus, the trial court properly concluded that plaintiff was unable to sustain a defamation claim because he could not establish the falsity of the statements contained in the ad.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Patrick M. Meter

/s/ Christopher M. Murray