STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1229

Trocaderos, LLC,
Appellant,

vs.

City of Minneapolis, et al.,
Respondents.

Filed June 30, 2009
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-07-5537

Jack Y. Perry, Jason R. Asmus, Briggs & Morgan, P.A., 2200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402; and

James E. LaFave, 7571 Ninth Street North, Oakdale, MN 55128 (for appellant)

Charles N. Nauen, Gregory J. Myers, Lockridge Grindal Nauen, P.L.L.P., 100 Washington Avenue South, Suite 2200, Minneapolis, MN 55401; and

Peter Ginder, Deputy City Attorney, Joel M. Fussy, Assistant City Attorney, 333 South Seventh Street, Suite 300, Minneapolis, MN 55402 (for respondents)

Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges the district court's grant of summary judgment in favor of respondents, arguing that the basis for the decision, that respondent city council member's statements were not defamatory as a matter of law, was erroneous. Because we conclude that the statements at issue were either not factual assertions or were substantially true, we affirm.

FACTS

Appellant Trocaderos, LLC commenced an action against respondents City of Minneapolis and Lisa Goodman, a city council member, after the city attempted to enforce its noise ordinance against Trocaderos. Trocaderos claimed that the noise ordinance was void for vagueness and also in conflict with state law. The district court granted summary judgment to Trocaderos on the ground that the noise ordinance was impermissibly vague, but ruled that the ordinance did not conflict with state law.

This appeal stems from information Trocaderos discovered, pertaining to remarks made by Goodman, while this action was pending in district court.

In October 2006 Goodman responded by e-mail to a constituent's complaint about Trocaderos by stating that (1) the constituent's complaint constituted "about the 50th or so problem over there," (2) there had been "a huge number of issues with the bad behavior of Trocaderos," and (3) Trocaderos's management "refused to respect the concerns of the immediate neighbors." In January 2007 Goodman responded by e-mail to a complaint by other constituents about Trocaderos by stating that "[t]he city HAS

been enforcing the noise, [litter], and loitering issues out there but the truth of the matter is they don't care."

After discovering that Goodman made the above statements, Trocaderos amended its complaint to include defamation claims against respondents. Respondents moved for summary judgment on these claims, which the district court granted. This appeal follows.

D E C I S I O N

On appeal from summary judgment, this court must determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *Zank v. Larson*, 552 N.W.2d 719, 721 (Minn. 1996). We must view the evidence in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "All doubts and factual inferences must be resolved against the moving party." *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981).

I

In order to prove a claim of defamation, a plaintiff must show that the defendants (1) made a false and defamatory statement about the plaintiff, (2) in an unprivileged communication to a third party, and (3) the defamatory statement harmed the plaintiff's reputation in the community. *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). Generally, only statements of fact that can be proven true or false are actionable as defamatory. *Lund v. Chicago & Nw. Transp. Co.*, 467 N.W.2d 366, 369 (Minn. App. 1991), *review denied* (Minn. June 19, 1991). This court has found that a statement of opinion can be actionable, but only if it presents or implies the existence of a

fact or facts that can be proven true or false. *Marchant Inv. & Mgmt. Co., Inc. v. St. Anthony W. Neighborhood Org., Inc.*, 694 N.W.2d 92, 95-96 (Minn. App. 2005). "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Id.* (quotation omitted). Whether a statement can be proven true or false is a question of law. *Lund*, 467 N.W.2d at 369.

Here, the district court found that each of the four statements at issue was not defamatory as a matter of law because none was provably false. In determining whether a statement presents or implies a provably false assertion of fact, this court examines: (1) the statement's broad context, including the general tenor of the entire work and its statements, setting, and format; (2) the specific context and content of the statement, including the use of figurative or hyperbolic language and the reasonable expectations of the audience; and (3) whether the statement is sufficiently objective to be susceptible of being proved true or false. *Marchant*, 694 N.W.2d at 96.

As to broad context, this court stated in *Marchant* that "the more personal and informal" nature of a letter, as opposed to a more formal document, suggested that the statements in the letter represented "the subjective concerns and perceptions" of the writer. *Id.* at 97. This court also stated that because the letter in *Marchant* addressed issues that were at the center of a heated debate, an audience would be likely to expect the author to use persuasive force in writing the letter rather than to depend on it as an objective statement of truth. *Id.* In this case, like in *Marchant*, Goodman's e-mail messages were of a personal and informal nature and represented Goodman's subjective

concerns and perceptions in response to her constituents' subjective concerns and perceptions about a matter of obvious public interest. The broad context of the messages weighs against a conclusion that the statements present or imply the existence of facts that can be provably true or false.

As to specific context, a court considers the extent to which the language in a statement is figurative or hyperbolic. *Id.* Here, with regard to Goodman's statements that the city had a "huge number of issues" with Trocaderos, the district court determined that given the specific context of the statement and the use of the subjective descriptor "huge," the statement was one of opinion or rhetoric that was not defamatory as a matter of law. The district court's determination is consistent with this court's conclusion in *Marchant*, that the term "countless" was "more hyperbolic than precise," and intended for dramatic effect rather than a factual assessment of quantity. *Id.* The district court also determined that Goodman's statements that Trocaderos "refused to respect the concerns of [its] immediate neighbors" and that "they don't care" were statements of Goodman's opinion. Again, the district court's determination is consistent with this court's conclusion in *Marchant*, that an accusation that a party "refused to listen to our concerns" was merely "an expressed belief" that the other party was not actively considering the issues raised by the declarant. *Id.*

Finally, a court considers whether the statement is sufficiently objective to be susceptible of being proven true or false, i.e., whether the sentence is capable of verification. *Id.* In *Marchant*, this court stated that an accusation that a party "refused to listen to our concerns" is inherently subjective, while the term "countless" was capable of

verification to some extent as it suggested a large number. *Id.* Under *Marchant*, Goodman's statements that Trocaderos's management "refused to respect the concerns of [its] immediate neighbors" and "they don't care" do not present or imply provable assertions of fact, and therefore are not actionable as a matter of law. And although the phrase "a huge number of issues" with Trocaderos is capable of verification to some extent, we conclude that because of the hyperbolic nature of the word "huge," the statement was also an expression of subjective opinion and does not present or imply a provable assertion of fact.

Applying *Marchant*, we conclude that Goodman's statements that there were a "huge number of issues" with Trocaderos, that Trocaderos's management "refused to respect the concerns of [its] immediate neighbors," and that "they don't care" were statements of hyperbole or expressed belief and do not present or imply the existence of facts that can be proven true or false. Therefore, the statements are not defamatory as a matter of law.

But Goodman's statement that the constituent's complaint was "about the 50th or so problem" with Trocaderos, despite her use of the qualifying terms "about" and "or so," is neither hyperbolic nor opinion. Rather, this statement expresses a reasonably precise and objective number that presents a provable statement of fact. We therefore proceed to consider whether this statement was substantially true.

II

If a statement is substantially true, it is not actionable as defamatory. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). Statements that are

substantially true "are incapable of carrying a defamatory meaning, even if a reasonable jury could find that the statements were mischaracterizations." *Hunter v. Hartman*, 545 N.W.2d 699, 707 (Minn. App. 1996) (quotation omitted), *review denied* (Minn. June 19, 1996). Generally, the determination of the truth or falsity of a statement for purposes of defamation is inherently within the province of a jury. *Kuechle v. Life's Companion P.C.A., Inc.*, 653 N.W.2d 214, 218 (Minn. App. 2002), *review dismissed* (Minn. Jan. 21, 2003). But when the parties do not dispute the underlying facts, the question of whether a statement is substantially accurate is one of law for the court. *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

In this case, the district court noted that Goodman's office received 47 complaint calls regarding Trocaderos and that city police received 38 calls. Trocaderos does not dispute the existence of these complaint calls or police calls in its brief. Rather, Trocaderos argues that Goodman's use of the word "problem" in her statement, "about the 50th or so problem," should not be construed as referring to complaints but, instead, should be construed as referring to actual violations of the city's ordinances. Trocaderos cites the deposition of city employee Grant Wilson, who, when asked whether he was aware of "50 or so problems with Trocaderos," answered "No" and testified that he was only aware of four problems. Wilson testified that of the four problems he identified, only two alleged ordinance violations were still pending at that time before the city, because the noise violation was almost completely resolved and an adult-entertainment violation occurred after the time frame relevant to the case. Trocaderos argues that in this

section of Wilson's deposition, the word "problems" referred to ordinance violations, and not to complaints in general. We agree.

But it does not follow from Wilson's deposition testimony that Goodman used the word "problem" to refer to actual ordinance violations in her e-mail messages. When Wilson was asked at his deposition whether he would say that an issue represented "the fiftieth or so problem over there," he replied, "that's about [how] many times that somebody has complained and whined and screamed at City Hall and the Mayor and everyone else about Trocaderos." Wilson's testimony reveals not only that he was aware that over 50 complaints had been made about Trocaderos, but that he interpreted "problem" to mean alleged violations in one part of his deposition and to mean complaints in another part. Moreover, we are not persuaded that because Wilson referred to ordinance violations as "problems" in one context during his deposition, the district court erred in not construing Goodman's use of the word "problem" in her e-mail as a provably false representation about the number of discrete ordinance violations.

In addition to Wilson's testimony, Trocaderos urges us to construe Goodman's use of the word "problem" to mean an ordinance violation because of the context of other e-mail messages sent by Goodman to constituents and city employees. In a May 2006 response to a neighborhood resident about a noise complaint, Goodman informed the resident that Trocaderos was issued "a second tag" after police were summoned on an earlier complaint and "hear[d] the problem." Goodman also stated that a "third tag" would subject Trocaderos to a hearing, and advised the resident to call 911 in the future and "document the problem."

We are not convinced that Goodman's use of the word "problem" in statements she made to different constituents, five months before the statements at issue in this case, cast any light on her intended meaning of the word "problem" in the May 2006 e-mail. Even if we agreed with Trocaderos that the e-mail statements fit within the "broad context" of the statements at issue in this case, we do not read Goodman's use of the word "problem" in the May 2006 e-mail to refer only to noise ordinance violations rather than noise complaints. An equally plausible explanation of Goodman's use of the term "problem" is that she was encouraging residents to report any "problem" they experienced with noise at Trocaderos, so that a citation could be issued.

We note that the record contains a January 2006 e-mail from a neighborhood resident complaining of noise and loitering around Trocaderos, to which Goodman responded that she had "heard a lot about these issues with this nightclub," that her "office will not tolerate this kind of behavior by bars and bar owners," and that she would inform the resident or his neighborhood association "what we can and can't do to address this problem." After a police officer replied to the neighborhood resident's same e-mail, Goodman responded that it seemed obvious to her why no one was "doing anything about this problem." In that e-mail statement, it is apparent that Goodman used the word "problem" to refer to the general issue of noise and loitering at Trocaderos. At most, the content of Goodman's e-mails indicates that Goodman has used the word "problem" to refer to complaints, violations, and the general set of issues regarding Trocaderos, more or less interchangeably.

Statements are substantially true "if any reasonable person could find the statements to be supportable interpretations of their subjects." *Hunter*, 545 N.W.2d at 707 (quotation omitted). After examining the record, we are not persuaded that Goodman was referring to actual ordinance violations when she referred to "about the 50th or so problem with" Trocaderos in her October 2006 e-mail. Because it is undisputed that Goodman's office had received 47 complaint calls regarding Trocaderos, we conclude that her statement referring to "about the 50th or so problem with" Trocaderos was substantially true and not defamatory as a matter of law.

Affirmed.