STATE OF MICHIGAN

COURT OF APPEALS

NEIL RICHARD MARTZ, Plaintiff-Appellant, v EVELYN BOWER, Defendant-Appellee.	UNPUBLISHED November 27, 2012 No. 306484 Genesee Circuit Court LC No. 10-094850-NO
CHARLES J. MELKI and STEVEN P. IAMARINO, Plaintiffs-Appellants, v EVELYN BOWER, Defendant-Appellee.	 No. 306486 Genesee Circuit Court LC No. 10-094007-NO

Before: FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

In these consolidated appeals,[1] plaintiffs appeal as of right from orders granting defendant's motion for summary disposition and denying plaintiffs' motions for summary disposition in this action alleging defamation per se. We affirm.

I. BASIC FACTS

[1] On our own motion, we have consolidated the cases for appellate review. *Martz v Bower*, unpublished order of the Court of Appeals, entered November 7, 2012 (Docket No. 306484); *Melki v Bower*, unpublished order of the Court of Appeals, entered November 7, 2012 (Docket No. 306486)

Plaintiffs brought this action for slander based on statements defendant made at a November 12, 2009, public meeting of the Clayton Township Board. During the meeting, defendant made comments about former township building and zoning administrator Neil Martz, former township attorney Steven Iamarino, and former police chief Charles Melki. The meeting followed a recall election in which the township supervisor and two trustees were removed. Members of the public had expressed concern about the process for filling the empty positions. Defendant criticized the recall effort and then informed the audience of events several years earlier. She stated:

> About 13 years ago Steve [Iamarino] brought his sidekick Neil [Martz]. Rod [Shumaker] made a title . . .and a hefty salary for Neil, put him on the board every meeting, and Neil ran the show. It was illegal for Neil to be on the board. Steve and Rod knew that and didn't do a thing about it.
>
> In '02 the police protection . . .renewal was revoted in. The next morning we had a special meeting. We had a police department all done behind closed doors. Illegal. Illegal. Rod, Steve, and Chuck [Melki] knew that it was illegal.
>
> You on the board, please get honest, knowledgeable, caring people on the board. Even if you have to extend the time period. The board . . .inherited a lot of problems . . .Our people in this township deserve the best.

In his complaint[2], Martz alleged that the statements of "illegal" actions on his part amounted to defamation per se. Melki and Iamarino filed a separate complaint,[3] alleging that defendant's "tortuous acts of defamation per se are constituted of unfounded claims of 'illegal' actions on the part of Charles Melki and Steven Iamarino relative to the creation and formation of the Clayton Township Police Department and the employment of Neil Martz, which were fabrications and lies."

The parties submitted cross-motions for summary disposition. Plaintiffs pointed out that defendant accused them of illegal conduct at the public meeting, but then later conceded in her deposition testimony that she did not think they did anything "illegal." Plaintiff testified at her deposition:

> I think [Martz] was a good guy. I think he did a good job, but when they had a meeting and they had the different numbers on the agenda, he would state and read the agenda and gave his pros and cons on it, and then the board would make a decision whether to go along or go against what he had made a decision on. . . . And that went on and on.

* * *

[2] Genesee Circuit Court case number 10-094850-NO.

[3] Genesee Circuit Court case number 10-094007-NO.

> He made it awfully easy for the trustees to just go along with him. I'm sure he was correct in a lot of things he did. . . .The principle was they weren't following proper procedures, the board . . .The board wasn't. . . . The board didn't follow proper procedures.

When asked why she commented on Martz at the public meeting, defendant stated that she "probably shouldn't have, but it always bothered me because I felt the board did not do their job and – doing their job properly."

The trial court granted defendant's motion for summary disposition. It found that "at some point in time" plaintiffs were "public officials and public figures in Clayton Township." The court recognized that whether they were still public figures at the time defendant made her statements was questionable, but noted that "she's referencing their actions as public figures." Therefore, the court reasoned that plaintiffs were required to prove actual malice by clear and convincing evidence, and the complaint did not include those allegations. Moreover, the court found that defendant's statements were protected by the First Amendment; the statements were "rhetorical, hyperbole, and exaggerated language used to express her opinions" on a matter of public concern. Accordingly, the trial court entered an order denying plaintiffs' motions and granting defendant's counter-motion. Plaintiffs now appeals as of right.

I. ANALYSIS

A. STANDARDS OF REVIEW

Defendant's motion was brought pursuant to MCR 2.116(C)(8) and (C)(10). Although the trial court did not specify the subrule under which it granted the motion, because the court considered evidence outside the pleadings, we review the motion as having been granted under MCR 2.116(C)(10). *Steward v Panek,* 251 Mich App 546, 554-555; 652 NW2d 232 (2002). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999).

Whether a statement is capable of defamatory meaning is a matter of law that may be decided by summary disposition. *Kevorkian v American Med Ass'n,* 237 Mich App 1, 9; 602 NW2d 233 (1999). Whether the evidence is sufficient to support a finding of actual malice is also a question of law. *Tomkiewicz v Detroit News, Inc,* 246 Mich App 662, 677; 635 NW2d 36 (2001). "In considering whether actual malice exists in the context of a motion for summary disposition, the court must consider whether the evidence is sufficient to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Id.*

B. DEFAMATION PER SE

Plaintiffs brought their actions on a theory of defamation per se based on defendant's accusations of criminal conduct. Words charging the commission of a crime are defamatory per se. *Burden v Elias Bros Big Boy Restaurant,* 240 Mich App 723, 727-728; 613 NW2d 378 (2000). However, statements on which a defamation action is premised must be examined in the context in which they were made. *Ireland v Edwards,* 230 Mich App 607, 617-618; 584 NW2d

632 (1998). For example, descriptions of conduct as "blackmail," or of an individual as a "traitor," "crook," or "murderer" are not actionable if the particular context in which they were made is not capable of a defamatory interpretation. *Kevorkian*, 237 Mich App at 8-9; *Ireland*, 230 Mich App at 617-618. Where there is no genuine issue of material fact concerning the statements that were made, an evaluation of whether they are capable of defamatory meaning may be made as a matter of law on summary disposition. *Kevorkian*, 237 Mich App at 5, 9.

Here, neither defendant's claim that Martz's participation on the board was "illegal" nor defendant's assertion that Iamarino "failed to act" were accusations of criminal conduct. With respect to defendant's references to the police department, plaintiffs argue that defendant's reference to the creation of the department behind "closed doors" as "illegal" was an accusation of a violation of the Open Meetings Act. An accusation of a violation of the Open Meetings Act is not an accusation of criminal conduct, as is necessary for the defamation per se claim that plaintiffs have advanced. Similarly, an accusation that Iamarino and Melki "knew that it was illegal" also is not an accusation of criminal conduct. As our Michigan Supreme Court has noted:

> [w]e are mindful of the inherent imprecision of language and the difficulties this poses to any evaluation of the truth or falsity of [a statement], particularly one that rests upon the use of a word with ambiguous implications. . . .To ensure the requisite 'breathing space' for free and robust debate on matters of public concern, we think it important to allow for imprecision and ambiguity in the choice of language. [*Rouch v Enquirer & News of Battle Creek Mich*, 440 Mich 238, 263 n 25; 487 NW2d 205 (1992).]

For that reason, "[t]echnical inaccuracies in legal terminology employed by nonlawyers" should not form the basis for recovery. *Id*. at 263. Especially when "the popular sense of a term may not be technically accurate." *Id.* at 264.

Defendant's comments were not accusations of criminal conduct so much as a comment on irregular procedure. During her deposition testimony, defendant was asked:

> *Q.* [by Iamarino]. Did Charles Melki do anything illegal as the chief of police?
>
> *A.* No, I don't think he did anything illegal, and what I was referring to was when the police department came into . . .Clayton Township. . . .The process of getting into is where I felt it – the board did not do it properly.
>
> *Q.* Well, you only named two people, Steve and Rod knew that and . . . didn't do a thing about it. So did I [Iamarino] do something illegal?
>
> *A.* Maybe not illegal, but you knew it should have gone before the board.
>
> *Q.* But you said putting him on the board every meeting and Neil ran the show. He wasn't put on the board, was he?

A. No, I guess you're correct, he wasn't, but that wasn't the problem. I wasn't complaining about him. I was complaining about the procedures.

***

Q. All right. And I've asked you about Chuck [Melki]. I've asked you about myself [Iamarino]. . . .did Mr. Martz do anything illegal that you know of?

A. I never said he did. . . .I said it was procedures. The board didn't follow proper procedures.

Q. Show me one place in Document Number 1 [transcript of meeting] where it uses . . .the words proper procedures.

A. I didn't say it, no.

Q. You didn't say that, did you?

A. It's not in there, no.

Q. When you spoke that night, you said ["]illegal[,]illegal["]. You didn't say proper procedures, right?

A. I probably should have used proper procedures in there instead of illegal. I'm not a lawyer.

We conclude that, given the context of defendant's statements at the public meeting, defendant's statements were not capable of being understood as accusations of criminal conduct as claimed by plaintiffs. Therefore, the trial court did not err in granting defendant's motion for summary disposition.

C. PLAINTIFF AS A PUBLIC OFFICIAL

Even if we were to conclude that defendant's statements were capable of being understood as accusations of criminal conduct, we conclude that plaintiffs were "public officials" for purposes of the alleged defamatory statements.

> 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).]

Where the plaintiff is a public official or a public figure, the defendant is entitled to a qualified privilege in the form of a heightened standard that must be met by the plaintiff. *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1,* 468 Mich 722, 731; 664 NW2d 728 (2003).

Specifically, a public official or public figure must prove that the defendant made the statements with "actual malice." *Id.* This standard is codified in MCL 600.2911(6):

> An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.

For the purposes of the qualified privilege derived from *New York Times v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964), the designation of "public official" "applies at the very least to those among the hierarchy of government employees who have, or appear to have, substantial responsibility for or control over the conduct of governmental affairs." *Tomkiewicz*, 246 Mich App at 669, quoting *Peterfish v Frantz*, 168 Mich App 43, 50-51; 424 NW2d 25 (1988), quoting *Rosenblatt v Baer*, 383 US 75, 85; 86 S Ct 669; 15 L Ed 2d 597 (1966). "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Rosenblatt*, 383 US at 86 n 13.

Martz was hired by Clayton Township as building and zoning administrator. The role afforded him the "significant authority and control . . .over the daily lives of other citizens." *Tomkiewicz*, 246 Mich App at 671. Martz cites no authority indicating that the qualified privilege for public officials applies only to statements made during the official's tenure. In fact, in *Rosenblatt*, a comment made six months after an official's discharge as supervisor for a county recreation area was protected under the *New York Times* rule. *Rosenblatt*, 383 US at 87. Thus, the fact that Martz was no longer the building and zoning administrator at the time defendant made her statements does not affect his status as a public official for purposes of analyzing defendant's statements, which concerned Martz's involvement with the township board while he was holding the position of building and zoning administrator.

Iamarino's position of township attorney was likewise one that afforded the holder of the position "significant authority and control . . . over the daily lives of other citizens." *Tomkiewicz*, 246 Mich App at 671. As was Melki's position as chief of police. The analysis whether Melki was a "public official" is complicated by the fact that defendant's statements refer to the period leading to the creation of the police department, which was before Melki was appointed chief. However, his involvement in the creation of the department is as much a matter of public concern as his activities once the appointment was made. Melki does not argue that a distinction should be drawn, much less cite any authority to support that view. Accordingly, the trial court did not err in determining that both Melki and Iamarino were public officials.

III. CONCLUSION

Given the circumstances of these cases, the trial court appropriately granted defendant summary disposition. In *Ireland*, 230 at 613 n 4, this Court noted:

This Court and others have recognized this principle:

> Summary judgment is particularly appropriate at an early stage in cases where claims of libel or invasion of privacy are made against publications dealing with matters of public interest and concern. In recognition of the constitutional privilege of free expression secured by the First and Fourteenth Amendments, the courts in libel actions have recognized the need for affording summary relief to defendants in order to avoid the 'chilling effect' on freedom of speech and press. [*Lins v Evening News Ass'n*, 129 Mich App 419, 425; 342 NW2d 573 (1983), quoting *Meeropol v Nizer*, 381 F Supp 29, 32 (SDNY 1974).]
>
> Summary judgment is an integral part of the constitutional protection afforded defendants in actions such as this. Plaintiff has purposely been given the heavy burden of proving actual malice.... When it has been established ... that he cannot meet it, the First Amendment makes it incumbent upon the Court to grant defendant's motion for summary judgment. [*Hayes v Booth Newspapers, Inc*, 97 Mich App 758, 775; 295 NW2d 858 (1980), quoting *Cerrito v Time, Inc*, 302 F Supp 1071, 1075-1076 (ND Cal 1969).]

By the same token, appellate courts are responsible for ensuring that free speech rights are adequately protected:

> When addressing defamation claims implicating First Amendment freedoms, appellate courts must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression and to examine the statements and circumstances under which they were made to determine whether the statements are subject to First Amendment protection. [*Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 322; 539 NW2d 774 (1995).]

Plaintiffs' actions are devoid of any legal merit. Not only did the trial court properly grant defendant summary disposition, but it also would have been well within its discretion to sanction plaintiffs for vexatious litigation. MCL 600.2591 grants a court the authority to award sanctions in the form of attorney fees and costs to a prevailing party if an action is deemed "frivolous," meaning:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a).]

All of these conditions are met in this case.

We note that the individual who filed suit on Martz's behalf was attorney Steven Iamarino, who also filed a separate suit naming himself and Melki as plaintiffs. As an attorney, we find his conduct particularly egregious. Each complaint contained the following allegations:

> Evelyn Bower HAS NOT served as a member of the Board of Trustees for the Charter Township of Clayton and/or the Clayton Township staff at times relevant and pertinent hereto. However Defendant Bower has secured materials associated with the business of the Township and Board of Trustees at times pertinent hereto, so as to have been in a position to know the truth about topics, which she chose to speak about, and persons that she has chosen to make complaints about.
>
> ***
>
> On November 12, 2009 at a regular meeting of the Charter Township of Clayton Board, Evelyn Bower, ***as nothing more than a member of the general public***, made unjustified; spurious; slanderous and defamatory statements, which did bring, and upon information and belief was intended to cause harm to the reputation and character of Plaintiff Martz, thus giving rise to this cause of action for actions amounting to what is known as defamation per se. [Emphasis added.]

Plaintiffs' complaints imply that the board and its members or affiliates are not subject to criticisms by those not on the board. Taken to its logical conclusion, plaintiffs' complaints seek to chill citizen participation in matters concerning local governance.

Additionally, it is obvious from our review of the record that plaintiffs were annoyed and irritated by defendant's constant presence and participation at the public board meetings and just wanted her to "go away." Melki, who had a myriad of lawsuits against other individuals for, among other things, defamation, testified that defendant "was always upset about something" and "I just took it in stride. She's a resident, she has a right to be upset." When asked if defendant had the right to express her opinion, Melki responded, "Absolutely. One hundred percent, sir. . . .she's entitled to her opinion as long as it's truthful." Defense counsel asked:

> *Q.* Well, but what it comes down to, though, I mean, you never had any run-in with Mrs. Bower; she would express her opinions, that would be the end of the session, she'd be gone, you'd be gone, everybody's back to work?
>
> *A.* She would make complaints to township members, trustees, because they would come back and tell me that, that she was upset with me that I bought too many magazines, or spent too much money, or I was patrolling on 69 and I should be on the secondary roads, or I was too much on the secondary roads and I should be somewhere else. And, like I said, there was no pleasing her, but that's her opinion.
>
> ***
>
> *Q.* Well, what she would bring up at the meetings was matters that concerned her?

A. Absolutely.

Q. I mean, the meetings aren't necessarily called for people to stand up and heap platitudes on somebody, is it?

A. It's for them to express their constitutional rights, to say what they want.

Iamarino was less generous and simply belligerent. At one point during his deposition testimony, Iamarino refused to respond to a question because he did not understand how "it has to do with Evelyn Bower's flapping lips." Iamarino testified, "I mean, here's a woman who got up and spoke her mind and spoke trash." Iamarino complained that "Mrs. Bower has many faces that she will display during the course of a meeting that makes you wonder what she's thinking," but admitted that "[e]verybody's entitled to their own wrong opinion, yes." He also noted that defendant "likes holding court, you know, outside of the township hall." He believed that defendant "just went too far." Iamarino used obscenities throughout his deposition, necessitating defense counsel to ask him why he needed to speak that way. Iamarino was clearly an angry, frustrated individual. It appears his ire was directed at defendant, who attended one public meeting too many, in his view.

We stress that defendant and other citizens are able to comment on matters of public concern without fear of reprisal. US Const, Am I; Const 1963, Am I; Mich Const 1963, art 1, § 5. Plaintiffs' attempt to suppress such participation will not be tolerated. Iamarino's conduct and statements are particularly distasteful. We are offended by his behavior and treatment of defendant, but, more importantly, we are disgusted by plaintiffs' blatant attempt to quiet public discourse. This lawsuit and the behavior of the individuals involved was "obnoxious," "outrageous," "ridiculous" and "shameful;" such terms are not actionable because not only are expressions of opinion protected from defamation actions, *Lakeshore Community Hosp, Inc, v Perry*, 212 Mich App 396, 402; 538 NW2d 24 (1995), but truth is an absolute defense to any defamation claim. *Porter v Royal Oak*, 214 Mich App 478, 486; 542 NW2d 905 (1995).

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219.

/s/ Karen M. Fort Hood
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio