

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2381

Cir. Ct. No. 2008CV1361

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ANGELA TERRY,

PLAINTIFF-APPELLANT,

V.

**CHAD UEBELE, JANA UEBELE, JOURNAL BROADCAST CORPORATION,
MAUREEN MACK, JOHN MERCURE, SEAN BRIGGS, JOURNAL BROADCAST
GROUP, INC., JOURNAL COMMUNICATIONS, INC., GREGG
SCHRAUFNAGEL, EXECUTIVE RISK INDEMNITY, INC., MARK A.
STRACHOTA AND PAUL BALISTRERI, STEPHANIE GRAHAM, STEVE
WEXLER, WILLIAM BERRA, A/K/A BILL BERRA,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. At issue in this appeal is whether the trial court erred in granting summary judgment dismissing Chad and Jana Uebele (“the Uebeles”) from Angela Terry’s claims of libel, slander and negligence against them and various media defendants. Because we conclude that the Uebeles’ statements at issue are not defamatory or negligent, we affirm.

BACKGROUND

¶2 Angela Terry is a Milwaukee school bus driver who ran a part-time wedding video service, known as “Angie’s Wedding Videos.” On January 25, 2005, Terry contracted with the Uebeles to attend and videotape their wedding, scheduled for July 16, 2005. The Uebeles provided Terry with various personal pictures to be included in the video and paid Terry the complete cost of \$1003.20 in advance of Terry’s service. Terry represented to the Uebeles on an informational flier that the video would take approximately ten to twelve weeks to complete, upon which time the edited video and pictures provided would be delivered to the Uebeles.

¶3 Approximately twelve weeks after the wedding, on October 5, 2005, Jana contacted Terry via email to inquire about the status of the video.¹ Terry responded five days later stating that she was behind on all of her videos due to an equipment change and thought the Uebeles’ video would be completed in “2-3 weeks.” Approximately eight weeks later, the Uebeles still had not received their video. Jana again attempted to contact Terry by email on December 11, 2005, but did not receive a response. Jana emailed Terry again on December 29, 2005,

¹ Because Chad and Jana Uebele share the same last name, we refer to them by their first names when addressing individual attempts at contacting Terry and when addressing their individual statements.

indicating that she had been unsuccessful in attempting to reach Terry by email and cell phone and that Terry's business line had been disconnected. Terry again did not respond. Jana attempted contacting Terry by email again on January 9, 2006, approximately six months after the wedding, informing Terry that she and her husband filed a complaint with the Better Business Bureau and had contacted two Milwaukee-area television stations.

¶4 One of the television stations contacted by the Uebeles was WTMJ-4. The station responded to the Uebeles' request to investigate the matter, and Investigative Reporter John Mercure interviewed the Uebeles. Mercure also interviewed Terry at her home. Clips of the interviews, as well as clips of a confrontation between Mercure and Terry, were made part of an investigative broadcast which aired on February 2, 2006. The segment also contained the following statement from Chad:

You feel like you're being robbed, and the worst part of it is it's like in plain daylight, it's not like you don't know who it is.

It additionally contained a statement from Mercure indicating that the wedding video was to be provided to the Uebeles within 10 weeks of the wedding.

¶5 Following the broadcast, approximately seven months after the Uebeles' wedding, the couple received their video. The Uebeles were again interviewed by Mercure and WTMJ-4 aired a follow-up broadcast on March 9, 2006, in which the Uebeles expressed their disappointment in the quality of their video. The segment contained the following statements from Jana and Mercure:

The video she'd showed us and what we got ... I think that there are some big differences and I guess I was disappointed in some instances where I heard her voice in the background. I really don't want her voice on my wedding video.—Jana.

[T]he quality [of the video] is well below what they were promised.—Mercure.

¶6 A description of the Uebeles experience, as well as Mercure's confrontation with Terry, were posted on Mercure's professional blog. Terry filed suit against the Uebeles, as well as various media defendants, including WTMJ-4, its parent company, Mercure, and various station executives. Terry's complaint against the Uebeles alleges libel/slander and negligence. Specifically, the complaint alleges that Chad and Jana's statements, as well as two statements attributed to them by Mercure, were defamatory, and that the Uebeles were both negligent for making defamatory statements that they knew or should have known would be broadcast to the public and for not correcting false and defamatory statements in the follow-up broadcast. The trial court granted summary judgment in favor of the Uebeles, finding no material issue of fact as to the falsity of the statements at issue.²

DISCUSSION

¶7 Terry contends that the above-mentioned statements, taken in the context of the broadcasts in their entirety, have false and defamatory meanings and

² Only the Uebeles' summary judgment motion concerning their statements and statements attributed to them are at issue in this appeal. The media defendants remain parties to Terry's action in the trial court.

have led to a loss of clientele and the receipt of hate messages.³ We conclude that the statements at issue cannot be proven false and are not capable of having defamatory meanings as they are either opinions, or are substantially true. Because the statements are therefore not defamatory, we affirm.⁴ We address each statement separately.

I. Standard of Review.

¶8 We review the grant or denial of a summary judgment motion *de novo* and without deference to the trial court. *Schaul v. Kordell*, 2009 WI App 135, ¶9, 321 Wis. 2d 105, 773 N.W.2d 454. “Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Rechsteiner v. Hazelden*, 2008 WI 97, ¶27, 313 Wis. 2d 542, 753 N.W.2d 496.

³ Terry focuses much of her brief on the conduct of the media defendants. This appeal concerns only the motion for summary judgment dismissing the Uebeles and does not address the conduct of the media defendants. To that end, we do not reach Terry’s assertion that this matter was not a matter of public concern, as the bulk of Terry’s argument on this point focuses on what she considers to be the media defendants’ dramatization of a contractual dispute between private parties. We also decline to address Terry’s negligence claim against the Uebeles in which she asserts the Uebeles were negligent for not distancing themselves from the conduct of the media defendants and for not correcting false statements in the second broadcast. There is no evidence that the Uebeles had control over the editorial decisions of the media defendants. We also decline to address Terry’s remaining arguments because our conclusion that the statements cannot be proven false makes those determinations unnecessary. See *Patrick Fur Farm, Inc. v. United Vaccines, Inc.*, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (appellate courts should decide cases on the narrowest possible grounds).

⁴ We also do not reach Terry’s argument about whether the context in which the statements were made lead to inferences that the statements have defamatory meanings. Negative inferences derived from defamatory statements must be specifically pled under WIS. STAT. § 802.03(6). See *Mach v. Allison*, 2003 WI App 11, ¶28, 259 Wis. 2d 686, 656 N.W.2d 766 (Ct. App. 2002). Because Terry’s complaint does not meet the heightened pleading requirement with regard to the negative inferences, and because the trial court did not err in denying her motion to amend her complaint, we decline to address her argument.

¶9 The elements of a defamatory communication are: “(1) a false statement; (2) communicated by speech, conduct or in writing to a person other than the one defamed; and (3) the communication is unprivileged and tends to harm one’s reputation.” *Ladd v. Uecker*, 2010 WI App 28, ¶8, 323 Wis. 2d 798, 780 N.W.2d 216.

II. The statements are not capable of being proven false and are not capable of having defamatory meanings.

A. Relevant Law

¶10 A statement is defamatory if it “tends to harm one’s reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.” *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 534, 563 N.W.2d 472 (1997) (citation omitted). “A person who claims that his or her reputation has been unlawfully damaged by something someone else has said *must first establish that the words are not true and are capable of a defamatory meaning.*” *Freer v. M & I Marshall & Ilsley Corp.*, 2004 WI App 201, ¶8, 276 Wis. 2d 721, 688 N.W.2d 756 (emphasis added). ““In determining whether language is defamatory, the words ... must be construed in the plain and popular sense in which they would naturally be understood.”” *Maguire v. Journal Sentinel, Inc.*, 2000 WI App 4, ¶19, 232 Wis. 2d 236, 605 N.W.2d 881 (Ct. App. 1999) (citation omitted). The context and circumstances in which the statements were made are also to be considered. *Frinzi v. Hanson*, 30 Wis. 2d 271, 276, 140 N.W.2d 259 (1966).

B. Chad Uebele's statement

¶11 The February 2, 2006 broadcast contained the following statement from Chad:

You feel like you're being robbed, and the worst part of it is it's like in plain daylight, it's not like you don't know who it is.

Terry contends that this statement, taken in the context of the entire broadcast, implies a false and defamatory meaning. The broadcast as a whole, Terry contends, consisted of (1) advertisements leading up to the broadcast containing the statement “newlyweds ripped off”; (2) an interview with Terry in which Mercure said she was “robbing these people”; (3) an appearance by a representative from Consumer Protection stating the Uebeles had been “ripped off”; and, among other things, (4) the use of the word “scam.” Terry argues that Chad’s statement, against the backdrop of what appeared in the broadcast (and the blog), is capable of conveying a false and defamatory meaning. We disagree.

¶12 It is important to distinguish between Chad’s statements and the broadcast and blog postings as put forward by the media defendants. We are only dealing with Chad’s statement in this appeal, not what the media defendants did with it. Chad’s statement, in the context in which *he* made it, reflects his sentiments of frustration and anger, the subjectivity of which is clear by his expression “you *feel*.” Chad’s opinion cannot be proven false. Although opinions are not completely exempt from the realm of defamatory communications, an actionable opinion must be blended with an expression of fact and must imply “the assertion of undisclosed defamatory facts as a basis of the opinion.” *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265, 1268 (7th Cir. 1996) (citation omitted). Chad’s statement does not assert an undisclosed defamatory fact; rather, his

statement reflects his disappointment in an undisputed fact—that he received his wedding video close to seven months after his wedding despite having paid prior to the wedding. Therefore, Chad’s statement is incapable of being proven false.

¶13 Chad’s statement is also incapable of having a defamatory meaning. In light of the context and circumstances in which the statement was made, Chad’s statement was not the cause of harm to Terry’s reputation or business. As a consumer who paid for a product not received—presumably a product with significant sentimental value—the context, circumstances and plain language of Chad’s statement reflect nothing more than the sentiment of a frustrated groom waiting for the wedding video he paid for.

¶14 The dissent mistakenly characterizes Chad’s statement “you *feel like* you’re being robbed” (emphasis added) as a claim that he was *actually* robbed. Chad did not say that. How Chad felt about the way he was treated is what he expressed. His feeling, as we have explained, is not capable of being proven false. Because the media defendants are not involved in this appeal, how they chose to describe Terry’s business is not germane to this appeal. Without citation to any authority, the dissent appears to impose on Chad some form of vicarious responsibility for the manner in which some or all of the media defendants chose to report and comment on Chad’s expression of his feelings. Nothing in the record before us provides a legal reason to make Chad responsible for the media defendants’ characterization of his statements.

C. Jana Uebele’s statement

¶15 After the Uebeles received their video, WTMJ-4 conducted a follow-up interview with them. Clips of the interview were broadcast in a follow-up

report. Among the statements from the interview that aired was the following statement from Jana:

The video she'd showed us and what we got ... I think that there are some big differences and I guess I was disappointed in some instances where I heard her voice in the background. I really don't want her voice on my wedding video.

Terry contends that this statement is false because the quality of the video received by the Uebeles was substantially similar to the videos she had done for former clients. Terry has not made a *prima facie* case that this statement is false. First, Terry did not put in the record any videos that she had made prior to her contract with the Uebeles to substantiate her assertion that the quality of the Uebeles' video matched that of prior videos. Second, Jana's statement reflects her subjective opinion about the quality of a product she received. Like Chad's statement, there is no assertion of an undisclosed defamatory fact. In fact, Terry does not dispute that her voice is audible on the Uebeles' wedding video and admits to interviewing wedding guests on the video. The video also contains approximately four minutes of footage focusing on an empty altar, though the ceremony was in progress. In examining the plain language of Jana's statement in that context and under those circumstances, it is clear that Jana's expressed disappointment with the quality of her video cannot be proven false. Similarly, nothing about Jana's subjective statement renders it capable of having a defamatory meaning. Thus, Terry's reputation and business did not suffer because of what Jana said. Again, we only address *Jana's* statement, not the manner in which the media defendants reported or described it.

D. Statements attributed to the Uebeles by Mercure

¶16 Terry also contends that Mercure’s statement indicating that the Uebeles were to receive their video within ten weeks of the wedding is defamatory. She further contends that the following statement made by Mercure, also as a representation of a statement made by the Uebeles to Mercure, is defamatory:

[T]he quality [of the video] is well below what they were promised.

¶17 Terry contends that Mercure’s statement regarding the timeframe in which the video would be delivered is false because Mercure did not clarify that the ten to twelve week timeframe was only an estimate according to the informational flier received by the Uebeles. We disagree.

¶18 Mercure’s statement regarding the completion time of the video was substantially true, and therefore not defamatory. It is not “necessary that the article or statement in question be true in every particular. All that is required is that the statement be substantially true.” *Lathan v. Journal Co.*, 30 Wis. 2d 146, 158, 140 N.W.2d 417 (1966). The informational flier Terry provided to the Uebeles stated that the estimated completion time of the video would be ten to twelve weeks. That Mercure did not clarify the timeframe was an estimate or that it was ten to twelve weeks, rather than just ten, does not undermine the substantial truth of the statement. It is not disputed that the Uebeles were provided with a general timeframe but received their video approximately seven months after their wedding. The statement therefore cannot be proven false, nor is it capable of a defamatory meaning as it is substantially true. The Uebeles are not liable for Mercure’s characterization of their statements.

¶19 Mercure's characterization of Jana's statement regarding the quality of the video is also not defamatory. Mercure's reiteration of the Uebeles' subjective feelings regarding their video cannot be proven false, nor is it capable of a defamatory meaning, for the same reasons Jana's statement cannot be proven false or be found capable of having a defamatory meaning.

CONCLUSION

¶20 For all the foregoing reasons, we conclude that the trial court did not err in dismissing the Uebeles from Terry's defamation and negligence action. We affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

No. 2009AP2381(C/D)

¶21 FINE, J. (*concurring in part; dissenting in part*). This case was decided on summary judgment. Therefore, whether either the delay in Angela Terry’s delivery of the video or its asserted poor quality resulted in Chad and Jana Uebele being “robbed” (or close to it) or was sufficient for him to say that he had the “feel[ing]” that he was “being robbed,” cannot, in my view, be decided short of trial. First, “robbery” is a crime, *see* WIS. STAT. § 943.32, as is theft, *see* WIS. STAT. § 943.20. Accusing someone of a crime or close to it in connection with his or her business is defamatory *per se*, *Martin v. Outboard Marine Corp.*, 15 Wis.2d 452, 458–461, 113 N.W.2d 135, 138–139 (1962), because for a reasonable listener, who does not minutely scrutinize language through the focused lens of the lawyer or court, telling someone that the speaker felt that he or she was being robbed by another is, in my view, essentially indistinguishable from making the direct, flat-out accusation—at least for summary-judgment purposes. Indeed, the media’s use of the word “scam” shows how at least some reasonable listeners would interpret what Mr. Uebele said. Second, contrary to the Majority’s assessment, whether Terry’s business took customers’ money without giving fair value or was such that it supported Mr. Uebele’s assertion that what she did was equivalent to or was largely indistinguishable from robbery or theft, is certainly capable of being proven false. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21–22 (1990) (accusation of perjury). Indeed, that is what trials are for. Further, insofar as the Uebeles contend that their robbery or theft accusation was mere opinion because Mr. Uebele only had the “feel[ing]” that he was “being robbed,” framing a defamatory declaration as an opinion does not insulate the speaker from liability. *See Milkovich*, 497 U.S. at 20–21.

¶22 Although I agree with much of the Majority's opinion, I would reverse the grant of summary judgment as to the imputation of a theft-like crime in connection with Terry's business, and remand for trial. Accordingly, I respectfully concur in part and dissent in part.

