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Brown County, WI
2024CV001144

BY THE COURT:

DATE SIGNED: February 24, 2025

Electronically signed by Donald R. Zuidmulder
Circuit Court Judge

STATE OF WISCONSIN	CIRCUIT COURT BRANCH I	BROWN COUNTY

ERIC D. HOVDE, et al.,

Plaintiffs,

v.

WINSENATE PAC, et al.,

Defendants.

Case No. 24CV1144

DECISION AND ORDER

Before the Court are combined motions to dismiss from Defendants WinSenate PAC ("WinSenate") and various broadcasting stations (the "Media Defendants," or the "stations") (collectively, "the Defendants"). The Defendants assert that neither of the statements identified as defamatory in the Plaintiffs' complaint are capable of a defamatory meaning and that disposing of this case on the pleadings is appropriate. For the following reasons, WinSenate's motion will be **GRANTED**.

FACTUAL BACKGROUND

Plaintiff Eric D. Hovde ("Hovde") was the Republican front runner in the 2024 United States Senate race in Wisconsin. (Compl. ¶ 14.) On June 13, 2024, WinSenate aired a political attack advertisement against Hovde which characterized him as having "rigged the system to rake

in thirty million in government subsidies and loans," and stated that he "shelter[ed] his wealth in shady tax havens around the world." (*Id.*, ¶ 15.)

On June 14, 2024, the day after the advertisement was first aired, counsel for the Hovde campaign sent a cease-and-desist letter to the stations broadcasting the advertisement. (*Id.*, ¶ 36.) On June 17, WinSenate responded with a letter maintaining that the advertisement was accurate. (*Id.*, ¶ 40.) Counsel for Hovde then followed up by sending reply letters to the stations on June 18 insisting that the information aired about Hovde was false and that the stations were obligated to remove the advertisement from the air. (*Id.*, ¶¶ 41-42.) Despite these communications, the stations continued to air WinSenate's advertisement. (*Id.*, ¶ 43.)

On August 9, 2024, Hovde and Hovde For Wisconsin, Inc. ("Hovde For Wisconsin") (collectively, "the Plaintiffs") filed suit against WinSenate as well as seven broadcasting stations that aired the advertisement for defamation. (*Id.*) In their complaint, the Plaintiffs characterize the representations made about Hovde in the advertisement as "demonstrably false statements" that were made intentionally and with actual malice. (*Id.*, ¶¶ 46, 50-51.) The Plaintiffs' complaint requests that this Court enter an order against the Defendants for injunctive relief, an award of punitive damages, and an award for the Plaintiffs' attorneys' fees and costs. (*Id.*, ¶ 65.)

On October 14, 2024, WinSenate and the Media Defendants filed separate motions to dismiss the Plaintiffs' complaint. (Doc. 52; Doc. 55.) The thrust of the Defendants' motions is that the challenged statements do not contain any false or defamatory statements of fact and that the Plaintiffs' complaint fails to adequately plead that WinSenate acted with actual malice. (Doc. 54:11.)[1] For the following reasons, the Defendants' motions to dismiss will be granted.

[1] WinSenate's brief in support of its motion to dismiss was filed and docketed as document 54.

STANDARD

When analyzing a motion to dismiss, the Court must accept all alleged facts as true and draw any inferences in favor of the party against whom the motion is brought. *Notz v. Everett Smith Group, Ltd.*, 2009 WI 30, ¶ 15, 316 Wis. 2d 640, 764 N.W.2d 904 (citing *Peterson v. Volkswagen of Am., Inc.*, 2004 WI App 76, ¶ 2, 272 Wis. 2d 676, 679 N.W.2d 840). Because pleadings are to be liberally construed with a view to achieving substantial justice, a claim will be dismissed only if it is quite clear that under no conditions can the plaintiff recover. *Id.*

ANALYSIS

To state a claim for defamation, the Plaintiffs must plead facts sufficient to demonstrate that the challenged statements are false, that they were communicated by "speech, conduct or… writing to a person other than the person defamed," and that the communication was unprivileged and "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). When the person asserting a defamation claim is a public figure, they must also prove actual malice of the speaker by clear and convincing evidence. *In re Storms v. Action Wis. Inc.*, 2008 WI 56, ¶ 38, 309 Wis. 2d 704, 750 N.W.2d 739.

Further, whether the challenged statements are "capable of a defamatory meaning" is a question of law that the Court determines by construing the statements "in the plain and popular sense in which they would naturally be understood." *Terry v. Journal Broad. Corp.*, 2013 WI App 130, ¶ 19, 351 Wis. 2d 479, 840 N.W.2d 255. When the statements are made in the context of a television broadcast, the court should "consider the broadcast as a whole." *Mach v. Allison*, 2003 WI App 11, ¶ 31, 259 Wis. 2d 686, 656 N.W.2d 766. Since opinions cannot be false, opinions are

not actionable in the context of a defamation claim unless they implicate undisclosed defamatory facts which form the basis for the opinion. *Terry,* 2013 WI App 130, ¶ 14.

Therefore, the question before the Court is whether the statements claimed as defamatory in the Plaintiffs' complaint operate as assertions of fact, can be construed as statements of mixed opinion and fact, or, at least, whether the opinions expressed by those statements implicate unspoken facts. If WinSenate's statements within the advertisement could be so construed, the Court must then consider whether those statements are capable of a defamatory meaning. For the following reasons, it is the Court's conclusion that the statements at issue constitute mere expressions of opinion which do not implicate any defamatory facts. As such, the Defendants' motion to dismiss will be granted.

As stated, in order to conduct a proper analysis, statements challenged as defamatory must be considered in their full context. Here, the challenged statements occurred in the context of a political campaign, and, by the Plaintiffs' own admissions, are purportedly defamatory by their implications. As such, it should be acknowledged that, "courts shelter strong, even outrageous political speech, on the ground that the ordinary reader or listener will, in the context of a political debate, assume that vituperation is some form of political opinion neither demonstrably true nor demonstrably false." *Adelson v. Harris*, 973 F. Supp. 2d 467, 487 (S.D.N.Y. 2013).

The first statement at issue is the statement that Hovde "rigged the system to rake in thirty million in government subsidies and loans." (Compl. ¶ 15.) According to the Plaintiffs, this statement was intended to harm Hovde's reputation by implying that he "became wealthy through unethical or illicit means." (Doc. 84:2.)[2] In the Court's view, whether this statement suggests

[2] The Plaintiffs' response to the Defendants' supplemental briefing was filed and docketed as document 84.

undisclosed, defamatory facts turns on how a reasonable person would understand the meaning of the term "rigged" in this context.

The Plaintiffs suggest that the term "rigged" necessarily implicates that Hovde was engaged in illegal conduct. The Defendants, however, argue that the full statement is a "nonactionable statement of opinion based on undisputed facts." (Doc. 54: 6.) It is undisputed that Hovde received $30 million in government subsidies and loans and that Hovde's family negotiated for these subsidies and loans. Insofar as the statement that Hovde "rigged the system" is a statement of mixed opinion and fact, the underlying facts which form the basis for the opinion are undisputed.

A review of the case law makes it clear that the mere expression that Hovde "rigged the system" is a statement of opinion. The Plaintiffs, for example, cite to *Terry v. Journal Broadcast Corporation*, in which the court of appeals held that "variation of the terms 'rob,' 'ripped off,' and 'cheat'… convey statements of opinion that are not defamatory." 2013 WI App 130, ¶ 23. A reasonable person would understand the term "rigged the system" in this context as functioning as an unflattering characterization of the undisputed facts rather than as a factual assertion of illegal conduct.

The second challenged statement is that Hovde "shelter[ed] his wealth in shady tax havens around the world." (Compl. ¶ 15.) Again, the Plaintiffs' main contention in support of their claim that this statement constitutes defamation is that this statement suggests "illicit" conduct on the part of Hovde. (Doc. 74:11.)[3] However, the Court cannot accept that a reasonable person would understand the term "shady tax havens" as referring to illegal conduct. Indeed, the very reason that particular places can function as tax havens is because they provide a legal, favorable tax

[3] The Plaintiffs' response to the Defendants' motion to dismiss was filed and docketed as document 74.

environment. The descriptor "shady" in this context cannot reasonably be understood as referring to a plainly illegal tax arrangement.

The Plaintiffs also assert that the information contained in the advertisement, when taken together, makes a false, factual assertion that Hovde, at the time of the airing of the advertisement, was involved with investments in the Cayman Islands and Bermuda. While the Plaintiffs acknowledge that "Hovde has companies incorporated in Delaware and Nevada due to their favorable legal protections for corporate entities," they maintain that "none of his companies are incorporated in foreign countries." (Compl. ¶ 30.)

However, since the Plaintiffs do not dispute that Hovde has invested in publicly traded companies located in Bermuda, or that Hovde "has managed assets funded by foreign investors in companies based in the Cayman Islands," the Plaintiffs assert that this statement is defamatory because Hovde was not contemporaneously engaged in these activities at the time of the advertisement. However, the Plaintiffs rely on a plainly unreasonable interpretation of the advertisement. Specifically, they assert that the word "shelters" in the statement, "Hovde shelters his wealth in shady tax havens around the world" indicates that Hovde's use of tax havens outside of the United States is present and ongoing. It is this Court's determination that a reasonable person could not come to this conclusion.

In the Defendants' words, the "precise temporal scope of Hovde's activities does not change the substantial truth of the statement." (Doc. 54:11.) Whether Hovde was making use of international tax havens at the time of the airing of the advertisement is inconsequential in that the statement, "Hovde shelters his wealth in shady tax havens" is substantially true. *See Guccione v. Hustler Mag., Inc*., 800 F.2d 298, 302-03 (2d Cir. 1986) (statement implying that plaintiff was currently an adulterer was substantially true where plaintiff had ceased committing adultery after

doing so for several years). The more reasonable interpretation of the statement is that Hovde makes use of international tax havens and therefore may do so in the future, rather than that Hovde is presently engaged in the use of international tax havens. For these reasons, the Court concludes that neither of the challenged statements are capable of a defamatory meaning.

As a final matter, much of the Plaintiffs' resistance to the instant motion is predicated upon their position that, regardless of what determination is made regarding the merits of their claims, disposing of this case on the pleadings as opposed to at the summary judgment phase is inappropriate and contrary to the relevant case law. Indeed, the Court was initially inclined to see this litigation proceed to the summary judgment phase. However, it is conclusion of this Court that, in cases of a highly political nature such as this, the case law supports disposing with defamation claims on the pleadings.

In support of their argument, the Plaintiffs cite to a plethora of cases in which defamation claims were disposed of at the summary judgment phase. However, the fact that these cases proceeded to the summary judgment phase and were not instead dismissed on the pleadings does not compel the same result here. In *Biskupic v. Cicero*, a case which involved a defamation claim from a political candidate regarding published news reports about the candidate's record as district attorney, the circuit court granted summary judgment after discovery revealed that the defamatory statements at issue were the result of negligence rather than actual malice. 2008 WI App 117, ¶¶ 8-11, 313 Wis. 2d 225, 756 N.W.2d 649. This is one of many cases that Plaintiffs cite to support their position that dismissing the instant case on the pleadings would be premature.

However, these cases are easily distinguishable from the instant case in that they involve claims where defamatory statements are sufficiently pled from the outset and discovery is necessary to factually develop the presence of actual malice. In the case before the Court, the

Defendants are asserting that the Plaintiffs have failed to adequately plead the initial component of their claim, namely that WinSenate's advertisement is capable of a defamatory meaning. This component is not subject to further factual development, as it is a question of law that can be answered entirely by reference to the Plaintiffs' complaint. Consequently, there is nothing premature or inappropriate about disposing of the Plaintiffs' claims on the pleadings if it can be determined that the Plaintiffs have failed to overcome this first obstacle. To be sure, the Defendants have produced an impressive list of cases in which both Wisconsin courts and federal courts applying Wisconsin law have dismissed defamation claims on the pleadings. (Doc. 83:5-6.)[4]

The Court also finds it necessary to acknowledge the Defendants' concern regarding the chilling effect that allowing this case to proceed to the summary judgment phase would have on the Defendants' speech rights. The Court finds this concern most potent when a defamation claim concerns highly political speech, such as here where the challenged statements were made in the context of a highly contested United States Senate race. For these reasons, the Court will grant the Defendants' motion, and the Plaintiffs' complaint will dismissed with prejudice.

CONCLUSION AND ORDER

Therefore, the Defendants' motion to dismiss is **GRANTED**.

It is further ordered that Plaintiffs' complaint is dismissed without cost and with prejudice.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.

[4] The Defendants' combined supplemental brief in support of their motions to dismiss was filed and docketed as document 83.