IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-0563

RICHARD BAUER, Individually and as Trustee for the KENDALL R. BAUER TRUST,

Petitioner-Appellant,

vs.

BRADLEY R. BRINKMAN, (a/k/a Brad Brinkman),

Respondent – Appellee.

RESISTANCE TO APPELLANT'S APPLICATION FOR FURTHER REVIEW FROM THE COURT OF APPEAL'S DECISION FILED ON DECEMBER 5, 2020

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COMES NOW, Defendant/Appellee, Bradley R. Brinkman, (hereinafter "Brinkman") and pursuant to Iowa Rule of Appellate Procedure 6.1103(2), submits the following Resistance to Plaintiffs/Appellants' Application for Further Review:

BACKGROUND

Plaintiffs/Appellants Richard Bauer, Individually and as Trustee for the Kendall R. Bauer Trust, (hereinafter "Bauer") filed their Application for Further Review after the District Court's grant of Brinkman's motion for summary judgment was upheld in its entirety by the Iowa Court of Appeals. This case involves allegations of defamation against Bauer.

Brinkman adopts the Trial Court's Statement of Facts from the Ruling on pages 1-2 of the opinion. (App. at 7-8.) Brinkman won't repeat them for the sake of brevity.

Brinkman also asks this Court to consider that he considers Kathy Lynch, a friend of his and they have children in the same high school class. Brinkman was aware of Bauer's disputes with the City of Sloan and Lynch, related to her business. (App. at 427, depo. pg. 29.) Lynch began operating Pet Perfect, LLC across the street from Bauer's apartments. It is a dog grooming and boarding business. (*Id.*) The dispute got so heated that Bauer filed a lawsuit against the City of Sloan to try and shut down Pet Perfect, LLC claiming the City of Sloan was not enforcing its zoning ordinances. Bauer also installed video surveillance

cameras at his apartment that were aimed at Pet Perfect, LLC, apparently to annoy and harass Pet Perfect. (App. at 446, depo. pg. 69.)

Brinkman had seen the posts that Kathy Lynch, and her adult daughter, Gabbie Lynch, had made on Facebook about Bauer and the dispute between Bauer and Lynch. (App. at 419-420.) Several third parties responded including Brinkman when he posted,

> It is because of shit like this that I need to run for mayor! Mr. Bauer, you sir are a PIECE OF SHIT!!! Let's not sugar coat things here people, Kathy Lynch runs a respectable business in this town! You sir are nothing more than a Slum Lord! Period. I would love for you to walk across the street to the east of your ooh so precious property and discuss this with me!

(App. at 101.) Although Brinkman did not initiate the Facebook thread, Bauer filed suit against him and others.

There is no actionable defamation against Brinkman, as the District Court and Court of Appeals held. For reasons outlined below, this Court should deny Bauer's Application for Further Review.

LEGAL STANDARD

An Application for Further Review is not a matter of right, but is a matter of judicial discretion. Iowa R. App. P. 6.1103(1)(b). In deciding whether to grant further review, the Court may consider a number of factors, including, (1) whether the Court of Appeals entered a decision in conflict with a decision of the Supreme Court; (2) whether the Court of Appeals has decided a substantial question of

constitutional law or an important question of law that has not, but should be, settled by the Supreme Court; (3) whether the Court of Appeals has decided a case where there is an important question of changing legal principles; or (4) whether the case presents an issue of broad public importance. Iowa R. App. P. 6.1103(b)(1-4).

Bauer asserts that the Application is warranted because: the lower court erred by determining Brinkman's statement was one of opinion rather than a statement of fact; that Brinkman's statement was false and did not reflect his actual knowledge of Bauer; and the Court of Appeals failed to address any other issues raised by Bauer. Bauer's Application for Further Review, pg. 5. Bauer does not provide any basis as outlined in Iowa R. App. P. 6.1103(b)(1-4). This case does not fall within any ground outlined in the Iowa Rules of Appellate Procedure, and for the reason's outlined below, Bauer's Application should be denied.

ARGUMENT

Bauer's defamation claims raise a variety of legal issues, but he cannot establish his right to recovery against Brinkman as a matter of law. The District Court's and Court of Appeals' ruling does not involve a question of law that requires further clarification by this Court because the statements made by Brinkman were clearly of opinion and not fact. The Court of Appeals and District Court so held correctly.

Certainly, while the line between opinion and fact is sometimes difficult, drawing that line is important because opinions, like Brinkman's, are "absolutely protected under the first amendment." *Jones v. Palmer Comm'ns, Inc.,* 440 N.W.2d 884, 891 (Iowa 1989). And, as the Court of Appeals found in this case, and this Court found in *Jones,* the drawing of this line involves important First Amendment issues that make it a determination as one for the court rather than a jury fact-finder. *Id.*

The Court of Appeals looked at the four factors to determine whether a statement is actionable. Those factors include: (1) whether the "statement 'has a precise core of meaning for which a consensus of understanding exits, or conversely, whether the statement is indefinite and ambiguous"; (2) the degree to which the statement is "objectively capable of proof or disproof"; (3) "the contact in which the" statement occurs; and (4) "the broader social context in which" the statement fits. *Bandstra v. Covenant Reformed Church,* 913 N.W.2d 19, 47 (Iowa 2018).

In looking at these factors, the Court of Appeals, correctly noted that the term "slum lord" was not defined in Brinkman's post and the courts looked at definitions of this term. The term "slum lord", as used by Brinkman, was vague enough that a reader of the post is left to use their own definition, which results in the term meaning "different things to different people." *See, Yates v. Iowa W.*

Racing Ass'n, 721 N.W.2d 762, 771 (Iowa 2006). This inclusiveness, as the Court of Appeals noted, made it difficult-to-impossible to prove of the concept of a landlord being without concern for its tenants. It goes against the conclusion that Brinkman meant his name-calling to be a statement of fact. This was a heated argument on Facebook that included name-calling, not defamatory statements meant to libel anyone.

"It should also be understood that Internet blogs, message boards, and chat rooms are, by their nature, typically casual expressions of opinions." *SI03, Inc. v. Bodybuilding.com, LLC,* 2008 WL 113458, * 8 (D. Idaho 2008) citing *Doe v. Cahill,* 884 A.2d 451, 465 (Delaware 2005). Words that are mere name-calling or found to be rhetorical hyperbole or are employed only in a loose, figurative sense have been deemed nonactionable. 50 Am.Jur.2d *Libel and Slander* 159, at 449 (1995) (emphasis added). It has been further stated:

> The common law has always differentiated sharply between genuinely defamatory communications as opposed to obscenities, vulgarities, insults, epithets, name-calling, and other verbal abuse. No matter how mean or vulgar, such language is not defamatory. It is not defamatory, for example, to call someone a "bastard," or a "son of a bitch," or an "idiot." No matter how obnoxious, insulting, or tasteless such name-calling, it is regarded as a part of life for which the law of defamation affords no remedy.

Suntken v. Den Ouden, 548 N.W.2d 164, 169 (Iowa App. 1996) (citing Rodney A. Smolla, *Law of Defamation* § 4.03, at 4–12 (1995)). Brinkman's statements were mere rhetorical hyperbole.

The fact the statements were posted on Facebook has to be part of the analysis in this case. In *McGlothlin v. Hennelly*, 370 F. Supp. 3d 603, 618 (D.S.C. 2019), a court was asked to determine if statements on Facebook that a person was a "crony capitalist," a "crook," and a "crooked owner" were actionable. The court determined these were all rhetorical hyperbole and not capable of being proven false or even properly defined. In addition, the general tenor of the statements in the context of a Facebook post and a long, emotive comment on a newspaper article negated any impression that the speaker is asserting actual facts. The court concluded that these rhetorical statements in the Facebook post warranted First Amendment protection and that the plaintiff could not base his defamation claims on these statements. *McGlothlin v. Hennelly*, 370 F. Supp. 3d 603, 618–19 (D.S.C. 2019).

Courts throughout the country, in regard to internet posts, have found no defamation existed. The Northern District for the United States District of Ohio found that statements on an internet message board where a publicly traded company was accused of accounting fraud, readers were warned to "get ready for" an "FBI and SEC probe", and readers were advised to sell a certain company's

stock did not constitute actionable defamation. The court found that they were privileged opinions fraught with figurative language and hyperbole and the statements were unverifiable to any reader just like in this case. *See, SPX Corp. v. Doe,* 253 F.Supp.2d 974, 978 (N.D. Ohio 2003).

In *Global Telemedia Int'l v. Doe 1,* 132 F.Supp.2d 1261 (C.D. Cal. 2001), the United States District Court for the Central District of California, the plaintiff sued 35 anonymous internet message posters for libel and interference with contractual relationships when posts were made that were not flattering of plaintiff or its management practices. The court struck the claims because of the general tenor, and because the setting and the format of the posts strongly suggested the postings were opinion. The court looked at the context and stated, "[i]mportantly, the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents . . . " finding the court to hold that a reasonable reader of the postings would not expect that the defendant was airing anything other than his personal views. *Global* at 1267-1268. This description describes the Facebook posts in this case.

In the context of the Facebook post in this case, the reference to "slum lord" could not be interpreted as a defamatory statement of fact by a reasonable reader. There is no Iowa case directly on point with regard to the word "slumlord".

However, there are persuasive decisions from other state courts that determined calling a landlord a "slum lord" is not libelous. In *Rasky v. Columbia Broad. Sys., Inc.*, 103 Ill. App. 3d 577, 582, 431 N.E.2d 1055, 1058 (1981), the Illinois court determined slumlord was not actionable because it was capable of innocent construction and innocent construction is presumed. A New York court agreed and also found it not actionable. *See*, *Wahrendorf v. City of Oswego*, 72 A.D.3d 1604, 1605, 899 N.Y.S.2d 502, 503 (2010) (calling defendant a slumlord on website not actionable defamation).

Facebook is not a forum where a reasonable reader would perceive what was being stated as a statement of fact. The Supreme Court, Monroe County, New York in *Kindred v. Colby*, 54 Misc. 3d 1205(A), 50 N.Y.S.3d 26 (N.Y. Sup. Ct. 2015), *aff'd,* 145 A.D.3d 1586, 42 N.Y.S.3d 906 (N.Y. App. Div. 2016) had this to say about a Facebook post:

> Internet forums are venues where citizens may participate and be heard in free debate involving civic concerns. It may be said that such forums are the newest form of the town meeting. We recognize that, although they are engaging in debate, persons posting to these sites assume aliases that conceal their identities or "blog profiles." Nonetheless, falsity remains a necessary element in a defamation claim and, accordingly, "only statements alleging facts can properly be the subject of a defamation action". Within this ambit, the Supreme Court correctly determined that the accusation on the newspaper site that the plaintiff was a "terrorist" was not actionable. Such a statement was likely to be perceived as "rhetorical hyperbole, a vigorous epithet" This conclusion is especially apt in the digital age, where it has been commented that readers give less credence to allegedly defamatory Internet communications than they would to statements made in other milieus.

> Accordingly, we conclude that this statement constituted an expression of opinion, and, as such, is nonactionable.
>
> "Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable" Statements that amount to "no more than name-calling or ... general insults" are not actionable. Where "the tone of the statements at issue 'is ironic, sarcastic and caustic; 'it is evident that the [statements were] intended to be invective expressed in the form of heavy-handed and nonsensical humor'' (*citations omitted*)" and are not actionable. Expressions of opinion are "deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (internal citations omitted).

Kindred v. Colby, 54 Misc. 3d 1205(A), 50 N.Y.S.3d 26 (N.Y. Sup. Ct. 2015), *aff'd,* 145 A.D.3d 1586, 42 N.Y.S.3d 906 (N.Y. App. Div. 2016).

Other New York decisions contain additional guidance for dealing within online posts and keeping the context in mind. Those courts have said that "sifting through a communication for the purpose of isolating and identifying assertions of fact" is not "the central inquiry" and the courts "should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff." (*Guerrero v. Carva,* 10 A.D.3d 105, 112, 779 N.Y.S.2d 12 [1st Dept.2004]). The "*dispositive inquiry* ... is whether a reasonable [reader] could have concluded that [the articles were] conveying facts about the plaintiff' (*Gross v. New York Times Co., supra* at 152, 603 N.Y.S.2d 813, 623 N.E.2d 1163[emphasis supplied])." *Finkel v. Dauber*, 29 Misc. 3d 325, 329, 906 N.Y.S.2d 697, 702 (Sup. Ct. 2010).

The District Court in this case found, just like the Illinois and New York Courts cited above, that, in addition to the definition of "slumlord" being unverifiable as to whether or not an individual is one,

> It is also important to note that Brinkman's statement was contained within a Facebook comment. Although Facebook is regularly used to share reputable journalism and factual information, it is also commonly used to share personal opinions and comments on public and private life. Brinkman made the allegedly offending comment in response to a discussion concerning the conflict between Bauer and the Co-Defendants affiliated with the Pet Perfect LLC legal action(s). Brinkman, apparently angry with Bauer's actions regarding that dispute, first insulted Bauer by using the phrase "piece of shit" and in a subsequent sentence then accused Bauer of being a "slumlord." Given that Facebook is regularly used as a forum for sharing opinions and the fact that Brinkman was attempting to insult Bauer in the same message, it is apparent that this specific use of the word "slumlord" was not a statement of act, but rather that of an opinion.
>
> Hypothetically, "slumlord" could be used as a statement of fact; for instance, if a hypothetical tortfeasor was attempting to discourage prospective tenants by calling a property owner a "slumlord" and commenting on how a property's accommodations are poor. However, in the context used in this case, Brinkman was not attempting to comment on the quality of the Bauer Apartments, but rather Brinkman was attempting to insult Bauer. The sole fact that Bauer might find the word "slumlord" insulting does not make the statement actionable defamation.
>
> (App. at 4-5.)

The statements made by Brinkman are constitutionally protected speech, opinion or rhetorical hyperbole—none of which is actionable as defamation. It

was name-calling in a heated Facebook post about Bauer objecting to and trying to impede the business of Kathy Lynch in Sloan. The District Court and the Court of Appeals were correct in noting it was a heated Facebook thread not related to Bauer's apartments, but rather about Bauer's contesting and creating legal problems for Pet Perfect, LLC and Kathy Lynch. The terms "piece of shit" and "slumlord" were name-calling and hyperbole, not actionable defamation.

Bauer has not provided a sufficient basis for this Court to take on a review of this case. Bauer has not met any of the requirements of Iowa R. App. P. 6.1103(b)(1-4). As such, Bauer's Application for Further Review should be denied.

CONCLUSION

The District Court and the Court of Appeals both found that Brinkman's statements calling Bauer "slum lord" and a "piece of shit" are not factual statements, but rather are opinion. As a result, the statements do not constitute actionable defamation. The District Court and the Court of Appeal's rulings were made on sound, existing Iowa case law. Therefore, Bauer's Application for Further Review should be denied.

ORAL ARGUMENT

Brinkman does not believe this matter warrants oral argument.

Respectfully submitted,

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CERTIFICATE OF FILING

I hereby certify that I have filed this Resistance by filing electronically through EDMS, on the 28th day of December 2020.

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CERTIFICATE OF COST

It is certified that the actual cost paid by Appellee's for submitting this brief was $0.00 as it was filed electronically by EDMS pursuant to Court Order.

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Iowa R. App. P. 6.903(1)(g) because this brief contains 2,717 words, excluding parts exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(3) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief was prepared using a proportionally spaced typeface using Microsoft Word 2010 in 14 size font and Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December 2020, I served the attached Resistance by filing via EDMS to the following attorneys:

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