

In the Wisconsin Court of Appeals

DISTRICT 1

MARY MACCUDDEN,
PLAINTIFF-RESPONDENT,

v.

KATY SCARLETT JOHNSON,
DEFENDANT-APPELLANT.

On Appeal from the Milwaukee County Circuit
Court, The Honorable Kristy Yang, Presiding,
Case No. 22CV6894

**REPLY BRIEF OF DEFENDANT-APPELLANT
KATY SCARLETT JOHNSON**

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ARGUMENT

I. MacCudden Has No Answer to the Main Issue on Appeal—That None of Johnson’s Statements Are Provably False.

As Johnson explained in detail in her opening brief, statements are only actionable for defamation if they are capable of being proved true or false. Opening Br. 12–25. Epithets, names, insults, criticisms, and the like generally are not actionable precisely because they are not “sufficiently factual to be susceptible of being proved true or false.” *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 21 (1990). Most of the criticisms hurled about in public discourse are too imprecisely defined to be verifiable as true or false by a judge or jury, and they depend too heavily on one’s opinion and viewpoint. Johnson cited numerous cases holding that words and phrases similar to—or even identical to—those she used are nonactionable for precisely this reason. Opening Br. 14–15, 16–20.

Despite 70 pages of briefing, MacCudden has no meaningful response. She does not even attempt to articulate how statements like “woke,” “white savior,” “bully,” “lunatic,” and “god complex” are capable of being proved true or false. Her main counter is that “the burden is on Johnson” to prove that her statements were true, Response Br. 34, as if that’s somehow responsive and relevant to the antecedent question of whether the statements are even capable of being proved true or false. Even setting aside the non-sequitur, this argument exposes the fundamental problem with MacCudden’s lawsuit. Her whole tactic is to sue over ambiguous statements of opinion, put the burden on Johnson to prove their truth, and then hope to automatically win given that they cannot be proven true or false. If that is how defamation law worked, the burden would be the whole ballgame. That is why courts everywhere, including both the United States Supreme Court and Wisconsin

Supreme Court, have been so emphatic in policing the line between statements that are capable of being proved false and those that are not.¹

MacCudden's second response, that Johnson's posts "had negative connotations," is equally beside the point. Response Br. 34. A negative statement alone does not make defamation; it has to be false and *provably so*. People are free to call each other ugly, mean, crazy, or whatever else, so long as they do not assert false factual claims. The target can respond or ignore the criticism, but a "negative" statement does not automatically put a defamation lawsuit in play.

MacCudden has little to no response to the many cases Johnson cited finding similar or identical statements to be non-actionable. Opening Br. 16–20. In response to the various "bully" cases Johnson cited, for example, MacCudden cites a single case from an intermediate appellate court in California. *Nguyen-Lam v. Cao*, 171 Cal. App. 4th 858 (2009) (Response Br. 35–36). This case is doubly irrelevant. It did not involve the word "bully," but instead calling a Vietnamese candidate for superintendent a "communist." And second, the court did not evaluate whether this statement was provably false; the main question analyzed was whether the trial court properly allowed the plaintiff to amend her complaint to plead actual malice.

MacCudden cites just two cases in response to the many Johnson cited dismissing defamation claims for calling someone a "lunatic" (and similar phrases), but both are also irrelevant. The first, *Goldwater v. Ginzburg*, 261 F. Supp. 784 (S.D.N.Y. 1966), involved a magazine article about presidential candidate Barry Goldwater. The statements there

¹ To be clear, Johnson does not concede that the burden would be on her to prove the truth of her statements. That issue is not before this Court at this stage of the litigation. That would ultimately be a question for the trial, if there ever were one. This appeal raises the preliminary question of whether the statements are even capable of serving as the basis for a defamation claim.

were far more fact-based than merely calling him a “dangerous lunatic.” The article quoted various psychiatrists who asserted that Goldwater “has had ‘nervous breakdowns’, has ‘paranoia’, is a ‘compensated schizophrenic’, has ‘a chronic psychosis’, etc., etc.” *Id.* at 785. The Court viewed these statements, especially from professional psychiatrists, as asserting “in substance that [he] suffers from a mental illness which renders him unfit to be President.” *Id.* No one would reasonably understand Johnson’s tweet about “these woke lunatics,” R.23, Ex. D, to be asserting that MacCudden suffers from a mental illness. And, regardless, the question raised to the court was not whether any of these statements were verifiably false. Likewise, the court in the second case—an intermediate appellate court in Indiana—did not consider whether the statement was provably false because that argument was not raised by the appellant. *Powers v. Gastineau*, 568 N.E.2d 1020, 1024 (Ind. Ct. App. 1991).

II. The Public/Non-Public Figure Dichotomy Is Irrelevant to This Appeal.

The major theme of the response brief is that MacCudden is not a public figure, and therefore, in her view, any case involving a public figure is irrelevant. Response Br. 22, 25, 40, 48, 50, 53, 56, 57–58, 63, 65. This is a red herring. MacCudden misunderstands the relevance of the public-versus-non-public figure distinction.

The “public figure” dichotomy originated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Court held (as a *constitutional* limit on defamation claims) that “public official” plaintiffs have the burden to prove “actual malice” to recover damages for defamation based on comments about their “official conduct.” *Id.* at 279–80; *Milkovich*, 497 U.S. at 14. The Court later extended that rule to “public figures”—those “involved in the resolution of important public questions or [who], by reason of their fame, shape events in areas of concern to society at

large”—and then declined to extend it to private figures, even where the statements related to matters of “public concern.” See *Milkovich*, 497 U.S. at 14–15 (citations omitted) (surveying this “evolution”). Thus, the public-versus-private-figure test determines whether the plaintiff must plead and prove “actual malice.” But it has no bearing on the ancillary question of whether the statement is objectively verifiable enough to support a defamation claim, which is the issue here. See *Wagner v. Allen Media Broad.*, 2024 WI App 9, ¶ 21, 410 Wis. 2d 666, 3 N.W.3d 758 (noting that the “starting point for all defamation claims” is a “false statement ...” but that “there may be additional constitutional requirements depending on the status of the plaintiff and defendant.”).

Milkovich makes clear that these are distinct questions. After surveying the “public figure” cases, the Court explained that it has “also recognized constitutional limits on the *type* of speech which may be the subject of state defamation actions.” 497 U.S. at 16 (first emphasis added). Statements “that cannot reasonably be interpreted as stating actual facts about an individual,” like “rhetorical hyperbole” and “vigorous epithets,” are not actionable. *Id.* at 16–17, 20. So too for statements that “do[] not contain a provably false factual connotation.” *Id.* at 20.² In other words, a statement must be “sufficiently factual to be

² One of cases the Court cited for this principle was *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). *Hepps* held that, for “media defendants,” plaintiffs must bear the burden to prove falsehood, rather than the defendant bearing the burden to prove truth. *Id.* The Court in both *Hepps* and *Milkovich* left open whether a similar burden shift would apply to “nonmedia defendants.” See 497 U.S. at 20 n.6. Who bears the burden of proving truth/falsity is a different question from whether the statement is even “susceptible of being proved true or false.” 497 U.S. at 21. The Court did not indicate that that preliminary question would be limited to “media defendants.” In any event, the “majority” of Courts to consider the question after *Milkovich* have held that *Hepps*’ burden-shifting rule applies to media and nonmedia defendants alike. See *Cousins v. Goodier*, 283 A.3d 1140, 1148 n.40 (Del. 2022); *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014).

susceptible of being proved true or false.” *Id.* at 21. Or, as the Delaware Supreme Court recently put it, the “sine qua non” is “objective verifiability”—the statement must be “capable of being proved false.” *Cousins v. Goodier*, 283 A.3d 1140, 1154–56 and n.83 (Del. 2022) (citations omitted).

The Supreme Court has never limited this principle to “public figure” cases. Contrary to MacCudden’s characterization of *Milkovich* as “a public figure case,” see Response Br. 65, the Ohio Supreme Court had held that *Milkovich* was not a “public figure,” *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 294–97, 473 N.E.2d 1191 (1984), a holding that the Supreme Court viewed as the “law of the case.” 497 U.S. at 10 n.5. Even so, the Court applied this limit to *Milkovich*’s case, notwithstanding that he was not a public figure. See 497 U.S. at 21–22 (concluding that the “the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false.”).

But even setting aside *Milkovich* and any constitutional limit on defamation claims, the same requirement has long been part of Wisconsin’s common law on defamation. As noted above, “a false statement” is one of the three main elements that are the “starting point for all defamation claims.” *E.g.*, *Wagner*, 2024 WI App 9, ¶ 21; *Ladd v. Uecker*, 2010 WI App 28, ¶ 8, 323 Wis. 2d 798, 780 N.W.2d 216. And “truth is a complete defense.” *Ladd*, 2010 WI App 28, ¶ 8. If falsity is required and truth is a defense, the statement must be *capable* of being proved true or false—regardless of who bears the burden of proof. Wisconsin Courts have recognized this principle and rejected defamation claims on this basis. See, e.g., *Torgerson v. J./Sentinel, Inc.*, 210 Wis. 2d 524, 534–35, 563 N.W.2d 472 (1997) (“If the challenged statements as a whole are not capable of a false and defamatory meaning ... a libel action will fail.”); *Terry v. J. Broad. Corp.*, 2013 WI App 130, ¶¶ 17, 23, 351 Wis.

2d 479, 840 N.W.2d 255 (concluding that some of the statements “cannot be proven false” because they “convey statements of opinion”).

III. The Circuit Court Did Not Clearly Hold That the October 15 Post Was Actionable; Regardless, It Obviously Is Not.

At one point in her brief, MacCudden argues that this Court should allow a separate statement from an October 15 post to proceed to trial because Johnson did not directly address it in her opening brief. Resp. Br. 27–28 and n. 1. The post was a response to a comment from someone else. Johnson wrote: “If [MacCudden] really wants to promote equity, perhaps she should forfeit her job to a person of color?” R. 23, Ex. C. Johnson did not address that statement in her opening brief because she did not understand the Circuit Court’s decision as allowing that statement to proceed to trial for defamation.

At the beginning of its decision, the Court did not list this as one of the statements “at issue”—instead, according to the Court, it was the phrases “woke white women,” “god complex,” and “white savior.” App. 3–4. The Court briefly mentioned the phrase when recounting the remaining background facts, *see* App. 4, but not in the introductory paragraph setting forth the statements “at issue.” The next reference to that statement is on page 7 of the opinion, where the Court held, rightfully, that this was “a[n] opinion[] and not [a] statement[] of fact that can be proven.” App. 9. As Johnson explained thoroughly in her opening brief, a statement has to be provably true or false to be actionable. Opening Br. 12–15. A statement that is not even a “statement[] of fact” obviously “can[not] be proven,” App. 9, and is thus not actionable.

Confusingly, and in conflict with that finding, the header and first sentence on page 9 of the opinion include the October 15 statement (“perhaps she should forfeit her job to a person of color”) in a list of

phrases that “could potentially constitute mixed opinions.” App. 11. But the rest of the Court’s analysis never mentions this phrase again, much less explains how it could constitute an actionable “mixed opinion.” In the part of the opinion where the Circuit Court held—wrongfully—that Johnson’s posts could imply that MacCudden “abuses her position of power over students,” the only phrases the Court identified as having that implication were “woke, god complex, white savior, bully, [and] lunatic.” App. 11–12. No mention of the October 15 post there or anywhere else in the analysis. In light of that, Johnson did not reasonably read the opinion as allowing that phrase to go to trial.

In any event, this statement is the easiest to dismiss as non-actionable. It is not even close. As the Circuit Court recognized, this statement was not a “statement[] of fact” *at all*. It is a statement about what MacCudden *should do in the future*, not about who she is or what she has done in the past. (And, moreover, it was obviously a sarcastic, rhetorical device to make a point.) Statements about what someone else *should do* are straightforward opinions that cannot be proved true or false. *Milkovich*, 497 U.S. at 16–17 (statements “that cannot reasonably be interpreted as stating actual facts about an individual” are not actionable). How would one go about proving, at trial, whether MacCudden *should* do that or not? This statement is not remotely close to being actionable for defamation.

IV. MacCudden’s Remaining Arguments Are Meritless

Only a few other arguments warrant any response. Johnson explained that her posts were primarily about the district and “social justice coordinators” *generally*, rather than MacCudden specifically. Opening Br. 16. MacCudden counters that this characterization is “unsupported by the record.” Response 46. The “record” that supports this argument is the posts themselves; the Court simply needs to read them to verify that Johnson’s characterization is accurate. And

MacCudden’s assertion that her posts did not reference the school district, *id.*, is plainly false: her initial post started with criticizing “my school district” for “paying for” a “social justice coordinator.” And she also referenced “@mtschools,” another reference to the school district.

Finally, MacCudden argues that “First Amendment protection does not reach here” *at all*. Response Br. 54. *Milkovich* directly refutes this argument. It “recognized constitutional limits on the *type* of speech which may be the subject of state defamation actions,” regardless of the status of the plaintiff or defendant, 497 U.S. at 16, as many lower courts have since recognized. *E.g.*, *Snyder v. Phelps*, 580 F.3d 206, 222 (4th Cir. 2009), *aff’d*, 562 U.S. 443 (2011); *Huon v. Denton*, 841 F.3d 733, 743 (7th Cir. 2016); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993); *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of California v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995).

The case MacCudden cites is not to the contrary (it also had no majority and was decided *before Milkovich*). See Response Br. 54–55 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985)). The plurality opinion drew a distinction between “speech on ‘matters of public concern,’” which “is ‘at the heart of the First Amendment’s protection,’” and “speech on matters of purely private concern,” which “is of less First Amendment concern.” *Id.* at 758–59. But the plurality opinion did not state that the Constitution has *nothing* to say about the latter, just that its role is “*more limited*.” *Id.* The limits are those later articulated in *Milkovich*. In any event, as Johnson explained in her opening brief, her speech *was* on a matter of immense public concern—the operation of public schools—and therefore receives the highest protection, since it lies at the “heart of” the First Amendment. Opening Br. 26. MacCudden’s only response is to repeat her argument that there is “no support in the record” that Johnson’s speech was

directed at the school district. As explained above, that argument can be rejected merely by reading her posts at issue.

CONCLUSION

This Court should reverse the decision of the Circuit Court and direct the entry of summary judgment in Johnson's favor.

Dated: November 27, 2024.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,720 words.

Dated: November 27, 2024.

Electronically signed by Luke N. Berg

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