IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

Maurice Arcadier, individually,
and Arcadier, Biggie & Wood, PLLC,
a Florida limited liability company,

Plaintiffs,

v.

Kenneth G. Lunden, individually
and Cocoa Village Marina Boaters
Association, Inc., d/b/a Cocoa
Village Marina, a Florida not for
Profit Corporation,

Defendants.
_____/

Case No.: 05-2019-CA-054578

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Defendants, Kenneth G. Lunden and Cocoa Village Marina Boaters Association, Inc., d/b/a Cocoa Village Marina (hereinafter "Lunden" and "Cocoa Village Marina," respectively), through undersigned counsel, hereby move to dismiss Plaintiffs' Complaint in its entirety for failure to state a cause of action.

I. Introduction

Plaintiffs purport to assert claims for defamation and defamation per se against Lunden and Cocoa Village Marina for a statement of pure opinion posted as an internet review on Google. The statement in its entirety reads as follows: "Watch out for Maury Arcadier, he has a very bad temper." This statement is not actionable as a matter of law because it is pure opinion that is protected by the First Amendment to the United States Constitution. Additionally, the statement is not defamatory because it does not charge that the Plaintiffs committed an infamous

crime or subject them to hatred, distrust, ridicule, contempt or disgrace, nor injure them in their profession. For these reasons, Plaintiffs' Complaint must be dismissed, with prejudice.

II. Argument

To establish a claim of defamation, a plaintiff must allege the following five (5) elements: "(1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) the statement must be defamatory." *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008). The Florida Supreme Court has defined a defamatory statement as "one that tends to harm the reputation of another by lowering him or her in the estimation of the community or, more broadly stated, one that exposes a plaintiff to hatred, ridicule, or contempt or injures his business or reputation or occupation." *Id.* at 1108-09 . Of course, an allegation that a statement about another is false is a required element of defamation. *Kieffer v. Atheists ofFla., Inc.*, 269 So. 3d 656, 659 (Fla. 2d DCA 2019). To qualify as defamation per se, a statement must, without innuendo: (1) charge that a person has committed an infamous crime; (2) charge that a person has an infectious disease; (3) tend to subject one to hatred, distrust, ridicule, contempt, or disgrace; or (4) tend to injure one in his trade or profession. *Blake v. Giustibelli*, 182 So. 3d 881, 884 (Fla. 4th DCA 2016).

The Fifth District Court of Appeal has recognized that "expressions of pure opinion are privileged and protected by the Constitution." *Magre v. Charles*, 729 So. 2d 440, 442 (Fla. 5th DCA 1999). As the United States Supreme Court observed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974):

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscious of judges and juries, but on the

> competition of other ideas. But there is no constitutional value in false statements of fact.

The determination of whether a statement is a pure opinion is a question of law. *Morse v. Ripken*, 707 So. 2d 921, 922 (Fla. 4th DCA 1998). "To determine whether a statement is actionable or whether it is a pure expression of opinion, the court must construe the statement in its totality, examining not merely a particular phrase or sentence, but all the words used in a publication." *Dreggors v. Wausau Ins. Co.*, 995 So. 2d 547, 551 (Fla. 5th DCA 2008). Crticially, statements of pure opinion must distinguished from mixed opinion. "Mixed opinion is based upon facts regarding a person or his conduct that are neither stated in the publication nor assumed to exist by a party exposed to the communication." *Id.* (citing *Hay v. Indep. Newspapers, Inc.*, 450 So. 2d 293, 95 (Fla. 2d DCA 1984)). Additionally, mixed opinion "implies that a concealed or undisclosed set of defamatory facts would confirm [the author'] opinion." *Id.* The distinction is important, because pure opinion is protected under the First Amendment, but mixed opinion is not. *Id.*

The statement at issue in the instant case is not mixed opinion. Rather, it is pure opinion. The statement does not imply some undisclosed set of defamatory facts. Rather, it is a completely self-contained. The first part of the statement cautions the reader to watch out for "Maury Arcadier." The second part of the statement explains why – "he has a very bad temper." Nothing else is implied or suggested by the statement and there is certainly no suggestion of some undisclosed set of defamatory facts. To the contrary, it is objectively clear that the statement is simply the writer's opinion. As such, the statement is privileged and not actionable as a matter of law. The Complaint must, therefore, be dismissed in its entirety.

The decision in *Scandinavian World Cruises (Bahamas) Ltd. v. Ergle*, 525 So. 2d 1012 (Fla. 3d DCA 1988), is instructive. In *Ergle*, the harbormaster of the Port of Fort Pierce sued

Scandinavian World Cruises for defamation based on statements made by the cruise line's representatives that were published in a newspaper article. The allegedly defamatory statement was summarized by the court as follows: "We [SWC] are not coming back to Fort Pierce because Ergle is unreasonable, is milking the cow to death and the total charges are too high." *Id.* at 1013. The trial court entered judgment against Scandinavian World Cruises for both compensatory and punitive damages. *Id.* On appeal. the Third District Court of Appeal reversed the final judgment , holding that these "were statements of pure opinion and not actionable." *Id.* at 1015.

Similarly, in *Morse v. Ripken*, 707 So. 2d 921 (Fla. 4th DCA 1998), the plaintiff filed suit for defamation against Kelly Ripken, the wife of baseball player Cal Ripken, Jr. 707 So. 2d at 921. The claim was based on statements made by Mrs. Ripken that were published in an article in the magazine, *Ladies Home Journal*. The article contained the following statements plaintiff claimed were defamatory:

> The toughest part, they agree, are the fans who mob Cal wherever he goes. "They want to kiss him," says Kelly, making a face. "I hate that."
>
> * * *
>
> But honestly, says Kelly, perhaps the most telling quality about Cal is that "he's such a trusting soul."
>
> Take the woman in Florida who agreed to rent her home to Ripken this year for spring training. "When Cal showed up, the woman was still in the house," Kelly says laughing. "She hadn't quite gotten around to leaving. I told Cal, 'She was planning to spend the night with you!' "
>
> She sighs at his naivete. "He hadn't even *considered* that possibility."

Id. at 922 (emphasis in original).Plaintiff Morse claimed she was "the woman in Florida." *Id.* The alleged defamation was the suggestion that Morse "was planning to spend the night" with Cal Ripken, Jr. The trial court dismissed Morse's complaint with prejudice. *Id.* at 921.

On appeal, the Fourth District Court of Appeal framed the issue succinctly as one that required a determination of "whether the story contains statements of pure opinion, which are not actionable under the First Amendment." *Id.* at 922. The court held that the statements were pure opinion, "nothing more than her commentary on the facts presented in the article." *Id.* at 923. Importantly, the court emphasized that "[t]here was no implication in Kelly's reported statements that there were undisclosed facts which also formed the basis of her opinion." *Id.* Because the statements were pure opinion, they were not actionable under the First Amendment. Therefore, the court affirmed the dismissal of the complaint with prejudice.

In this case, the challenged statement is clearly nothing more than the writer's commentary on Arcadier's temper. There is no implication that there are undisclosed defamatory facts that formed the basis of the author's opinion. Even viewed in the light most favorable to the Plaintiffs, it would be obvious to any reader that the author of the statement is merely expressing an opinion.

Numerous courts have found similar expressions of opinion not to be actionable as defamation. *See, e.g.*, *Varughese v. Mt. Sinai Med. Ctr.*, Case No. 12–8812, 2015 WL 1499618, at *74 (S.D.N.Y. Mar. 27, 2015) ("What [the plaintiff] objects to are the characterizations of her work as 'unsatisfactory,' 'unprofessional' and 'substandard.' But these are matters of *opinion*, not actionable assertions of fact." (emphasis in original)); *Freiburger v. Timmerman*, Case No. 13–8174, 2014 WL 5423068, at *5 (N.D. Ill. Oct. 23, 2014) (holding that statement that a counter-plaintiff "has handled [the situation] in an extremely unprofessional manner" was an opinion that could not give rise to a defamation claim); *Piccone v. Bartels*, 40 F. Supp. 3d 198, 210 (D. Mass. 2014) *aff'd*, 785 F.3d 766 (1st Cir. 2015) (holding that statement that the plaintiffs were "unprofessional" was "unambiguously [an] expression[ ] of opinion"),; *Kiehn v. Stein*, Case

No. 12–6554, 2013 WL 1789718, at *3 (N.D. Cal. Apr. 26, 2013), *appeal filed*, Case No. 14–15104 (9th Cir. Jan. 13, 2014) ("'[E]xtremely inappropriate' and 'unprofessional' are expressions of opinion, and thus not actionable [as defamation]."); *Manjarres v. Nalco Co.*, Case No. 09–4689, 2010 WL 918072, at *3–4 (N.D. Ill. Mar. 9, 2010) (finding that the defendants' alleged statements that the plaintiff was "unprofessional" and "incompetent" were "nonactionable opinions"). The opinion expressed in the challenged statement in the instant case clearly falls into this same category of non-actionable opinion statements that are protected by the First Amendment.

To the extent that Plaintiffs are asserting that a "one star review," which allegedly accompanied the statement at issue,[1] constitutes either defamation or defamation per se, such an allegation is also not sufficient to state a cause of action. Much like the statement at issue, a one-star "rating" cannot support a defamation claim because it is a statement of opinion, which is incapable of being proven either true or false. By their very nature, ratings systems are inherently subjective. Indeed, a group of individuals may all have an identical experience with a particular company or service provider, but each might rate the company differently depending upon their own personal criteria and/or experiences. Courts around the country have acknowledged that a defamation action cannot lie when based upon a rating. *See Law Office of David Freydin, P.C. v. Chamara,* Case No. 17-C-8034, 2018 WL 4144638, *1-2 (N.D. Ill. Aug. 30 2018) ("All the complained of comments by Defendants such as 'unethical,' 'unprofessional,' 'chauvinist,' 'one-star rating,' 'an embarrassment and a disgrace,' 'hypocrite,' and 'racist' are similar statements of opinion and are not factually verifiable. The Motion to Dismiss Count I is granted.") (internal citation omitted); *Icon Health & Fitness, Inc. v. ConsumerAffairs.com,* Case No. 1:16-cv-00168-

[1] *See* Compl. at ¶12. However, the print-off attached to the Complaint as Exhibit "A" is almost unreadable, making it impossible to verify that the Internet post at issue—which has since been taken down—also contained a one-star rating.

DBP, 2018 WL 1183372, *2 (D. Utah Mar. 6, 2018) (re-iterating a prior ruling wherein the court found that, "A reader understands [star] ratings to represent the subjective satisfaction felt by a product user or group of users," and accordingly dismissing plaintiff's defamation claim as protected opinion); *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 441 S.W. 3d 345, 357 (Tex. App. 2013) ("But the "F" rating itself cannot be defamatory because it is the Bureau's self-described "opinion" of the quality of John Moore's services, which lacks a high degree of verifiability."); *Browne v. Avvo Inc.*, 525 F. Supp. 2d 1249, 1252 (W.D. Wash. 2007) ("A user of the Avvo site would understand that "5.5" [rating] is not a statement of fact. To the extent the numbers are tied to fuzzy descriptive phrases like "superb," "good," and "strong caution," a reasonable reader would understand that these phrases and their application to a particular attorney are subjective and, as discussed below, not sufficiently factual to be proved or disproved.").

Even taking Plaintiffs' allegation as true that Defendants actually posted a one-star rating of Plaintiffs, the rating is also a statement of opinion that is not actionable as defamation pursuant to Florida law. *See Magre*, 729 So. 2d at 442. Accordingly, any defamation claims based upon Defendants' alleged rating of Plaintiffs must be dismissed.

III. Conclusion

The statement relied upon by the Plaintiffs is obviously nothing more than an expression of the writer's pure opinion, which is privileged under the First Amendment to the United States Constitution. As such, the statement relied upon by the Plaintiffs cannot support an action for defamation or defamation per se.

WHEREFORE, Defendants, Kenneth G. Lunden and Cocoa Village Marina Boaters Association, Inc., d/b/a Cocoa Village Marina, respectfully move this Court to dismiss the Complaint, with prejudice, and to award further relief deemed proper under the circumstances.

Respectfully submitted,

GRAYROBINSON, P.A.
Attorneys for Defendants

/s/ Ted L. Shinkle
Ted L. Shinkle, Esq.
Florida Bar No.: 608051
Lesley-Anne Marks, Esq.
Florida Bar No.: 107009
1795 W. NASA Blvd.
Melbourne, FL 32901
Phone: (321) 727-8100
Fax: (321) 984-4122
Email: ted.shinkle@gray-robinson.com
lesley-anne.marks@gray-robinson.com
Secondary: jodi.aliano@gray-robinson.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was efiled through the Florida Courts E-Filing Portal on this 9th day of December, 2019, and, through the Florida Courts E-Filing Portal, a copy of same was automatically served on the parties as follows: Maurice Arcadier, Esq., Arcadier, Biggie & Wood, PLLC, 2815 W. New Haven, Suite 304, Melbourne, FL 32904 at office@abwlegal.com and arcadier@abwlegal.com, attorneys for the Plaintiffs.

/s/ Ted L. Shinkle
Ted L. Shinkle