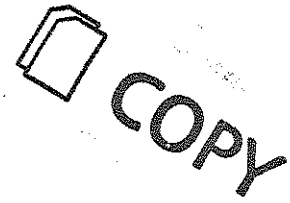
CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
LINCOLN & MINNEHAHA COUNTIES
425 North Dakota Avenue
Sioux Falls, SD 57104-2471



April 28, 2008

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RE: *Dan Scott v. Randall Beck and The Sioux Falls Argus Leader* (CIV. 07-3426)
Defendants' Motion for Judgment on the Pleadings

Dear Counsel:

This matter came before the Court for hearing on April 8, 2008 regarding the Defendants' Motion for Judgment on the Pleadings. After reviewing the record, the parties' submissions, and arguments of counsel, the Court issues its decision as follows:

I. INTRODUCTION

The Defendants' Motion for Judgment on the Pleadings arises out of a lawsuit brought by Dan Scott (Scott, Plaintiff) against Randall Beck (Beck) and *The Sioux Falls Argus Leader* (the *Argus*; collectively, the Defendants). Scott is the

former president of the Sioux Falls Development Foundation (the Foundation), a non-profit organization devoted to promoting the development of the city of Sioux Falls. Beck serves as the executive editor of the *Argus*, and authors a weekly column in the paper's Sunday issue. The *Argus* is a foreign corporation authorized to do business in South Dakota, and is the largest newspaper in this state. In addition, the *Argus* operates and maintains an internet website which exhibits much of the same content as its printed newspaper.

II. FACTS AND PROCEDURE

The facts of this case are well known. On June 15, 2007, Scott was one of several individuals asked to give a speech at a Sioux Falls Area Chamber of Commerce breakfast. The purpose of the event was to build relations with South Dakota legislators from areas outside of Sioux Falls. At the beginning of Scott's speech, he commented on the *Argus* by stating: "You must remember that the mission of the *Argus* Leader is to comfort the afflicted and afflict the comfortable." At the close of his speech, Scott made a comment that would stir controversy among some state legislators and members of the community. Discussing his desire to continue the growth of Sioux Falls, Scott opined: "So if you can't bring yourself to catch the excitement, then at least stay out of the way, because there is a bunch of us here that have a city to build."

Beck and the president of the *Argus*, Arnold Garson (Garson), were in attendance when these comments were made, as the *Argus* was a financial sponsor of the event. Later that day, Garson made a telephone call to Sioux Falls Area Chamber of Commerce president Evan Nolte to express his concern with Scott's comments about the *Argus*. Garson also called Scott's supervisor at the Foundation, Dana Dykhouse, to discuss the same.

Scott's closing remarks to the speech were not well received by some in the community, including several state legislators from areas outside of Sioux Falls. As a result, on June 16, 2007, the *Argus* published an opinion column criticizing Scott's statements. The article was titled "Official erodes city's image" and included a picture of Scott. The article's subtitle provided: "Arrogant comments undermine event." The column did not mention Scott's introductory jest regarding the *Argus*. Instead, it labeled Scott's comments about the importance of Sioux Falls' continued development as arrogant and counterproductive to healthy relations with other areas of the state.

On June 21, 2007, the Foundation's executive committee asked Scott to write a letter to state legislators explaining his comments at the breakfast. This letter

was allegedly prompted, at least in part, by Garson's various phone calls voicing his discontent with Scott's speech.

The main event prompting this lawsuit occurred on Sunday, July 15, 2007. That day, the *Argus* published an article written by Beck titled "Divisively Arrogant: Dan Scott's Apology." Under the title appeared a caption, reading "NEWS ITEM." The article was published in the "Voices" section of the paper, which frequently includes opinion commentary and community news items. In the article, Beck rehashed Scott's controversial comments at the June 15, 2007 breakfast, and further provided that Scott had been asked by the Foundation to write an apology letter to lawmakers. Beck then told readers that Scott's letter could be found on the *Argus* website and provided the site's address. "Or," Beck proceeded, "you can read a reasonable facsimile right here." The article then included a memorandum-style letter in which "Dan Scott" made a faux-apology to state legislators regarding his June 15 speech. Authored by Beck, this "letter" was full of sarcastic comments in an attempt to mock Scott's actual apology letter. Nowhere in the article did Beck expressly indicate that the article was a parody or a satirical version of Scott's actual letter.

Beck's article was also posted on the *Argus*' website. According to Scott, the actual apology letter was difficult to find, as the Defendants did not provide readers with instructions on how to access it on their website. Scott's actual apology letter was never reproduced in the print version of the *Argus*.

On July 22—one week after the allegedly defamatory column was published—Beck wrote another column for the "Voices" section, titled "City-centric attitude main target of satire." Addressing his July 15 column, Beck wrote: "I tried to use satire last week . . . . It's quite possible it didn't work, and I will take my lumps." On August 1, 2007, Scott sent the Defendants a letter demanding retraction of the July 15 article. The Defendants rejected that demand, citing Beck's July 22 column as an appropriate clarification. Scott subsequently filed suit against the Defendants on August 15, 2007. In his Verified Complaint, Scott has alleged claims sounding in defamation by libel, and invasion of privacy. Scott also seeks punitive damages.

On December 19, 2007, this Court denied the Defendants' Motion to Dismiss. The basis of the Court's decision was that Plaintiff's Complaint sufficiently pled the causes of action asserted. The Court noted that the various exhibits and newspaper articles at issue could not be examined by the Court, as the parties had not attached those exhibits to their pleadings, nor had the motion been properly converted into one for summary judgment. The Court opined that the relevant case law makes it clear that statements or writings categorized as "opinions" are not completely

exempt from civil liability, meaning Plaintiff's claims do not automatically fail as a matter of law.

Now before the Court is the Defendants' Motion for Judgment on the Pleadings. In essence, the parties' arguments are identical to those presented with regard to the Motion to Dismiss, the only difference being that the various exhibits—such as Beck's July 15, 2007 allegedly defamatory column—are now properly before the Court. Specifically, the Defendants' Answer, which was filed on January 16, 2008, properly included those articles as exhibits for the Court's viewing. While the Defendants seek to dismiss all of Plaintiff's claims, in the alternative, they seek an order dismissing Plaintiff's claim for punitive damages.

III. STANDARD OF REVIEW

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." SDCL 15-6-12(c). "Judgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." Loesch v. City of Huron, 2006 SD 93, ¶3, 723 N.W.2d 694, 695 (quoting M.S. v. Dinkytown Day Care Center, Inc., 485 N.W.2d 587, 588 (S.D.1992)).[1] It is only an appropriate remedy to resolve issues of law when there are no disputed facts. *Dinkytown*, 485 N.W.2d at 588. *See also* Sorenson v. Sommervold, 2005 SD 33, ¶4, 694 N.W.2d 266, 268; Korstad-Tebben, Inc. v. Pope Architects, Inc., 459 N.W.2d 565, 568 (affirming a trial court's refusal to grant a motion for judgment on the pleadings when there were various genuine issues of material fact in dispute).

When considering a motion for judgment on the pleadings, a court generally must consider only those materials contained in the pleadings. Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir.1999). This includes reviewing the parties' pleadings, as well as the exhibits and documents attached thereto. *See* Venetec Inter., Inc. v. Nexus Medical, LLC, --- F.Supp.2d --- (D. Del 2008), 2008 WL 821038. "Attachments to the pleadings may be considered under Federal Rule of

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[1] SDCL § 15-6-12(c) discusses a Motion for Judgment on the Pleadings. The statute, in whole, provides:

> [a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56.

SDCL § 15-6-12(c).

Civil Procedure 12(c) so long as the documents are central to the plaintiff's claim and undisputed." Horsley v. Feldt, 304 F.3d 1125, 1134-35 (11th Cir. 2002).

"A motion for judgment on the pleadings is analyzed under the same standard as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." Westcott v. Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). As such, a court must remain mindful that a motion to dismiss under our state's equivalent to Federal Rule 12(b)(6) tests the legal sufficiency of the pleading, and not the facts which support it. *See* Guthmiller v. Deloitte & Touche, LLP, 2005 SD 77, ¶4, 699 N.W.2d 493, 496. "For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubt in favor of the pleader." *Id.* "The court accepts the pleader's description of what happened along with any conclusions reasonably drawn therefrom." Wojewski v. Rapid City Regional Hosp., 2007 SD 33, ¶11, 730 N.W.2d 626, 631. "The motion is viewed with disfavor and is rarely granted." Thompson v. Summers, 1997 SD 103, ¶5, 567 N.W.2d 387, 390.

IV. LAW AND ANALYSIS

In this Motion for Judgment on the Pleadings, the Defendants ask the Court to hold that the allegedly defamatory July 15, 2007 article is protected by the First Amendment, as no reasonable reader could interpret that article as stating actual facts about Plaintiff Scott. In the alternative, the Defendants seek to dismiss Plaintiff's claim for punitive damages. These arguments will be discussed in turn.

A. Scott's Defamation Claim

The Defendants argue that Beck's column constitutes satire, parody, or opinion protected by the First Amendment, and as such, cannot serve as a basis for a libel claim because it did not assert statements of fact. In response, Plaintiff argues that a determination as to whether Beck's article included false assertions of fact is not for the Court to decide, but is a question for the jury. The underlying facts relating to Scott's defamation claim are undisputed by the parties.

The central issue now before the Court is whether a reasonable person could have understood the *Argus* column as asserting objective facts about the Plaintiff. Specifically, the Court must examine whether a *reasonable reader* could have believed that the "reasonable facsimile" in Beck's July 15, 2007 column was Scott's *actual* apology letter to state legislators. If there are no issues of material fact to be resolved, and the answer to this inquiry is in the negative, the Defendants are entitled to judgment on the pleadings.

The South Dakota Supreme Court has never adjudicated a First Amendment claim in the context of parody or satire. As such, the United States Supreme Court's defamation jurisprudence regarding opinion, satire and parody—as well as the relevant precedent from other jurisdictions—provides guidance in examining the issue now before the Court. With this in mind, it is clear the Court must analyze this case considering that "the backdrop of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964). The United States Supreme Court has instructed that opinion, satire and parody are protected by the First Amendment when those statements "cannot reasonably be interpreted as stating actual facts and about an individual." Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990). Interpreting this precedent, one court opined:

> [t]he test is not whether the story is or is not characterized as "fiction," "humor," or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual acts in which she participated. If it could not be so understood, the charged portions could not be taken literally.

Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 442 (10th Cir. 1983) (citing Greenbelt Pub. Assn. v. Bresler, 398 U.S. 6 (1970); Letter Carriers v. Austin, 418 U.S. 264 (1974)). *See also Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 127 (1st Cir. 1997) (providing that "if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.").

In *Hustler Magazine v. Falwell,* for example, the late Jerry Falwell, a well-known pastor and political commentator, sued Hustler Magazine asserting claims of libel, invasion of privacy, and intentional infliction of emotional distress. Falwell's lawsuit was based on Hustler's publishing of a cartoon parody depicting Falwell engaging in highly offensive sexual conduct with his mother. 485 U.S. 46 (1988). The Hustler "advertisement" contained a disclaimer at the bottom of the page, providing: "ad parody—not to be taken seriously." *Id.* at 48.

The Court held that public figures and officials may not recover for intentional infliction of emotional distress by reason of publication without first showing that the publication contains false statements of fact that were made with actual malice. *Id.* Because the jury had found that the allegedly defamatory

cartoon contained no statements of fact, the Court held that Falwell's libel claim could not prevail. *Id* at 57. In so holding, the Court noted that it accepted the jury's finding that the plaintiff's libel claim must fail when the parody "could not reasonably be understood as describing actual facts about [the plaintiff] or actual events in which [he] participated." *Id.* at 57 (adding that "[t]he Court of Appeals interpreted the jury's finding to be that the ad parody 'was not reasonably believable,' . . . and in accordance with our custom we accept this finding.").

The Court was again presented with a defamation controversy in *Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990). In that case, a former high school wrestling coach sued a local newspaper for publishing an article implying that he had committed perjury when testifying at a court proceeding. The Court declined to recognize a "wholesale defamation exception for anything that might be labeled as 'opinion.'"[2] *Id.* at 18. Further, the Court held that summary judgment was inappropriate because a "reasonable factfinder" could conclude that the statements in the article regarding the plaintiff's alleged perjury were implying assertions of fact. *Id.* at 20.

Following the ruling in *Milkovich,* the South Dakota Supreme Court followed suit by altering this state's defamation jurisprudence accordingly. In *Paint Brush Corp. v. Neu,* the Court discarded the formalistic, bright line approach formerly used to examine the liability of an individual expressing an allegedly defamatory "opinion." 1999 SD 120, 599 N.W.2d 384. Adhering to the pronouncements of *Milkovich,* the Court opined that "'expressions of opinion may often imply assertions of objective fact,' and those statements are actionable." *Id.* ¶47 (quoting *Milkovich,* 497 U.S. at 18).

After adopting the principles set forth in *Milkovich,* the Court proceeded to declare that "the dispositive question then becomes whether a *reasonable factfinder* could conclude that the statements in the [writing] imply a false assertion of objective fact[.]" *Id.* (emphasis added). And this determination, according to the Court, was for the jury. *See id.* ¶¶49-50. Summarizing its holding, the Court opined that "[a] statement is actionable if it implies a false assertion of objective fact. *Whether a statement implies such is a question for the jury.*" *Id.* ¶50 (emphasis added).

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[2] According to the Court, such a privilege "would ignore the notion that expressions of 'opinion' may often imply assertion of objective fact." *Id.* Further, "it would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly the words 'I think.'" *Id.* (citing *Cianci v. New Times Publishing Co.,* 639 F.2d 54, 61 (2nd Cir. 1980)).

In support of their Motion for Judgment on the Pleadings, the Defendants rely heavily upon the recent Texas case of *New Times, Inc. v. Isaacks,* 146 S.W.3d 144 (Tex. 2004). In *New Times,* a newspaper published a satirical article mocking local officials involved in a controversial incident with a seventh grade student from a local school. The student had written a story as a class project, which to some, was taken as exhibiting threatening behavior. Local authorities became involved, and the child was held in custody for several days.

Mocking the alleged overreaction of local officials, the *Dallas Observer* (the *Observer*)—a self-described "alternative" newspaper—published a satirical article lampooning the officials involved in the incident. Entirely fictitious, the article described a six-year old girl being jailed for writing a book report about "cannibalism, fanaticism, and disorderly conduct." *Id.* at 148. The article contained a picture of a little girl holding a stuffed animal, with a caption providing: "Do they make handcuffs this small? Be afraid of this little girl." *Id.* The article was replete with absurd and fabricated quotes from the officials involved in the original incident. The district attorney and local judge filed suit against the *Observer*, alleging defamation by libel.

Finding that no reasonable reader could have considered the article to be asserting actual facts about the plaintiffs, the Supreme Court of Texas reversed the trial court's denial of the *Observer's* motion for summary judgment. According to the court, "[f]alsity for constitutional purposes depends upon the meaning a reasonable person would attribute to a publication, and not to a technical analysis of each statement." *Id.* at 154. "Whether a publication is capable of a defamatory meaning is initially a question for the court. . . . But when a publication is of ambiguous import, the *jury* must determine its meaning." *Id.* at 155 (emphasis added) (internal citation omitted).

Applying this test, the court held that a reasonable reader would not have construed the *Observer's* article as asserting actual facts about the plaintiffs. The court highlighted the several "obvious" clues that the article was satirical, such as the column's unorthodox headline, picture and caption, and the absurd quotes from the plaintiffs.[3] *Id.* at 158. Moreover, the court revisited the undisputed fact that the *Observer* is an *alternative* newspaper rather than a standard news-disseminating publication. *Id.* at 159. This fact was significant, as the allegedly defamatory publication "must be examined in the *context* of the *Observer's* nature . . . because a reasonable reader must consider the *type* of publication in which the

[3] One such quote indicated that the district attorney was considering making the six-year old girl stand trial as an adult for her offensive book report. In addition, the article included a quote from the other plaintiff, a judge, providing that "any implication of violence in a school setting . . . is reason enough for panic and overreaction." *Id.* at 158.

offending material appears." *Id.* (emphasis added). Because the paper had previously published parodies and "spoof" articles, the nature of the *Observer* and the context in which the article appeared would not indicate to a reasonable reader that the article was factual in nature. *Id.* at 160.

The Court now turns to the facts of the instant case. Decisions from both the United States and South Dakota Supreme Courts make clear that, in general, determining whether an allegedly defamatory statement implies an assertion of fact is a question for the jury. However, if the Court finds, as a matter of law, that *no* reasonable person could have concluded that Beck's July 15, 2007 column included Scott's actual apology letter, the Court may grant the Defendants' motion. A review of the pleadings and attached exhibits reveals that such a finding is inapposite.

The Defendants are certainly correct in their assertion that Beck's July 15, 2007 article includes some absurd, hyperbolic statements purporting to be from Scott. They are also correct that the article was an attempt at satire. What the Defendants ignore, however, are the numerous signals within and surrounding the article which could indicate to a reasonable reader that the "reasonable facsimile" was Scott's actual apology letter to state lawmakers.

The *Argus* is much more than an "alternative" or "fringe" publication. To the contrary, it serves as a major source of news for many South Dakotans, as it is the largest publisher of newspapers in this state. As such, the *Argus* simply cannot be reconciled with the likes of the *Dallas Observer* in *New Times v. Isaacks,* or *Hustler Magazine* in *Hustler Magazine v. Falwell.* This is true despite the Defendants' contention that the "Voices" section of the *Argus* contains mostly opinions and editorials. The Court's record reveals that, along with opinion commentary, readers can also find legitimate news-worthy material in the "Voices" section of the *Argus.* On July 15, 2007, for example, "Voices" included obituaries, weather forecasts, the weekly voting activity of the United States Congress, an editorial piece regarding the city's potential water shortage, and an article discussing the affect of corn on the local economy. Therefore, the nature of the *Argus,* as well as the context in which Beck's column appeared, may not signal to a reasonable reader that they were only reading a parody of Scott's actual apology letter.

In addition, Beck's article itself contained the line "NEWS ITEM" as its sub-title. As a true "news item" might do, the article began by examining the factual events giving rise to the controversy surrounding Scott's June 15, 2007 speech to the out-of-town legislators—a story that had been well-documented in the *Argus* throughout the previous weeks. It was not until *after* explaining these events, and informing the reader that "members of the foundation's board asked Scott to write a letter of apology to lawmakers," did the "reasonable facsimile" of Scott's apology

letter appear. While Beck's picture appeared within the initial "news" portion of the article, Scott's picture was included within the body of the faux-letter's second page. Again, these characteristics could signal to the reasonable reader that the "reasonable facsimile" was truly authored by Scott. It is because of these considerations that the Court finds it is for the jury to determine whether Scott is entitled to relief on his claim of defamation.

B. Scott's Claim for Punitive Damages

In the alternative, the Defendants argue that, based on the pleadings, Scott cannot maintain a claim for punitive damages. The Defendants rely upon SDCL § 20-11-7,[4] which sets forth the circumstances in which punitive damages are not available to a plaintiff in a libel action. In essence, the statute provides that a claimant will not be able to obtain punitive damages if the defendant publishes a retraction correcting the erroneous statements within a specified amount of time after receiving the request for retraction. *See* SDCL § 20-11-7. For purposes of this motion, Plaintiff accepts the Defendants' contention that Beck's July 22 article—wherein he admitted that his July 15 column was a potentially unsuccessful attempt at satire—qualifies as a retraction under South Dakota law.

In reviewing the record, the Court notes that Scott's Verified Complaint does in fact assert that the Defendants' conduct was "intentional, wanton, malicious, wilful[.]" This assertion was denied by the Defendants in their Answer. As such, there is certainly an issue of disputed fact as to whether the Defendants acted in "good faith" as required by SDCL § 20-11-7. Inasmuch, the Court finds that the Defendants' Motion for Judgment on the Pleadings is inappropriate due to this unresolved issue of fact.

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[4] According to the statute,

> Before any action for libel can be brought against a newspaper or the publisher, editor, or manager thereof, the party aggrieved must at least three days before the commencement of such action serve a notice on the person or persons against whom said action is to be brought specifying particularly the statement or statements claimed to be false and defamatory. **If on the trial it appears that such statement or statements were written or published in good faith and with the belief founded upon reasonable grounds that the same were true,** and a full and fair retraction of the erroneous matter correcting any and all misstatements of fact therein contained was published in the next issue of the paper, or in the case of a daily paper within three days after the mistake was brought to the attention of the publisher, editor, or manager in as conspicuous type as the original statement and the same position in the paper, the plaintiff will be entitled to recover no punitive damages.

SDCL § 20-11-7.

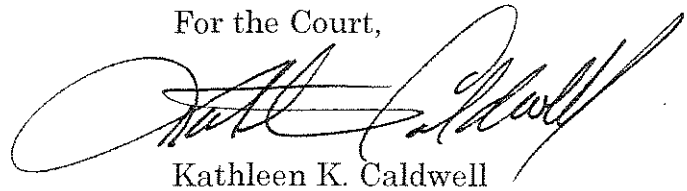
V. CONCLUSION

After reviewing the record, the parties' arguments, and the relevant legal authority, the Court holds that the Defendants' Motion for Judgment on the Pleadings is denied. It cannot be said, as a matter of law, that no reasonable reader could have interpreted Beck's July 15, 2007 *Argus* column as including Scott's actual apology letter. As such, this issue is best suited for the jury.

In addition, the Court finds that dismissal of Plaintiff's claim for punitive damages is improper, as there remains a disputed material fact as to whether the Defendants acted in good faith in publishing the article at issue.

The Defendants' Motion for Judgment on the Pleadings is hereby denied. Counsel for the Plaintiff shall prepare an order consistent with this decision.

For the Court,



Kathleen K. Caldwell
Circuit Judge

c/c Clerk's File