

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM M. NAGLER,

Plaintiff,

vs.

BRAD HENDERSON, et al.,

Defendants.

Civil Action No.
08-CV-10493

HON. BERNARD A. FRIEDMAN

OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter is presently before the Court on Defendants' Motion to Dismiss, filed on April 16, 2008 ("Defendants' Motion") [docket entry 8]. This matter has been fully briefed and the Court has had an opportunity to thoroughly examine the pleadings and motion papers. Pursuant to E.D. Mich. LR 7.1(e)(2), the Court shall decide this matter without oral argument. For the reasons that follow, the Court will grant Defendants' Motion.

I. INTRODUCTION

This is a defamation and product disparagement action between diverse parties. The relevant facts are not in dispute. Plaintiff, a magician, developed a magic trick that he named "Any Card at Any Number." (Compl. at ¶ 15.) Plaintiff offered his trick for sale to the public at a purchase price of \$99 plus shipping. (*Id.* at ¶¶ 14, 16.) Included in the purchase price are six pages of instructions and three decks of gaffed cards. (*Id.* at ¶ 15.) According to Plaintiff, his "product sold successfully for a period of time until" the events giving rise to this lawsuit occurred. (*Id.* at ¶ 17.)

Plaintiff names two defendants herein. Defendant Stagewrite Publishing, Inc. is the

publisher of *Magic Magazine*, “a trade magazine widely read by persons specializing in the subject of magic.” (*Id.* at ¶¶ 5, 7.) Defendant Brad Henderson (“Defendant Henderson”) contributes to *Magic Magazine* by “review[ing] ‘magic tricks’ that are offered for sale to the interested public.” (*Id.* at ¶ 9.) Defendant Henderson authored a critical review of Plaintiff’s card trick, “Any Card at Any Number.” (*Id.* at ¶ 18.) The review, which is highly negative and reproduced in its entirety below, appeared in the January 2007 edition of *Magic Magazine*. According to Plaintiff, “the review . . . was filled with error and misleading content all specifically done with the intent to cause the public not to purchase the product of Nagler and to cause the Plaintiff economic harm.” (*Id.* at ¶ 22.) Plaintiff further believes that Defendant Henderson “harbored animosity and malice” toward him because he has a reputation of revealing the secrets behind other magicians’ magic tricks. Plaintiff alleges that this animosity was the driving force behind the negative review:

11. Plaintiff has for many years been actively engaged in the quality of magic effect production offered to the public and other magicians . . .
12. [I]n furtherance of such interest, [Plaintiff] has from time to time published reviews of various magic tricks offered for sale as a benefit to the public and when he has determined that the trick being offered is poor, has disclosed the secret of the trick.
13. [A]s a result of such an approach to maintain the quality of tricks being offered to the public, [Plaintiff] has drawn the ire of various member [sic] of the magicians [sic] circle including . . . Defendant, Henderson.

* * * *

19. Henderson prefaced his review with the opinion that the Plaintiff had a bad habit of exposing other people’s secrets and believed that he had the authority based upon his analysis of [Plaintiff’s] trick to do the same . . .

* * * *

21. Henderson has harbored animosity and malice toward [Plaintiff] as a result of [Plaintiff's] endeavor to lift the level of the quality of magic tricks offered to the public and to reveal those that are without (merit) or a sham.

(*Id.* at ¶¶ 11-13, 19, 21.) Plaintiff asserts defamation and product disparagement claims under Michigan law. He seeks actual, compensatory, exemplary, and punitive damages in excess of \$100,000 for the personal and economic harm caused by the allegedly defamatory actions of Defendants. (*See id.* at ¶¶ 32, 34.)

II. DEFENDANTS' MOTION TO DISMISS

Defendants filed their Motion on April 16, 2008.¹ Defendants argue that Plaintiff's Complaint must be dismissed under FED. R. CIV. P. 12(b)(6) because "Henderson's review of [Plaintiff's] magic card trick is quintessential opinion, protected and privileged as such under the First Amendment to the United States Constitution, as well as Michigan case law." (Defs.' Mot. at 1.) Defendants also argue that the allegedly defamatory statements do not "concern" Plaintiff as they must under both the First Amendment and Michigan law. On the other hand, Plaintiff contends that the allegedly actionable statements are not opinion, but rather "misrepresentations of fact" concerning Plaintiff's magic trick and therefore fall outside the scope of First Amendment protection. Plaintiff further states that the "tone of the article . . . gives rise to a belief that the article was written with a malicious intent." (Pl.'s Resp. at 10.)

The review appears on page thirty-six of the January 2007 edition of *Magic*

¹ Plaintiff asks the Court to convert Defendants' Motion to Dismiss into a motion for summary judgment because Defendants have attached matters outside the pleadings to their Motion. Rather than convert the Motion, the Court will instead exclude the outside matters. *See* FED. R. CIV. P. 12(d). Therefore, Exhibit A to Defendants' Motion, which contains a printout of Plaintiff's website, is stricken from the record.

Magazine. A copy is attached to Plaintiff's Complaint and as Exhibit B to Defendants' Motion. For convenience, the entire review is also reproduced below.

Any Card at Any Number

by Bill Nagler

Reviewed by Brad Henderson

Bill Nagler has a bad habit of exposing other people's secrets. In fact, his website states: "My intent is to expose." This is in reaction to fraudulent advertising and tricks he feels are "garbage." He continues this practice in the instructions to his Any Card at Any Number trick.

In it, he overtly and gratuitously explains methods, marketed and guarded, used by John Born, Barrie Richardson, Del Ray, and T.A. Waters. Given his choice to expose, I have no problem exposing that, for the \$99 price tag his Any Card at Any Number carries, purchasers receive poorly written instructions for equivoque technique and three decks of gaffed cards.

Any Card at Any Number, or ACAAN as internet "insiders" have dubbed it, is this year's Card through the Window (which, of course, was last year's Self-Levitation). It seems everyone is chomping at the bit to release their version, some selling for hundreds of dollars.

Most closely associated with David Berlas, this is Nagler's attempt to recreate the famous Berglas Effect. In his advertisements, Nagler states emphatically that there is "No force." That simply isn't true. Equivoque, in my mind, qualifies as a forcing technique. Is this the same kind of false advertising Nagler claims to despise on his website?

Hypocrisy aside, how is the trick? You are dealing with a pack of cards that cannot be handled, examined, or shuffled in any way. Compared to other versions, this fact is a letdown. In most accounts of the Berglas Effect, the spectator counts to and displays the named card. In Nagler's version this cannot be done; only the magician can count to the card and display it at the finale. That's right, depending on the specific outcome, you are advised to "flash the card, snap the corner, and keep it moving." Nagler provides a few other equally awkward workarounds in the instructions, as well.

Also, in most accounts of the Berglas Effect, there is no extended procedure for the selection of the card and the number. Here again Nagler's handling falls short. As stated previously, there is no equivoque used to arrive at both the card and the number. Equivoque is *not* self-working. It is

not easy. It is, in a master's hands, an art. Nagler is not a master. His verbal handling is flawed and forceful — his exact word is “aggressive,” which is probably the opposite of how you want to appear when employing equivocation. He also has moments built into his script in which the spectator can uncover inconsistencies in action. Sometimes eliminate means “use,” sometimes it means “get rid of.”

Here is one example from his script: “Start the ELIMINATION. Choose red or black. (Black is chosen) Fine, we *have* black. There is no equivocation. Whatever you choose we eliminate. Choose clubs or spades. (Spades) We *eliminate* spades. We have ace through King of Clubs.” Nagler's insistence at using the same words like these opens up potential pitfalls several times throughout the selection process.

To be fair, he discourages us from using the phrase “There is no equivocation” on laypeople. Instead, we are to say, “Whatever you choose, we use.” Really? You eliminate something, and that's what I chose? That's what we used?

The gaffed cards are nicely produced. Providing three decks so one can repeat the trick with a different outcome was a nice thought, but anyone who suggests that Nagler's brand of “aggressive” equivocation could be deceptively repeated has never used the technique reliably in professional work. The instructions are repetitive and occasionally difficult to follow. The suggested presentation of telling the Berglas story as written fails to offer any reason to make a lay audience care. And the equivocation... well, in the “credits” (when he is not tipping other people's work), Nagler offers this wise counsel: “See Phil Goldstein's book for more information on equivocation if needed.”

If only he had heeded his own advice.

Any card at Any Number by Bill Nagler. Six pages of instructions and three gaffed decks of cards. \$99 plus \$5 shipping US, \$15 international. Available exclusively from Bill Nagler, M.D., 16311 Middlebelt, Livonia, MI 48154, (800) 511-9769, www.25offmagic.com.

(emphasis in original). Plaintiff alleges that six particular statements contained within the review are “false,” “untrue,” and “inaccurate” as a matter of law and therefore defamatory. Those six statements are as follows:

- (1) “You are dealing with a pack of cards that cannot be handled . . .”

- (2) “In most accounts of the Berglas Effect, the spectator counts to and displays the named card. In Nagler’s version this cannot be done . . .”
- (3) “Also, in most accounts of the Berglas Effect, there is no extended procedure for the selection of the card and the number. Here again Nagler’s handling falls short.”
- (4) “He also has moments built into his script in which the spectator can uncover inconsistencies in action. Sometimes eliminate means ‘use,’ sometimes it means ‘get rid of.’”
- (5) “Nagler’s insistence at using the same words like these opens up potential pitfalls several times throughout the selection procedure.”
- (6) “. . . but anyone who suggests that Nagler’s brand of ‘aggressive’ equivoque could be deceptively repeated has never used the technique reliably in professional work. The instructions are repetitive and occasionally difficult to follow. The suggested presentation of telling the Berglas story as written fails to offer any reason to make a lay audience care. And the equivoque... well, in the ‘credits’ (when he is not tipping other people’s work), Nagler offers this wise counsel: See Phil Goldstein’s book for more information on equivoque if needed.’ If only he had heeded his own advice.”

The Michigan Court of Appeals has defined the basic contours of a defamation claim as follows:

A communication is defamatory if it tends to lower an individual’s reputation in the community or deters third persons from associating or dealing with that individual. However, not all defamatory statements are actionable. If a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment.

* * * *

Where a defendant’s statements are not protected by the First Amendment, a plaintiff can establish a defamation claim by showing: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod).

Ireland v. Edwards, 584 N.W.2d 632, 636-637 (Mich. Ct. App. 1998). The Court finds that none of the challenged statements are defamatory. Statements (1) and (2) are rhetorical hyperbole and protected as such under the First Amendment. Statements (3), (4), (5), and (6) are unverifiable “supported interpretation” and therefore cannot serve as the basis for a defamation claim consistent with the First Amendment.

A. *Statements (1) and (2) are Non-Actionable Rhetorical Hyperbole*

As explained by the Michigan Court of Appeals in *Ireland*,

[t]he [United States] Supreme Court has . . . recognized that certain *types* of speech are protected. While the Court has not given any precise test for determining whether particular statements are protected, the reasoning appears to be that certain statements, although factual on their face, and provable as false, could not be interpreted by a reasonable listener or reader as stating actual facts about the plaintiff. Thus, parodies, political cartoons, and satires are generally entitled to protection. However, protection is not limited to these forms. In *Greenbelt Cooperative Publishing Ass’n, Inc. v. Bresler*, 398 U.S. 6 (1970), the Supreme Court recognized that some statements, read in context, are not capable of defamatory interpretation. There, a real estate developer was involved in two simultaneous negotiations with the city of Greenbelt, Maryland. One negotiation involved the developer’s desire to obtain a zoning variance for some of his property, while the other negotiation involved the city’s desire to purchase certain other land from him. The concurrent negotiations provided both parties with significant bargaining leverage, and some community members described the developer’s bargaining position as “blackmail.” After a local newspaper printed two articles using the term “blackmail,” the developer sued, claiming that the articles effectively charged him with the crime of blackmail. The Supreme Court rejected this argument:

[W]e hold that the imposition of liability on such a basis was constitutionally impermissible—that as a matter of constitutional law, the word “blackmail” in these circumstances was not slander when spoken, and not libel when reported

* * * * *

. . . [E]ven the most careless reader must have perceived that

the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable.

Thus, statements must be viewed in context to determine whether they can reasonably be understood as stating actual facts about the plaintiff.

Ireland, 584 N.W.2d at 638 (citing and quoting cases) (internal citations omitted) (emphasis in original). Applying this law to the facts, the *Ireland* court found the defendant's statement that the plaintiff-mother "never spent a moment with [her] child" "could not reasonably be understood as stating actual facts about plaintiff." *Id.* The court continued,

the statements regarding the amount of time plaintiff spent with [her child] amount to "rhetorical hyperbole." These were obviously expressions of disapproval regarding the amount of time plaintiff spent with her child, and, taken literally, they are patently false. However, any reasonable person hearing these remarks in context would have clearly understood what was intended. Under these circumstances, these statements are not actionable.

Id. (footnote omitted). Similarly, in *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 271-272 (1974), the Supreme Court held that the use of the word "traitor" to define a "scab" in the context of a labor dispute could not serve as the basis for a defamation action because no reader could understand the epithet "traitor" to be a charge that the "scab" has committed the criminal offense of treason.

Turning now to the present case, Plaintiff alleges that he was defamed when Defendant Henderson wrote, "[y]ou are dealing with a pack of cards that cannot be handled . . ." This statement constitutes rhetorical hyperbole under the authority of *Bresler*, *Ireland*, and *Austin* because the clear import of the statement is not that the pack of cards literally cannot be handled (i.e., grasped by the hand), and no reader would interpret the statement in such a technical and rigid fashion. Likewise, in statement (2) Defendant Henderson writes that, in Nagler's version of the card

trick, the spectator cannot count to and display the named card. This is also rhetorical hyperbole inasmuch as no reasonable person would understand the statement as an assertion of fact; that is, as an assertion that it is literally impossible for the spectator to perform these actions.² As such, statements (1) and (2) are indistinguishable from the ones at issue in *Bresler, Ireland, and Austin*. All five statements, although factual on their face and technically provable as false, could not be interpreted by a reasonable listener or reader as stating actual facts. Statements (1) and (2) are not actionable.

B. *Statements (3), (4), (5), and (6) are Non-Actionable Unverifiable Supported Interpretations*

According to the *Ireland* court,

[o]ne of the difficulties in addressing defamation issues lies in determining whether specific statements are actionable. The United States Supreme Court has rejected the idea that all statements of “opinion” are protected. Instead, the Court has directed that a statement must be “provable as false” to be actionable. By way of example, the Court suggested that the statement “In my opinion Mayor Jones is a liar” would be potentially actionable, while the statement “In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin” would not be actionable. The Court apparently intended these examples to illustrate the difference between an objectively verifiable event, such as lying, and a subjective assertion like “shows his abysmal ignorance”

584 N.W.2d at 637 (footnote omitted) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-22

² In addition, the Court notes that statement (2), on its face, is incapable of defamatory meaning as a matter of law. As explained above, “[a] communication is defamatory if it tends to lower an individual’s reputation in the community or deters third persons from associating or dealing with that individual.” *Ireland*, 584 N.W.2d at 636. First, Plaintiff fails to explain why statement (2) is even injurious. Just because Plaintiff’s version of the card trick may not conform to most other versions is not in and of itself negative. Moreover, even if a reasonable reader could interpret the statement as negative criticism, in no way does Defendant Henderson’s comment “tend[] to lower [Plaintiff’s] reputation or deter[] third persons from associating or dealing with [him].” See *id.* Statement (2) is therefore not actionable for this reason as well.

(1990)). Relying on the example in *Milkovich*, the *Ireland* court held that “whether someone is a ‘fit mother,’ like the question whether someone is abysmally ignorant, is necessarily subjective” and therefore concluded that the defendant’s statements regarding the plaintiff’s fitness as a mother were not actionable. *Id.*

In addition, “[t]he context of the publication is . . . crucial in determining whether it may be deemed to convey facts and, thus, possibly defamatory.” *DuPuis II v. City of Hamtramck*, 502 F. Supp.2d 654, 658 (E.D. Mich. 2007). For example, in *Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994), the Court of Appeals for the District of Columbia considered whether six statements taken from the *New York Times Book Review*, a supplement to the Sunday edition of the daily newspaper, were defamatory. In its analysis of the statements, the court found it highly significant that they appeared in the context of a book review:

[courts must] take account of the fact that the challenged statements were evaluations of a literary work which appeared in a forum in which readers expect to find such evaluations. As the Supreme Court has recognized, writers must be given some leeway to offer “rational interpretation” of ambiguous sources. See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519, 111 S.Ct. 2419, 2434, 115 L.Ed.2d 447 (1991). Thus, when a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author’s work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation.

22 F.3d at 313. Indeed, “criticism’s long and impressive pedigree persuades us that, while a critic’s latitude is not unlimited, he or she must be given the constitutional ‘breathing space’ appropriate to the genre.” *Id.* at 315 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964)).

However, there are some situations in which courts have discounted or ignored context. In particular, context is unimportant when an allegedly libelous statement touches on a topic that is outside the scope of the discourse that one might reasonably expect to find in the setting

in which the statement is found. The *Moldea* court explained this proposition clearly in its analysis of the Supreme Court's decision in *Milkovich*:

In *Milkovich*, the Supreme Court rejected the argument that an accusation of perjury was nonactionable merely because it was offered as the writer's "opinion." In that case, a high school wrestling coach argued that an Ohio newspaper libeled him by printing a column which alleged that he had perjured himself in his testimony to a state court concerning his role in an altercation between his team and an opposing squad at a wrestling match. The column stated that: "Anyone who attended the meet . . . knows in his heart that Milkovich ... lied at the hearing." Although the statements at issue in *Milkovich* appeared in an "opinion column" in a newspaper sports section, the Court found no relevance in this fact in reaching its decision, apparently because an accusation of perjury is not the sort of discourse that even arguably is the usual province of such columns. Sports columnists frequently offer intemperate denunciations of coaches' play-calling or strategy, and readers know this and presumably take such railings with a grain of salt; but an accusation of criminal conduct is a classic libel, and so *Milkovich* did not even pause to assess the effect that the column's context may have had on those who read it.

22 F.3d at 313-314 (internal citations and footnote omitted). In other words, in determining the importance of context, the inquiry centers around whether the commentary in question belongs where it is found. For example, "[a] writer may not commit libel at will merely by labelling his work a 'review.'" *Id.* at 313.

The Court turns now to the present case. First, the Court notes that the challenged statements appear in the context of a product review published in a trade magazine. Moreover, the challenged statements concern the product being reviewed, "Any Card at Any Number." Therefore, just as the book review at issue in *Moldea* belonged in the *New York Times Book Review*, so too does Defendant Henderson's review of Plaintiff's card trick belong in *Magic Magazine*. That in both cases the challenged statements "appear[] in a forum in which readers expect to find such evaluations" is undisputable. Consequently, the statements "must be judged with an eye toward

readers' expectations and understandings of" product reviews because Defendant Henderson has not "employ[ed] the medium of a . . . review as a vehicle for what would be a garden-variety libel . . ." as did the sports columnist in *Milkovich*. See *id.* at 315. The Constitution therefore mandates that Defendant Henderson be given significant "breathing space." See *N.Y. Times Co.*, 376 U.S. at 272.

Statements (3), (4), (5), and (6) are not "provable as false." Rather, the statements constitute Defendant Henderson's opinion concerning the quality and appeal of Plaintiff's card trick and the utility of the instructions that come with it. In statement (3), Defendant Henderson expresses his belief that Plaintiff's "handling falls short." In statement (4), Defendant Henderson opines that there are "moments built into [Plaintiff's] script in which the spectator can uncover inconsistencies in action" and that "[s]ometimes eliminate means 'use,' sometimes it means 'get rid of.'" In statement (5), Defendant Henderson states that Plaintiff's word choice "opens up potential pitfalls several times through the selection procedure." In statement (6), Defendant Henderson calls Plaintiff's instructions "repetitive" and "difficult to follow," and submits that "[t]he suggested presentation of telling the Berglas story as written fails to offer any reason to make a lay audience care." The Court finds that all of these opinions are just that – unverifiable opinions that any reader is free to accept or reject. Nothing in statements (3), (4), (5), or (6) is objectively capable of proof or disproof. Whether Plaintiff's product "falls short" or measures up to a certain standard is purely a matter of opinion. Likewise, whether a "spectator can uncover inconsistencies in action" depends on who the spectator is and what definition that person ascribes to the word "inconsistent." Whether the word choice used by an author "opens up potential pitfalls"—or whether a writing is generally "repetitive," "difficult to follow," or "fails to make a lay audience care"—is strictly a matter of

personal preference.³ These questions, like the question of whether someone is an “unfit mother” or “abysmally ignorant,” are necessarily subjective and incapable of verification. For this reason, they are not actionable in defamation.

In so concluding, the Court acknowledges Plaintiff’s argument that “the tone of the article . . . gives rise to a belief that the article was written with a malicious intent.” (Pl.’s Resp. at 10.) Indeed, one might reasonably infer from the opening paragraphs of the review that Defendant Henderson harbors a grudge against Plaintiff based on Plaintiff’s “bad habit of exposing other people’s secrets.” However, as the D.C. Circuit has recognized,

[s]ome bad reviews may be written with an aim to damage a writer’s reputation. There is nothing we can do about this, at least not without unacceptably interfering with free speech. There is simply no viable way to distinguish between reviews written by those who honestly believe the book is bad, and those prompted solely by mischievous intent. To allow a plaintiff to base a lawsuit on claims of mischief, without some indication that the review’s interpretations are unsupportable, would wreak havoc on the law of defamation.

Moldea, 22 F.3d at 320.

In the present case, there is no getting around the fact that each of the six challenged statements is critical of Plaintiff’s *product*, not of Plaintiff as a person, and each statement constitutes either protected rhetorical hyperbole or an unverifiable opinion that is simply not “provable as false.” It is true that a reasonable person might conclude from the tone of the review that Defendant Henderson does not like Plaintiff. The review may even have been written with the hope that it would damage Plaintiff’s reputation. However, “there is nothing [the Court] can do

³ The Court notes that Plaintiff appears to have abandoned his argument that some of the language used in statement (6) is defamatory. In his response brief, Plaintiff concedes, “one can comment upon whether the instructions are easy or hard to follow . . .” (Pl.’s Resp. at 13.)

about this” because a defamation claim based upon mischievous intent alone is not cognizable. *See Moldea*, 22 F.3d at 320.

Finally, “First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement.” *Carafano v. Metrosplash.com Inc.*, 207 F. Supp.2d 1055, 1076 (C.D. Cal. 2002). Because the Court finds that all six statements are not actionable in defamation due to First Amendment limitations, these statements also cannot serve as the basis for Plaintiff’s product disparagement claim. Accordingly,

IT IS ORDERED that Defendants’ Motion to Dismiss [docket entry 8] is granted.

IT IS FURTHER ORDERED that Plaintiff’s request that the Court convert Defendants’ Motion into a motion for summary judgment is denied.

Dated: July 2, 2008
Detroit, Michigan

s/Bernard A. Friedman_____
HON. BERNARD A. FRIEDMAN
CHIEF UNITED STATES DISTRICT JUDGE