American Educational Institute

CLAIMS LAW UPDATE

A SUPPLEMENT TO CLAIMS LAW COURSES IN CASUALTY, PROPERTY, WORKERS' COMPENSATION, FRAUD INVESTIGATION, AND AUTOMOBILE

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AEI CLAIMS LAW QUIZ

PURE OPINION OR DEFAMATORY STATEMENT OF FACT?

[Ref. Tort Concepts: Para. 2.04*]*

FACTS: On April 29, 2014, a severe storm produced 22 inches of rain over a 24-hour time period in Escambia County, Florida. The storm flooded 19 county buildings, including the Sheriff's office and the county jail, and caused damage to county buildings in the range of $45-$50 million. StopLoss Specialists was in the business of providing emergency mitigation services after catastrophic events and was retained by the county to mitigate the storm damage. The county's insurers, which insured part of the claim, hired VeriClaim to serve as the insurance adjuster on the project and it, in turn, assigned its employee, Rongstad, to act as the person in charge. VeriClaim also engaged Madsen Kneppers & Associates (MKA) to visit all of the mitigation sites and compare the services performed to invoices submitted by StopLoss.

During the first few weeks after the storm, members of the companies involved attended daily strategy meetings. These meetings were described by the attendees as tense and somewhat adversarial. For example, according to StopLoss representatives, Rongstad variously accused StopLoss of:

- not having enough employees
- having too many employees
- needing more equipment
- failing to complete certain tasks

He also claimed that a photo depicted StopLoss employees standing around and doing nothing, resulting in StopLoss's owner, John Lewis, having to explain that the workers were on a break. These incidents made StopLoss representatives believe that Rongstad was attempting to get StopLoss replaced by a new contractor.

On a visit to one of the buildings, Rongstad found that the floor was still wet even though mitigation should have been nearly complete. A StopLoss employee told him that water was "wicking up" through the concrete. The next day, however, Rongstad saw a StopLoss employee dumping water on the floor while two others used squeegees to move the water around. Rongstad concluded that the concrete was still wet because StopLoss workers were pouring water on it. This prompted him to send an email:

Team,

This will confirm documentation exists in several forms:

1. Stop Loss is dumping water into dried buildings.

2. Stop Loss then employs 12 temp laborers to push it around on the concrete slab with squeegees.

This appears to be Insurance Fraud.

An investigation has been initiated.

Good Catch TEAM!!

Rongstad sent the email to eight people including MKA employees, county representatives, the insurance broker for the county, and the lead adjuster reporting to the county's insurers. Rongstad claimed that the email reflected his opinion, "informed by 28 years as a claims adjuster," that StopLoss was dumping water into a dry building to perform "unnecessary work" and "increase its billings." StopLoss responded that it was following recognized mitigation standards, which sometimes involved using clean water to sanitize and decontaminate a dry floor.

QUESTION: Was the statement "this appears to be insurance fraud" a non-actionable statement of opinion or an actionable defamatory statement of fact?

ANSWER: According to the court in *StopLoss Specialists, LLC v. VeriClaim, Inc.,* 340 F. Supp. 3d 1334 (N.D. Ga. 2018), the statement "this appears to be insurance fraud" in the email was an actionable defamatory statement of fact. The key to distinguishing between an actionable defamatory statement of fact and a non-actionable pure opinion is whether it is possible to prove that the statement is false. If a natural interpretation of the statement would lead an average person to believe that the subject of the statement was a fact that could be proved false, it is not an opinion, regardless of whether it is qualified by modifiers such as "I think," "It appears," or "In my opinion." The court concluded that the statement "this appears to be insurance fraud," interpreted reasonably and in the context of the entire email, recited a defamatory fact that could be proved false by StopLoss and, as a result, was not a subjective opinion.

The court began its analysis by reviewing the elements of an actionable defamation claim. In a defamation action, a plaintiff must prove that the defendant (1) made a false and defamatory statement about the plaintiff, (2) that was published to a third party, (3) with fault amounting to at least negligence. In most cases there must also be proof of special harm caused by publication, such as financial loss or damage to the plaintiff's reputation. Some statements, however, are defamation per se, meaning they are actionable without proof of special harm because they are so destructive that damages can be presumed.

With respect to the first element of defamation, the court explained that defamation cannot be based on a pure opinion because an opinion is a subjective assessment about which reasonable minds could differ. For example, a restaurant patron telling a friend that "the food at that restaurant was terrible" would be pure opinion. While there is no specific definition of precisely what constitutes pure opinion, the court offered some guidance.

First, the court pointed out that under Georgia law an opinion could constitute actionable defamation if the opinion could reasonably be interpreted, according to the context of the entire writing in which the opinion appears, to state or imply defamatory facts about the plaintiff that are capable of being proved false. If something can be proved false it is not a subjective assessment about which reasonable minds could differ. The court illustrated this by quoting from a U.S. Supreme Court case, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990):

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "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'."

The court then considered the facts of the *StopLoss* case and the statement "this appears to be insurance fraud." Was it a statement of fact that could be proved false, or was it pure opinion that could not be the basis of an actionable defamation claim? The court found that an average reader could conclude from the email that its author was stating, as a fact, that the plaintiff had committed insurance fraud. Legally, it was a statement of fact that could form the basis of an actionable defamation claim because StopLoss could prove that the accusation was false by producing evidence that there was a lawful reason to pour water on the floor, such as to decontaminate it. The court explained:

> While Defendants assert that Rongstad's statement that "this appears to be insurance fraud" is "plainly Rongstad's opinion, and not a statement of fact," the Court respectfully disagrees. Rather, a natural reading of the statement, even considering Rongstad's use of the qualifying phrase "this appears," would lead the average reader to the conclusion that the writing, on its face, is stating a defamatory fact about the Plaintiffs that can potentially be proven false (i.e., Rongstad's allegation that Plaintiffs have engaged in insurance fraud can arguably be proven false by plaintiffs' proffering of relevant facts and evidence that the activities engaged in were undertaken for a lawful purpose).

The court ruled that the email, as a matter of law, was a defamatory statement, and that the email was published to the other members of the management group. The plaintiff's motion for summary judgment was granted to that extent.

The matter was remanded for the other elements of the plaintiff's defamation claim to be adjudicated at trial.

CONCLUSION: A statement that is pure opinion cannot be the basis of an actionable defamation claim. This is because pure opinion is a subjective assessment about which reasonable minds can differ. An opinion is not capable of being proved false. A statement that asserts a false fact, however, is not an opinion. A statement of fact is capable of being proved false. This type of statement can be defamatory even if it is preceded by modifiers such as "I think," "It appears," or "In my opinion." While the use of hyperbolic or figurative speech is a factor to consider, the key is whether the statement can be proved false. If a court determines that despite prefatory words such as "it appears that," the statement recites a defamatory fact that is capable of being proved false, the statement will be deemed defamatory and an opinion defense will be unavailable.