STATE OF MICHIGAN

COURT OF APPEALS

TERRELL PIERCE and DAELYN PIERCE,

Plaintiffs-Appellants,

v

DANIEL, SEYMOUR & GROSSMAN, P.C., W. SCHUYLER SEYMOUR, JR., JAMES L. EDMONDS, UAW LOCAL 599, and DAVID YETTAW,

Defendants-Appellees.

UNPUBLISHED
September 18, 1998

No. 199727
Genesee Circuit Court
LC No. 94-033444 NO

Before: Corrigan, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm in part, reverse in part, and remand for further proceedings.

I

Plaintiffs first argue that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(8) on the basis that their second amended complaint lacked specificity. A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(8) to determine whether the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. All factual allegations supporting the claim, and any reasonable inferences that can be drawn from the facts, are accepted as true. *Smith v Stolberg*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 202848, issued 8/18/98).

The elements of a libel cause of action are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of

special harm or the existence of special harm caused by publication. *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 323; 539 NW2d 774 (1995). A complaint in a libel action must specifically plead the defamatory words complained of. *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 62; 495 NW2d 392 (1992).

After reviewing the complaint, we conclude that the trial court did not err in finding that it is not sufficiently specific. Plaintiffs quote verbatim blocks of text from the various letters and articles, without indicating which particular statements are allegedly defamatory. While the passages contain statements that could be defamatory, they also contain some statements that do not appear to be untrue and other statements that, even if untrue, are not defamatory. MCR 2.111(B)(1) requires a plaintiff to state "the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." The Supreme Court has explained: "Leaving a defendant to guess upon what grounds plaintiff believes recovery is justified violates basic notions of fair play and substantial justice." *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992). This Court has held that a complaint in a libel action must specifically plead the defamatory words complained of. *Royal Palace Homes, supra*. Because plaintiffs' complaint does not clearly delineate what statements are alleged to be false, libelous, and defamatory, it is not sufficiently specific.

II

Plaintiffs next argue that the trial court abused its discretion in refusing to allow them to amend their complaint. This Court will not reverse a trial court's decision on a motion to amend a complaint absent an abuse of discretion that results in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

Amendment is generally a matter of right rather than grace. *Patillo v Equitable Life Assurance Society of the United States*, 199 Mich App 450, 456; 502 NW2d 696 (1992). A trial court should freely grant leave to amend if justice so requires. MCR 2.118(A)(2). Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile. *Phinney v Verbrugge*, 222 Mich App 513, 523; 564 NW2d 532 (1997).

At the October 21, 1996, hearing, the trial court refused to allow plaintiffs to amend their complaint, stating, "Well, it's been amended twice now." However, plaintiffs only amended their complaint once in response to a court directive. Plaintiffs first amended their complaint to add defendants UAW, Yettaw, and Braid.

The second amended complaint was filed in response to a trial court order dismissing the first amended complaint for lack of specificity. In response to this order, plaintiffs filed their second amended complaint on September 5, 1995. The second amended complaint included the specific dates, sources, and places of publication, as ordered by the trial court. The complaint also contained the verbatim blocks of text from the various letters and articles that plaintiffs alleged had been created and disseminated by defendants.

After reviewing the record, we conclude that the trial court should have allowed plaintiffs to amend their complaint. As discussed in Issue I, the trial court correctly found that plaintiffs' second amended complaint was not sufficiently specific because it contained too much extraneous material.[1] However, while leave to amend may be denied because of repeated failure to cure deficiencies by amendments previously allowed, *Phinney*, *supra*, here plaintiffs essentially created a new deficiency while attempting to correct a separate one. The trial court dismissed the first amended complaint because it did not contain enough information; the trial court then dismissed the second amended complaint because too much information was provided. There is no evidence that plaintiffs did not file their second amended complaint in good faith, and in fact the trial court did not make a finding of bad faith. There is no indication in the record that defendants would have been prejudiced by an amendment. The quotations from the letters and articles included in plaintiffs' second amended complaint contained a number of statements which, if false, could well be defamatory. Because leave to amend should be freely given when justice so requires, we hold that the trial court abused its discretion in refusing to allow plaintiffs to amend their complaint. See MCR 2.118(A)(2); *Phillips*, *supra*. We therefore remand to the trial court so that plaintiffs may amend their complaint.

III

Plaintiffs next assert that the trial court erred in granting partial summary disposition to Dave Yettaw, the UAW, and Dean Braid (the UAW defendants) with regard to Documents A, C, J, P, Q, and X.

A

The trial court granted the UAW defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) as to Documents A and C on the basis that the second amended complaint did not allege any involvement by any UAW defendant in these publications.

Plaintiffs argue that, contrary to the trial court's finding, the complaint did allege involvement by the UAW defendants in the publication of Document A. On page 22 of the second amended complaint, subparagraph vii states:

> Said document was published by Defendants Daniel, Seymour & Grossman and Schuyler Seymour thereof when copies of the document and/or the Headlight newspaper articles of November 10, 1994 was sent out of the law offices of Daniel, Seymour & Grossman to the managers or directors of all credit unions in the Flint area particularly including all those credit unions identified in the Flint area Yellowpages [sic]. Such document and statement was further published when sent as an attachment and exhibit with certain correspondence generated in concert between Schuyler Seymour and Dave Yettaw sent to the National Credit Union Administration in Chicago Illinois in October of 1994 and November of 1994 and January of 1995.

Because the complaint clearly alleges that defendant Yettaw had a role in publishing Document A, we conclude that the trial court clearly erred in granting summary disposition with regard to defendant

Yettaw on the allegations involving that document. However, because the complaint makes no allegations regarding defendant UAW Local 599 and defendant Braid, the trial court did not err in granting summary disposition to these defendants.

With regard to Document C, plaintiffs essentially concede that the second amended complaint does not allege involvement by any UAW defendant. However, plaintiffs assert that discovery has revealed that Document C was republished by defendant Yettaw as an attachment to a January 30, 1995, letter to the National Credit Union Administration (NCUA). Plaintiffs therefore seek permission to amend their complaint. We instruct the trial court to permit plaintiffs to amend their complaint to include this allegation on remand. See MCR 2.118(A)(2).

B

The trial court granted summary disposition with respect to Documents J, P, Q, and X pursuant to MCR 2.116(C)(10). The court explained that "the unrebutted affidavit of Dave Yettaw and deposition of Schuyler Seymour state that the UAW defendants were not involved in the creation and publication of these documents."

A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).

Plaintiffs contend that the affidavit and deposition testimony were in fact rebutted. Plaintiffs claim that they attached as Exhibit C to their response to the motion for summary disposition a January 30, 1995, letter by Yettaw to the NCUA that specifically referenced and attached Documents J, P, Q, and X.

We have examined plaintiffs' response to the motion for summary disposition and found no Exhibit C, nor is the aforementioned letter attached. However, a January 30, 1995, letter by Yettaw to the NCUA is Document S in the second amended complaint. The letter specifically lists more than thirty enclosed documents. Documents J, P, Q, and X may have been among these items. For example, the first enclosure mentioned by Yettaw is a Summary of Witnesses; Document X appears to be a list of witnesses and summary of what they could testify to. Item 9 on the list is "Six letters sent to C[redit]U[nion]'s Board of Directors." Document J is a letter to the board of directors of the Security Federal Credit Union (SFCU). Documents P and Q are letters to the NCUA dated, respectively, October 20, 1994, and November 15, 1994; these are specifically mentioned in Yettaw's letter as Items 19a and b.

On this record, we conclude that Yettaw's affidavit and Seymour's deposition merely raise questions of fact regarding the UAW defendants' involvement in the publication of Documents J, P, Q,

and X. Accordingly, the trial court erred in granting the UAW defendants' motion for partial summary disposition with respect to these documents.

IV

Plaintiffs assert that the trial court erred in granting summary disposition to defendant Braid on the basis that he could not have been negligent because he did not have discretion not to publish Yettaw's articles. Plaintiffs maintain that a genuine issue of material fact exists as to whether Braid had control of the content of *Headlight*, Local 599's newspaper.

The trial court relied on *Yettaw v Local Union 599, UAW*, UAW Public Review Board, Case No. 942 (1992). However, we conclude that the trial court read *Yettaw* too broadly. *Yettaw* did not involve editorial decisions to strike defamatory statements in an officer's column, but rather editorial decisions to suppress a union officer's opinions regarding issues "which may be the subject of legitimate debate among union members." *Yettaw*, *supra* at 7. *Yettaw* does not stand for the proposition that columns by union officers are not subject to editing, but rather that the editor may not censor the viewpoints of union officers on matters of legitimate discussion among union members.

Furthermore, the free speech principles emphasized in *Yettaw* do not comprehend an absolute right to make defamatory statements. The Constitution merely places limits on the application of the state law of defamation so that protected speech is not discouraged. See *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 686; 109 S Ct 2678; 105 L Ed 2d 562 (1989). These limits vary, depending on considerations such as whether the plaintiff is a public or private figure and whether the speech at issue is of public concern. See *Milkovich v Lorain Journal Co*, 497 US 1, 14-16; 110 S Ct 2695; 111 L Ed 2d 1 (1990); *Philadelphia Newspapers, Inc v Hepps*, 475 US 767, 774-775; 106 S Ct 1558; 89 L Ed 2d 783 (1986). Therefore, the elements of a cause of action for defamation, and the plaintiff's burden of proof, are structured to balance the competing First Amendment interest in protecting the freedom of speech with a State's interest in ensuring that a person may be compensated for injury to his reputation. See *Milkovich*, *supra* at 22-23; *Locricchio v Evening News Ass'n*, 438 Mich 84, 117-122; 476 NW2d 112 (1991), cert den 503 US 907; 112 S Ct 1267; 117 L Ed 2d 495 (1992). Accordingly, even under a broad reading of *Yettaw*, the editor of a union publication may remove libelous material from a column because the principle of freedom of expression does not include the right to make defamatory statements.

In Michigan, all persons who are "'actively connected with and engaged in the publication of a libel are responsible for the results.'" *Bowerman v Detroit Free Press*, 279 Mich 480, 491; 272 NW 876 (1937), quoting *Johnson v Gerasimos*, 247 Mich 248, 252; 225 NW 636 (1929). Thus, an editor is generally liable for defamatory statements contained in his newspaper because he has extensive supervisory control over the publication. 53 CJS § 118(c), Libel & Slander, p 202. We therefore conclude that the trial court erred in granting summary disposition to defendant Braid.

V

Plaintiffs next argue that the trial court erred in granting summary disposition on their claims of intentional interference with business and contractual relationships, fraud, injurious falsehood, invasion of privacy, and intentional infliction of emotional distress. We agree.

Plaintiffs allege that defendants disseminated letters to SFCU, to other Flint-area credit unions, and to various trade associations and regulatory agencies accusing plaintiffs of unethical and illegal conduct. The letters were mailed in SFCU envelopes and carried signatures such as "Concerned Union Employees of Security Federal Credit Union," "Security Federal Credit Union Management Staff," and "Group of Very Concerned Members." Others were attributed to "the hourly employees of Security Federal Credit Union;" still others were anonymous.

The trial court dismissed the claims of intentional infliction of emotional distress, invasion of privacy, and tortious interference with a business relationship because they were based on the allegedly defamatory publications, and the court had already granted summary disposition on the defamation count. However, the trial court erred in dismissing these claims, as they do not depend upon the falsity of the statements in the publications.[2] Plaintiffs' allegations on these counts were sufficient to survive a motion for summary disposition pursuant to MCR 2.116(C)(8).

VI

Plaintiffs next assert that the trial court erred in granting summary disposition to the UAW defendants, who only sought summary disposition as to twenty-one of the forty-one documents at issue, and to defendant Edmonds, who never moved for summary disposition. Because of our resolution of plaintiffs' previous claims, it is unnecessary for us to address this claim. However, we briefly note that, contrary to their argument, plaintiffs were given adequate notice of the charge that the complaint lacked specificity by the Seymour defendants' motion. Plaintiffs could not have reasonably assumed that the allegations in Counts One and Two lacked specificity as to the Seymour defendants but not as to the other defendants. Moreover, the UAW defendants filed a concurrence to the Seymour defendants' motion in September 1996, several weeks before the October 18, 1996, hearing. Accordingly, plaintiffs received adequate notice of the basis for the grant of summary disposition.

VII

Finally, plaintiffs contend that the trial court erred in denying their request for sanctions for discovery violations. This Court reviews the decision whether to impose sanctions for discovery violations for an abuse of discretion. *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612, 618; 550 NW2d 580 (1996). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Dacon, supra* at 329.

Plaintiffs allege that defendants Seymour and Yettaw gave false answers to interrogatories and denied under oath authorship or knowledge of the letters that were disseminated until they were confronted with documents retrieved from the dumpster at the offices of Daniel, Seymour & Grossman that had been authenticated by a handwriting expert. Plaintiffs also claim that, contrary to the trial

court's direct order, defendants continued to alter some documents and purge others on Daniel, Seymour & Grossman's computers, as evidenced by the deposition testimony of Seymour's secretary. The trial court acknowledged that defendants' behavior raised some concerns, but concluded that the issue was rendered moot by his grant of summary disposition to defendants.

We are unable to review this issue because plaintiffs did not make a proper record in the trial court. In asserting that defendants Seymour and Yettaw committed perjury and engaged in discovery violations, plaintiffs rely on answers to interrogatories and deposition testimony that are not contained in the lower court record. In their brief on appeal, plaintiffs cite their two motions for sanctions; however, in these motions plaintiffs merely typed in excerpts from the interrogatories and testimony to the motions without attaching the relevant pages. However, because plaintiffs raise disturbing allegations of perjury and flagrant discovery abuses, we instruct the trial court to fully address the merits of this issue on remand.[3]

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, no party having prevailed in full.

/s/ Maura D. Corrigan
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra

[1] In granting defendants' motions for summary disposition, the trial court relied on *Royal Palace Homes, supra*. However, the trial court does not appear to have realized that the *Royal Palace Homes* Court held that the plaintiffs should be given an opportunity to amend their complaint. See *id*. at 57-58.

[2] The tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228, 233-234; 551 NW2d 206 (1996).

The tort of invasion of privacy is based on a common-law right to privacy, which is said to protect against four types of invasion of privacy: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. *Doe v Mills*, 212 Mich App 73, 79-80; 536 NW2d 824 (1995).

The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996), lv den 456 Mich 879 (1997), cert den ___ US ___; 118 S Ct 1178; 140 L Ed 2d 186 (1998).

[3] We disagree with the trial court's conclusion that plaintiffs' motion for sanctions was rendered moot by the court's grant of defendants' motions for summary disposition. If defendants' conduct was as egregious as plaintiffs allege, at a minimum a sanction could be imposed to reimburse plaintiffs for the costs incurred in filing motions related to the discovery abuses, as well as the fees for the handwriting expert. Moreover, while defendants' conduct may be a proper subject for the consideration of the Attorney Grievance Commission, it does not follow that the trial court cannot also impose sanctions on defendants if it is shown that they committed perjury and violated a court order prohibiting the destruction or alteration of computer files.