STATE OF MICHIGAN

COURT OF APPEALS

BRAD TIDIK,

Plaintiff-Appellee,

v

THE HERALD NEWSPAPER, INC., THE HERITAGE NEWSPAPERS, INC., d/b/a THE ILE CAMERA, INC., KARL ZIOMEK, LYNN JARVIS, MAVIS MCKINNEY, ANNE SULLIVAN, and MICHAEL RAVEANE,

Defendants-Appellants.

UNPUBLISHED
October 19, 1999

No. 210193
Wayne Circuit Court
LC No. 97-701237 NZ

Before: Gribbs, P.J., and O'Connell and R. B. Burns*, JJ.

PER CURIAM.

This is a libel action. Defendants appeal by leave granted from the trial court's order denying their motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

Plaintiff was the Libertarian candidate for the twenty-third district of the Michigan House of Representatives in the November 5, 1996, general election. Defendants published two articles before the election indicating that plaintiff had received plea-based (no contest) felony convictions for assault and battery and for resisting and obstructing a police officer. Plaintiff informed defendants that the two convictions at issue were in fact misdemeanors, not felonies. Defendants printed two corrections. Nevertheless, after losing the election, plaintiff sued. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff had failed to show actual malice, that the articles were substantially true, and that defendants were entitled to statutory immunity under MCL 600.2911(3); MSA 27A.2911(3). The trial court disagreed.

Defendants first argue that the trial court erred in refusing to grant summary disposition because plaintiff failed to demonstrate a genuine issue of material fact with respect to actual malice. We agree.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Baker v Arbor Drugs*, 215 Mich App 198, 202; 544 NW2d 727 (1996). When reviewing a motion for summary disposition based on MCR 2.116(C)(10), this Court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996); see also *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455 and n 2; ___ NW2d ___ (1999).[1] The party opposing the motion may not rest on the mere allegations or denials contained in the pleadings but must come forward with evidence of specific facts to establish the existence of a material factual dispute. *Quinto, supra*, 451 Mich at 362, 371. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992). If the nonmoving party fails to establish that a material fact is at issue, the motion is properly granted. *Quinto, supra*, 451 Mich at 363.

Additionally, "[w]hen addressing defamation claims implicating First Amendment freedoms, appellate courts must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression and to examine the statements and circumstances under which they were made to determine whether the statements are subject to First Amendment protection." *Ireland v Edwards*, 230 Mich App 607, 613; 584 NW2d 632 (1998) (quoting *Northland Skating Center v Detroit Free Press, Inc*, 213 Mich App 317, 322; 539 NW2d 774 (1995)); see also *Locricchio v Evening News Ass'n*, 438 Mich 84, 110-112; 476 NW2d 112 (1991).

To prevail in a libel suit arising from a report by a media defendant on a matter of public interest, a plaintiff who is a public figure must show that the defendants, in publishing the allegedly defamatory articles, "acted with 'actual malice,' i.e., with knowledge of the falsity of the defamatory material or with a reckless disregard for its truth or falsity . . . ." *Hayes v Booth Newspapers, Inc*, 97 Mich App 758, 773; 295 NW2d 858 (1980) (relying on *Curtis Publishing Co v Butts*, 388 US 130; 87 S Ct 1975; 18 L Ed 2d 1094 (1967), and *New York Times v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964)). "Whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law." *Ireland, supra*, 230 Mich App at 622. Therefore, "[i]n considering a motion for summary disposition [in a First Amendment case], a court must consider whether the evidence is sufficient to allow a rational trier of fact to find actual malice by clear and convincing evidence." *Ireland, supra*, 230 Mich App at 622.

Plaintiff, as a candidate for public office, has not disputed his status as a public figure. He must therefore produce evidence of actual malice by showing that defendants published the articles either with knowledge of their falsity, or with reckless disregard for the truth or falsity of the information conveyed. After carefully reviewing the record, we find no such evidence.

Defendant Anne Sullivan, the reporter in this case, provided an affidavit indicating that, after an article was published on the various candidates, including defendant, she received an anonymous telephone call indicating that plaintiff had had legal difficulties. Sullivan indicated that she provided plaintiff an opportunity to respond, and that he did so in writing and admitted to having been convicted in the thirty-third district court of a misdemeanor assault on his then-wife. Sullivan went to the district

court to investigate the allegations and learned that plaintiff had been charged in another criminal case, which had been transferred to Detroit Recorder's Court. Sullivan then telephoned Detroit Recorder's Court, and was informed by a court employee in the records room that plaintiff "had pleaded no contest to felony charges of assaulting, resisting and obstructing a police officer." Sullivan admits in her affidavit that she had a copy of the "information felony" filed against plaintiff, which indicated that he had been charged with a felony (destruction of property), a misdemeanor assault, and a two-year misdemeanor for resisting and obstructing a police officer. The two articles published by defendants indicated that plaintiff had been convicted of a misdemeanor assault on his wife, that the conviction was being appealed; that he had pleaded no contest to two felonies and received one year probation; and that a charge for malicious destruction of property had been dismissed.

Sullivan's affidavit indicates that she relied on the information obtained from the Recorder's Court employee; that she believed that the information was accurate; that, when the articles were published, she did not believe that they were false; and that she was unaware of any inaccuracy until plaintiff came to see her -- after which two corrections were published. No contrary evidence has been presented. Plaintiff's reliance upon the information is misplaced because the document does not indicate the final disposition of plaintiff's case, only the original charges filed against him in district court. Even plaintiff's order of probation includes the word "felony" in its title and does not indicate whether the underlying offenses are felonies or misdemeanors. There is therefore no clear and convincing evidence from which a rational trier of fact could find that defendants had actual knowledge that the information reported in the articles was false.

Similarly, there is no evidence that defendants acted with reckless disregard for the truth or falsity of the information published. "Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation" nor by determining "whether a reasonably prudent [person] would have published or would have investigated before publishing." *Ireland*, *supra*, 230 Mich App 622 (quoting *Grebner v Runyon*, 132 Mich App 327, 333; 347 NW2d 741 (1984)). "Failure to undertake prior investigation does *not* constitute proof sufficient to present a jury question of reckless disregard . . . ." *Lins v Evening News Association*, 129 Mich App 419, 433; 342 NW2d 573 (1983) (emphasis original). Rather, reckless disregard is measured "by whether the publisher in fact entertained serious doubts concerning the truth of the statements published." *Ireland*, *supra*, 230 Mich App at 622 (quoting *Grebner*, *supra*, 132 Mich App at 333). Here, plaintiff has failed to create a question of fact concerning reckless disregard because there is no evidence that defendants had any awareness of the probable falsity of the articles, nor that they entertained serious doubts as to the truth of the matters published.

In summary, defendants were entitled to judgment as a matter of law under MCR 2.116(C)(10) because plaintiff failed to show that a genuine issue of material fact existed with respect to the element of actual malice. The trial court therefore erred in denying defendants' motion for summary disposition.

Because of our disposition of this issue, we find it unnecessary to address the alternative grounds for reversal argued by defendants, which we note were not addressed by the trial court below.

Reversed.

/s/ Roman S. Gribbs
/s/ Peter D. O'Connell
/s/ Robert B. Burns

[1] Overruling a line of cases, *Smith* held that the test for summary disposition under (C)(10) is *not* whether a record may be developed upon which reasonable minds may differ, *nor* whether the court is satisfied that the nonmoving party cannot prevail at trial because of a deficiency which cannot be overcome. *Smith, supra,* 460 Mich at 454-455.