STATE OF MICHIGAN

COURT OF APPEALS

PAUL W. COUSINO,

Plaintiff/Cross-Defendant/Counterdefendant/Counterplaintiff-Appellant,

v

JAMES F. NOWICKI,

Defendant-Not Participating,

and

JOHN KIEFER,

Defendant/Counterplaintiff/Third-Party Plaintiff/Counterdefendant-Appellee,

and

WEBCO MEDIA,

Third-Party Defendant/Cross-Plaintiff/Counterplaintiff-Not Participating.

UNPUBLISHED
March 30, 2004

No. 240764
Macomb Circuit Court
LC No. 96-007207-NZ

PAUL W. COUSINO,

Plaintiff/Cross-Defendant/Counterdefendant/Counterplaintiff-Not Participating,

v

JAMES F. NOWICKI,

Defendant-Not Participating,

No. 240794
LC No. 96-007207-NZ

and

JOHN KIEFER,

Defendant/Counterplaintiff/Third-Party Plaintiff/Counterdefendant-Appellant,

and

WEBCO MEDIA,

Third-Party Defendant/Cross-Plaintiff/Counterplaintiff-Appellee.

Before: Murray, P.J. and Gage and Kelly, JJ.

PER CURIAM.

In docket number 240764, plaintiff appeals as of right a judgment following a jury verdict in favor of defendant John Kiefer. In docket number 240794, Kiefer appeals as of right an order granting third-party defendant Webco Media's motion for summary disposition.[1] We affirm.

I. Basic Facts and Procedural History

Underlying this case is a probate action that commenced in 1986 involving the estate of plaintiff's deceased father Paul K. Cousino (Cousino). Defendant James F. Nowicki presided over the probate action and appointed Kiefer temporary personal representative of the estate in October 1992. During the course of that action, plaintiff filed approximately eighteen appeals with this Court, as well as appeals to our Supreme Court, the Sixth Circuit Court of Appeals, and the United States Supreme Court. Because of plaintiff's numerous and frivolous objections and appeals, Nowicki sanctioned plaintiff ordering him to pay Kiefer's attorneys fees and expenses. Nowicki also stayed plaintiff's further appeals until the sanctions were paid. This Court has previously addressed these rulings.[2] At some point during these proceedings, plaintiff formed a political action committee to "Replace Judge Nowicki" and created a political newspaper entitled

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[1] The trial court also granted defendant James F. Nowicki's motion for summary disposition, but plaintiff does not take issue with this ruling on appeal.

[2] See *In Re Estate of Paul K. Cousino*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2000 (Docket Nos. 211121 and 211831).

The Red, White and Blue, in which plaintiff disparaged Nowicki and Kiefer among others. Plaintiff hired Webco to print and mail *The Red, White and Blue.*

Plaintiff initiated this case against Nowicki and Kiefer alleging that they conspired in an "illegal agreement" in which Nowicki ordered plaintiff to pay Kiefer's attorney fees. Plaintiff also alleged that Nowicki improperly exercised appellate jurisdiction, negated the appellate process, and chilled the exercise of the federally secured right to appeal. Plaintiff asked that the money removed from the estate to pay Kiefer be returned with interest and that the order depriving plaintiff of his right to appeal be vacated. Plaintiff also sought "exemplary and punitive damages" and an injunction against Nowicki and Kiefer preventing them from interfering with plaintiff's appellate rights.

Kiefer denied the allegations and filed a countercomplaint against plaintiff and a third-party complaint against Webco for the publication of *The Red, White and Blue*, alleging that plaintiff and Webco committed libel per se by publishing that Kiefer was a "fat cat" guilty of cheating clients, judicial corruption, falsifying documents, receiving stolen money from estates, etc. Kiefer alleged that publishing these defamatory remarks caused him damages in excess of $1,000,000. Kiefer moved for summary disposition of plaintiff's conspiracy claims under MCR 2.116(C)(8). The trial court granted the motion.

Webco filed a third-party complaint alleging that Kiefer's claim against it was frivolous because Webco merely printed the newspaper, but did not publish or distribute it. Webco also filed a cross-complaint against plaintiff alleging that plaintiff agreed to indemnify Webco and hold it harmless for costs and attorney fees. Plaintiff filed a countercomplaint against Kiefer for abuse of process alleging that Kiefer's claim against Webco was "part of a long-standing conspiracy" between Nowicki and Kiefer to disrupt plaintiff's life and political activities.

Webco filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10). The trial court denied Webco's motion concluding that Kiefer was not a limited purpose public figure and there was a genuine issue of material fact as to whether Webco acted negligently in printing plaintiff's materials. After the case was transferred to a different judge, Webco filed a second motion for summary disposition. This time, Webco simply argued that there was no genuine issue of material fact as to whether it was negligent in printing plaintiff's newspaper. It argued that it had no duty to investigate materials that it did not author. The trial court granted Webco's motion.

Kiefer filed a motion for relief from order or for rehearing arguing that the trial court based its decision on the mistaken fact that Webco did not mail, distribute or publish *The Red, White and Blue* when there was evidence that it used its bulk mailing services to mail the newspaper. The trial court entered an order denying Kiefer's motion for reconsideration because it presented the same issues already ruled upon.

After trial, the jury returned a verdict in favor of Kiefer on his counterclaim against plaintiff awarding $150,000 for "physical pain and suffering or mental anguish," $100,000 for "general damages," and $100,000 for exemplary damages.

II. Docket No. 240764

A. Presentation of Issues on Appeal

To properly present an appeal, an appellant must appropriately argue the merits of the issues he identifies in his statement of the questions involved. *Richmond Twp v Erbs*, 195 Mich App 210, 220; 489 NW2d 504 (1992), overruled in part on other grounds in *Bechtold v Morris*, 443 Mich 105; 503 NW2d 654 (1993). He must cite to the place in the record at which the issue was preserved for review, and state the applicable standard of review. MCR 7.212(C)(7). The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003); nor may he give issues cursory treatment with little or no citation of supporting authority, *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Plaintiff raises seventeen issues on appeal. But with the exception of those discussed in the following sections, the issues suffer from one of more of the following flaws: plaintiff does not provide the proper standard of review, does not properly set forth the issues in his statement of issue presented, does not appropriately argue the merits of these claims, or does not provide proper citation to the record. Accordingly, these issues are abandoned.

Additionally, several of plaintiff's issues attempt to collaterally attack the trial court and this Court's rulings in the underlying probate action. Under the law of the case doctrine, questions of law decided by an appellate court will not be decided differently on a subsequent appeal where the facts remain materially the same and the issue was actually decided, either specifically or necessarily. *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981).

B. Change of Venue

Plaintiff argues that the trial court erred in denying his motion for change of venue. This issue arises from the fact that every Macomb County judge was disqualified from this case for various reasons. Consequently, the case found itself on the docket of an Oakland County judge. Plaintiff filed a motion for change of venue arguing that venue was proper in Macomb County and that it should not have been changed to Oakland County. At a hearing on plaintiff's motion, the trial court agreed with plaintiff that venue was proper in Macomb County, but it clarified that the location of trial would be Oakland County. Plaintiff then argued that venue was proper in Wayne County stating:

> If I can't have an Oakland Judge in Macomb, I'm prepared to compromise the next best thing and comply with the rules, I'll accept trial in the proper venue, which is Wayne County, because the Court Rules do indicate that the venue can be changed to accommodate the witnesses and the parties, and my business is located right there in Wayne County and I'm going to have to go there anyway everyday, because I have to check on the dogs and I have to check on the --

Trial ultimately took place in Macomb County. Plaintiff requested trial in Macomb County and was granted this request. Because he was not "aggrieved" by the trial court's decision, he is not entitled to appeal this ruling as of right. MCR 7.203(A); *Kocenda v Archdiocese of Detroit,* 204 Mich App 659, 666; 516 NW2d 132 (1994).

C. Cross-examination

Plaintiff argues that he was denied the right to cross-examine Leonard Reinowski. But the record reflects that Reinowski, *plaintiff's* witness, was briefly questioned by plaintiff on direct examination regarding his position as court administrator at Macomb County Probate Court. Plaintiff elicited testimony that the records in the probate action were complete and accurate and that Reinowski brought them to the court the day before he took the stand. Plaintiff then stated: "I don't think there is anything I need to ask. I move them into evidence." Over Kiefer's objection, the trial court admitted the record, but ruled that the jury would not be allowed to see it in full. Then Kiefer cross-examined Reinowski. When Kiefer attempted to elicit testimony about Reinowski's career, plaintiff objected stating that the trial court limited the scope of his direct exam to the file itself, but Kiefer was exceeding that scope. The trial court overruled the objection because the testimony was only background on Reinowski's career. When Kiefer attempted to elicit testimony about the normalcy of plaintiff's number of appeals in the probate case, plaintiff objected and the trial court sustained the objection. Plaintiff was then permitted redirect examination. The following exchange took place:

> *MR. COUSINO*. Well, again, I think I should be allowed to go into some other things here, but if you are not going to --
>
> *THE COURT*. Only in regards to the status of your father's estate. I think that is what is relevant to this jury. And anything that we discussed yesterday outside the hearing of the jury, I won't permit you to go into nor Ms. Franco to go into.
>
> *MR. COUSINO*. I have nothing further.
>
> *THE COURT*. Thank you.

Based on this record, we conclude plaintiff was not denied the right to cross-examine Reinowski.

D. Damages

Plaintiff argues that the trial court erred in permitting the jury to consider exemplary and punitive damages when Kiefer failed to make a timely demand for retraction.

MCL 600.2911(2)(b) provides in relevant part: "Exemplary and punitive damages shall not be recovered in actions for libel unless the plaintiff, before instituting his or her action, gives notice to the defendant to publish a retraction and allows a reasonable time to do so . . . ." Plaintiff argues and the record reflects that Kiefer sent the demand for retraction only two days before he filed his countercomplaint against plaintiff.

Under the circumstances of this case, we conclude that the trial court did not err in instructing the jury on exemplary and punitive damages. The purpose of the request for

retraction is to allow the libelous party to mitigate he damages it caused. Here, given plaintiff's ongoing efforts to malign Kiefer's reputation in what plaintiff alleges is really an effort at court reform, there is no indication that even with an earlier request for retraction that plaintiff would have retracted his comments. Plaintiff has been involved in lawsuits stemming from Cousino's estate since 1986. From that time, he filed numerous lawsuits against judges and lawyers who filled roles with respect to the probate action. Before Kiefer filed the countercomplaint against plaintiff, plaintiff had filed his complaint against Kiefer alleging facts similar to those published in *The Red, White and Blue*. Plaintiff does not argue that Kiefer's damages would have been mitigated if he had been given time to publish a retraction nor does plaintiff indicate that he had any intention of doing so. Indeed plaintiff never issued a retraction at any point during litigation. Moreover, the trial court instructed the jury that it would award exemplary damages *if* it found that Kiefer requested a retraction and allowed reasonable time for publication of the retraction. Therefore, the trial court did not err in permitting the jury to consider exemplary and punitive damages.

E. Jury Instructions

Plaintiff argues that the trial court erred in not providing certain jury instructions. This Court reviews claims of instructional error de novo. *Case v Consumers Power Co,* 463 Mich 1, 6; 615 NW2d 17 (2000). We review for abuse of discretion the trial court's determination whether a standard jury instruction is applicable and accurate. *Stevens v Veenstra,* 226 Mich App 441, 443; 573 NW2d 341 (1997). The trial court's jury instructions must include all the elements of the plaintiffs' claims and should not omit any material issues, defenses, or theories of the parties that the evidence supports. *Case, supra* at 6. Instructions not supported by the evidence should not be given. *Id.* If, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury, no error requiring reversal occurs. *Id.*

Plaintiff first argues that SJI 2d 6.01 should have been given. SJI 2d 6.01 provides:

> The [*plaintiff/defendant*] in this case has not offered [*the testimony of [name]/[identify exhibit]*. As this evidence was under the control of the [*plaintiff/defendant]* and could have been produced by [*him/her*], and no reasonable excuse for the [*plaintiff's/defendant's*] failure to produce the evidence was given, you may infer that the evidence would have been adverse to the [*plaintiff/defendant*].

The trial court refused to read SJI 2d 6.01 because the parties stipulated that Kiefer was not claiming his stroke as damage. The trial court ruled: "Okay that one is stricken, too, because of the stipulation you want to put before the jury immediately preceding your closing arguments and that is the counter plaintiffs are not proceeding with any claim that the stroke that Mr. Kiefer suffered was as a result of the damage regarding the tort." The trial court noted that plaintiff was free to argue, with respect to "sleeplessness and other symptomatic problems," that there was no medical testimony presented and noted that Kiefer himself testified as to these conditions. The trial court also instructed the jury "One thing I would want to add to you that has been stipulated and agreed to, that the plaintiff is not seeking any damages in regard to the stroke that Mr. Kiefer suffered and should not be considered in your consideration of the damages." Plaintiff did not request SJI 2d 6.01 with regard to Kiefer's financial records. But Kiefer did not testify or argue

in closing argument that he suffered specific financial losses. The trial did not abuse its discretion in deciding not to read SJI 2d 6.01.

Plaintiff also argues that SJI 2d 4.04 should have been read. Under this rule, it is written: "The committee recommends that no instruction on the 'willfully false witness' be given." It further states that our Supreme Court "has approved an instruction that if the jury finds that a witness has willfully sworn falsely as to a material fact, and the jury should be of the opinion that such false swearing rendered the witness incredible as a whole, they have a right to disregard his or her entire testimony." But it also notes that the instruction has been criticized "on the basis that questions concerning credibility of witnesses are the sole province of the jury; if the instruction is given, the jury should also be instructed that no rule of law prevents their giving credit to parts of a witness's testimony they believe to be true." The trial court noted this and decided not to give the instruction stating: "I will not read 404. I think it gives a wrong impression. 404 will be stricken." But with regard to witness credibility, the trial court instructed:

> Again, you are the judges of the fact[s] in this case, and you must determine which witnesses you believe and what weight you give to their testimony. In doing so you may consider each witness' ability and opportunity to observe, his or her memory, manner while testifying, any interest, bias or prejudice, and the reasonableness of the testimony considered in light of all the evidence presented in open court.

The trial court's instruction on witness credibility was appropriate.

Plaintiff also argues that SJI 2d 118.07 and 118.08 should have been read. SJI 2d 118.07 provides:

> Because (under Michigan law) in this case, the defendant had a qualified privilege to communicate information, the plaintiff has the burden of proving that the defendant had knowledge that the statement was false, or that the defendant acted with reckless disregard as to whether the statement was false.

Plaintiff's assertion that this instruction should have been given presumes that the trial court should have ruled that plaintiff "had a qualified privilege to communicate information." The trial court did not so hold, nor has plaintiff presented any argument or analysis as to why it should have. Indeed, plaintiff provides no analysis in support of his assertion that this instruction should have been given. As such, this issue is abandoned.

Plaintiff also argues that the trial court should have provided SJI 2d118.08 and SJI 2d 118.21. Our review of the record reveals that the trial court did so. Plaintiff also argues that SJI 2d 50.02 "should have been used to refer to applicable elements of damages." Again, our review of the record reveals that the trial court's instruction included all the elements set forth in SJI 2d 50.2. Therefore, we conclude the trial court did not err with respect to jury instructions as plaintiff contends.

F. Jury Deliberation

Plaintiff argues that he was denied his constitutional right to a jury because all eight jurors that were empanelled deliberated with a verdict requiring six out of eight to agree. MCR 2.512 provides:

> The parties may stipulate in writing or on the record that
>
> (1) the jury will consist of any number less than 6,
>
> (2) a verdict or finding of a stated majority of the jurors will be taken as the verdict or finding of the jury, or
>
> (3) if more than six jurors were impaneled, all of the jurors may deliberate.
>
> Except as provided in MCR 5.512, in the absence of such stipulation, a verdict in a civil action tried by 6 jurors will be received when 5 jurors agree.

Plaintiff argues that all eight jurors should not have been allowed to deliberate because "The record is devoid of any reference to such an agreement as is demanded by the rule." The record is indeed devoid of any reference to such an agreement; it is also devoid of any objection from plaintiff. Absent any objection on the record, we find no error.

III. Docket No. 240794

Kiefer argues that the trial court erred in granting summary disposition to Webco under both MCR 2.116(C)(8) and (10). We review de novo the trial court's grant of summary disposition of a defamation claim. *Garvelink v Detroit News*, 206 Mich App 604, 607-609; 522 NW2d 883 (1994).

Because the court looked beyond the pleadings in deciding the motion, we review the motion as having been denied pursuant to MCR 2.116(C)(10). *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). In reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented by the parties 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).

"A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Nuyen v Slater*, 372 Mich 654, 662; 127 NW2d 369 (1964), quoting 3 Restatement Torts, 2d, § 559, p 156. In *Locricchio v Evening News Ass'n*, 438 Mich 84, 115-116; 476 NW2d 112 (1991), our Supreme Court enumerated the four components of libel: 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. If the plaintiff is a public figure, he must show actual malice. *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992); MCL 600.2911(6) and (7).

Webco argues that Kiefer is a limited purpose public figure who is required to show actual malice to sustain his libel action. Although the trial court did not expressly make a determination on this issue, it applied the negligence standard appropriate for private figures. Such a determination is "one of law, to be made on the basis of the existing record, and as such may be made by a reviewing court." *Bufalino v Detroit Magazine*, 433 Mich 766, 775; 449 NW2d 410 (1989).

A limited purpose public figure is defined as follows:

> A private person can become a limited-purpose public figure when he voluntarily injects himself or is drawn into a particular controversy and assumes a special prominence in the resolution of that public controversy. However, a private person is not automatically transformed into a limited-purpose public figure merely by becoming involved in or associated with a matter that attracts public attention. The court must look to the nature and extent of the individual's participation in the controversy. [*New Franklin Enterprises v Sabo*, 192 Mich App 219, 222; 480 NW2d 326 (1991) (citations omitted); see also *Hodgins v Times Herald Co*, 169 Mich App 245, 256-257; 425 NW2d 522 (1988).]

Based on this definition, the trial court did not err in applying the negligence standard because Kiefer was a private figure, not a limited purpose public figure. With regard to Cousino's prominence in the community, Webco has not provided any record support for its assertions. Further, as appointed personal representative of his estate, Kiefer did not "voluntarily inject himself . . . into a particular controversy." Webco also argues that the probate action became controversial rendering Kiefer a limited purpose public figure. While the probate action certainly has lingered, it cannot be said in hindsight that Kiefer injected himself into a public controversy by agreeing to his appointment as personal representative. It is clear from the lower court record that the probate action did not linger because of its inherent controversial nature, but rather, because of plaintiff filed numerous vexatious pleadings. Kiefer cannot be transformed into a limited purpose public figure by either plaintiff's vexatious pleadings or by the publication of the alleged defamation itself.

In granting summary disposition to Webco, the trial court also ruled: "No evidence has been presented that Webco mailed, distributed or published in any way copies of *The Red, White and Blue*." This ruling was erroneous. In his deposition, Webco's president Wesley Smith president testified that the newspapers were mailed to 302,480 households and Webco billed plaintiff for mailing the newspapers. A price quote also indicates that Webco agreed to address the documents and deliver them to the post office for mailing. The newspaper filed in the lower court and on appeal indicates that the postage was in fact paid by Webco.

Despite its determination that Webco did not publish *The Red, White and Blue*, the trial court went on to determine that Webco was not negligent because it had no duty to "review, research and fact check every document it is asked to print." With respect to defamation, the Michigan Civil Jury Instruction on negligence provides:

> The plaintiff has the burden of proving that the defendant was negligent in making the statement.

> When I use the word "negligent," I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under the circumstances that you find existed in this case. It is for you to decide what a reasonably careful person would do or would not do under such circumstances. [M Civ JI 118.08.]

This Court has held that the correct standard for negligence with respect to a defamation claim against journalists is that of a "reasonably careful journalist." *Michigan Microtech, Inc v Federated Publications, Inc*, 187 Mich App 178, 186-187; 466 NW2d 717 (1991).

We apply this standard here although Webco was merely a printing company that mailed the newspapers. In so doing, we conclude that there was no genuine issue of fact as to whether Webco failed to do something a reasonably careful person would have done under the circumstances. Plaintiff sought the services of Webco in printing and mailing his political newspaper. Webco, a printing operation that prints a variety of documents, had no reason to be familiar with the political issues addressed in plaintiff's newspaper. Moreover, the overtly political nature of the newspaper did not require Webco to further investigate the information it contained. It is natural to assume that a political newspaper would contain at least a one-sided view of the facts and exaggerations. Webco, as a mere printer, had no duty to either know that the facts contained in the newspaper were untrue or to investigate these facts. Because there was no evidence to create a genuine issue of material fact on this issue, we conclude that the trial court did not err in granting Webco's motion for summary disposition.

Affirmed.

/s/ Christopher M. Murray
/s/ Hilda R. Gage
/s/ Kirsten Frank Kelly