STATE OF MICHIGAN

COURT OF APPEALS

JOHN INGERSOLL,

Plaintiff-Appellant,

v

GORDON TUESLEY, LINDA TUESLEY, GERTRUDE HENDERSON, GERALD FREED, MARY FREED, LAURA BURRER, JUDY JOHNSON, and RON HAGERMAN,

Defendants-Appellees.

UNPUBLISHED
September 16, 2008

No. 276828
Cheboygan Circuit Court
LC No. 05-007529-NZ

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

In this defamation action, plaintiff appeals by right the trial court's grant of summary disposition in favor of defendants. We affirm.

I

Plaintiff was deer hunting in the northern Lower Peninsula during the 2004 muzzleloader season. Late in the afternoon, he spotted an eight-point, whitetail buck. The buck's coloration was predominantly white rather than the typical brown. According to plaintiff, he examined the buck through his binoculars and noticed that it had some brown coloration on its head and hocks. He shot the buck, tagged it, and took it home.

Thereafter, plaintiff took the buck to the Michigan Department of Natural Resources (DNR) field office in Indian River. According to plaintiff, several DNR employees inspected the buck and concluded that it was a "piebald" rather than an albino.

Several photographs of plaintiff and the predominantly white buck were taken in the following days. One or more of these photographs, accompanied by descriptive captions, were published in area newspapers. One of those newspapers also carried three letters to the editor.

The first letter, written by defendants Gordon Tuesley, Linda Tuesley, Gertrude Henderson, Gerald Freed, and Mary Freed, asked: "Who killed our friend for a trophy?" The letter accused "someone from Indian River" of having "shot and killed the neighborhood's pet 'Albino' deer." The letter went on to state that members of the community "ha[d] been lovingly

feeding this pretty animal for four years," and that "[t]he neighbors and surrounding friends are very, very upset over the killing for a 'trophy.'" The letter also seemed to question whether DNR employees had actually seen natural brown coloration on the deer, observing that the brown areas on the animal could have been "a discharge from hind quarters" or "from tree rubbing."

The second letter, written by defendant Laura Burrer, accused "a hunter" of having shot and killed "the white buck that lived in the Burt Lake area . . . ." The letter asked "how the DNR stands with [respect to] killing an albino deer," and went on to state:

> This news has saddened myself and others. If the law doesn't protect these animals, who will? I know the people in the area tried—even hunters wouldn't shoot him if he came into their bait pile. I come from a family of hunters, but some living beautiful animals should be protected.

The third letter, written by defendant Judy Johnson, stated:

> After receiving the sad news on Christmas Eve about someone shooting the white deer near Alanson, I felt I needed to let people know how sad it really is.
>
> As a relative of people who watched this young buck grow and blossom since birth[,] and then watch them be so broken hearted over his death, I feel the people who live in Northern Michigan and appreciate its miracles and beauty should know that a young man looking for a "trophy" shot and killed the most beautiful sight I have ever seen! It's just too sad.

Just over two weeks later, a fourth letter to the editor appeared in one of the other area newspapers. The letter, written by defendant Ron Hagerman, stated:

> To say that your article and the picture of the Albino deer that was killed near Alanson saddened us would not be the correct choice of words. I also believe that the referring to Mr. Ingersoll as a hunter would not be correct. I am but one of the many residents of the area who ha[s] enjoyed viewing this deer over the past years. I have both movies and pictures of this beautiful animal.
>
> Reports are that the deer had a small brown spot near its back foot. I would like to know how Mr. Ingersoll could see such a spot with the amount of snow that we had on the ground on the day that he killed this animal[.] This deer has been cared for by the residents of this area for years and was almost as tame as our house pets.
>
> Many of us wonder how Mr. Ingersoll dispatched the animal; did he use his pocketknife or just a stick that he picked off the ground? I have been a deer hunter for more than 50 years and have never needed a deer bad enough to end the life of such a beautiful animal. I am very happy to say that I know of no real hunter who feels any different[ly] than I.

Plaintiff alleged that after the publication of defendants' letters to the editor, he was harassed and ridiculed in the community. He alleged that his company lost business and that he was damaged in other ways as well. He sent letters to defendants demanding retractions, but defendants did not reply. He therefore sued for defamation. Although not specifically spelled out in the pleadings, plaintiff's predominant theory of liability was that defendants' letters to the editor falsely accused him of a crime,[1] and that the letters therefore constituted libel per se.[2]

Early in the proceedings, defendants moved for summary disposition. The trial court denied the motions. After further discovery was completed, defendants Henderson and Freed and defendant Hagerman filed "renewed" motions for summary disposition. The remaining defendants filed papers "concurring" in these renewed motions. After entertaining oral argument, the trial court granted the renewed motions for summary disposition and dismissed plaintiff's claims with respect to all defendants.

II

Plaintiff first argues that defendants were not entitled to bring renewed motions for summary disposition after their initial motions for summary disposition had already been denied. Instead, plaintiff argues that defendants were limited to either seeking an interlocutory appeal of the trial court's denial of their initial motions, or waiting for the entry of final judgment and then appealing as of right. We disagree.

Whether the trial court properly considered defendants' renewed motions for summary disposition is a question of law. We review questions of law de novo. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006). We also review de novo whether the law of the case doctrine and the principle of res judicata apply. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007); *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

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[1] The DNR may establish orders regulating the hunting and taking of game and wild animals in this state. MCL 324.40107(1). A person who violates a DNR order concerning the hunting and taking of deer is guilty of a misdemeanor. MCL 324.40118(3); see also *People v Cummings*, 229 Mich App 151, 156; 580 NW2d 480 (1998), rev'd on other grounds 458 Mich 877 (1998). At the time this action was filed, a standing DNR order prohibited the hunting and killing of albino deer. See former DNR Order 3.100(2) (providing that "[i]t shall be unlawful for a person to take or possess, at any time, an albino deer, being a deer with all white or colorless hair, or a deer with a coat of all white or colorless hair similar to an albino deer. Piebald, or partially white deer, may be taken under the provisions of this order"). However, the Natural Resources Commission has repealed this provision of DNR Order 3.100, effective June 6, 2008, and it is therefore no longer unlawful to hunt albino deer in Michigan.

[2] Words that falsely impute the commission of a crime constitute defamation per se and are actionable even in the absence of an ability to prove actual or special damages. MCL 600.2911(1); *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 728; 613 NW2d 378 (2000); *Tumbarella v Kroger Co*, 85 Mich App 482, 493; 271 NW2d 284 (1978).

Litigants are generally entitled to file renewed motions for summary disposition after the completion of additional discovery. Successive motions for summary disposition are specifically permitted under MCR 2.116(E)(3). Indeed, litigants in the courts of this state have frequently brought renewed motions for summary disposition after the completion of new or additional discovery. See, e.g., *Brown v Brown*, 478 Mich 545, 550; 739 NW2d 313 (2007) (stating that "[d]efendant moved for summary disposition, which the trial court denied," but that "[a]fter the parties conducted further discovery, defendant renewed its motion for summary disposition[, and t]he trial court granted this motion, ruling that there was no genuine issue of material fact"); see also *Michalski v Bar-Levav*, 463 Mich 723, 727 n 5, 625 NW2d 754 (2001) (stating that "[t]he trial court initially denied defendant's motion," but that "[f]ollowing the completion of discovery, defendant filed a renewed motion for summary disposition"). Further, as this Court has stated previously, "While we certainly encourage parties to raise dispositive issues as soon as is practicable so as to avoid unnecessary litigation, the failure to do so is not grounds to thereafter deny the motion." *Alyas v Illinois Employers Ins of Wausau*, 208 Mich App 324, 329; 527 NW2d 548 (1995).

Nor did the law of the case doctrine or the principle of res judicata bar the trial court from considering defendants' renewed motions for summary disposition. The law of the case doctrine "bars reconsideration of an issue by an equal or subordinate court during *subsequent proceedings* . . . ," *People v Mitchell (On Remand)*, 231 Mich App 335, 340; 586 NW2d 119 (1998) (emphasis added), and "[r]es judicata bars a *subsequent action* between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action," *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005) (emphasis added). Here, defendants' renewed motions for summary disposition were considered and decided during the *same proceeding* and in the *same action*—not during subsequent proceedings or in a subsequent case. Moreover, the principle of res judicata does not apply "if the facts change, or new facts develop . . . ." *Labor Council, Michigan FOP v Detroit*, 207 Mich App 606, 608; 525 NW2d 509 (1994). In this case, new facts were developed and additional discovery was completed after the denial of defendants' initial motions for summary disposition. We perceive no error in the trial court's decision to consider defendants' renewed motions for summary disposition, which were properly entertained after the completion of additional discovery.

III

Plaintiff next argues that the trial court was without authority to grant summary disposition in favor of defendants Tuesley, Burrer, and Johnson because these defendants did not file their own, separate motions for summary disposition, but merely filed papers "concurring" in the remaining defendants' motions for summary disposition. Again, we disagree.

Whether the trial court had the authority to grant summary disposition in favor of certain defendants who did not file their own, separate motions is a question of law. We review questions of law de novo. *Cowles*, *supra* at 13.

As an initial matter, we note that plaintiff does not cite any legal authority in support of his argument on this issue. He merely states that the trial court "ignored the facts [and] ignored the law," that "[t]he order granting summary disposition cannot reasonably apply to the defendants who did not file motions for summary disposition in this case," and that "granting

summary disposition to defendants Burrer, Tuesley, and Johnson [was] totally erroneous when none of them properly asked the court for relief." An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). "Argument must be supported by citation to appropriate authority or policy." *Id*.; see also MCR 7.212(C)(7). Plaintiff has abandoned this argument by failing to properly address the merits of his assertion of error. *Peterson Novelties*, *supra* at 14.

But even if this argument had been properly presented, we conclude that it would be without merit. This Court recently addressed a similar argument in *Avery v Benke*, unpublished opinion of the Court of Appeals, issued August 17, 2006 (Docket Nos. 268107; 268108).[3] There, the plaintiff argued that "dismissal of her claims against [the concurring defendants] denied her due process because these defendants did not file their own motion for summary disposition, but instead only filed a concurrence to the motion filed by [the other defendants]." *Id*., slip op at 4 n 2. As this Court ruled:

> Due process requires adequate notice and a chance to respond to a motion for summary disposition. See *Lawrence v Dep't of Corrections*, 81 Mich App 234, 237-239; 265 NW2d 104 (1978), and *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 88-90; 492 NW2d 460 (1992) (CORRIGAN, J., concurring). The concurrence provided plaintiff with notice that [the concurring defendants] sought summary disposition for the same reasons raised by [the other defendants], and plaintiff had a fair opportunity to respond to those arguments. Her right to due process was not violated simply because [the concurring defendants] did not file a separate motion. [*Avery*, *supra*, slip op at 4 n 2.]

Although plaintiff in the instant case does not specifically couch his argument in terms of due process, we conclude that the reasoning of *Avery* applies equally in this case. In short, defendants' papers "concurring" in the motions for summary disposition afforded plaintiff reasonable notice that Tuesley, Burrer, and Johnson sought summary disposition for the same reasons as those set forth in the other defendants' motions. We perceive no error.

IV

Plaintiff also argues that the trial court erred by granting summary disposition in favor of defendants and by dismissing his claims. We cannot agree.

Defendants moved for summary disposition under both MCR 2.116(C)(8) and (10). However, because it appears that the trial court considered evidence outside the pleadings, we review the motion as having been granted pursuant to MCR 2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). We review de novo a trial

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[3] We fully recognize that unpublished opinions are not precedentially binding under the rules of stare decisis, MCR 7.215(C)(1), but we find the reasoning of *Avery* to be persuasive.

court's grant of summary disposition pursuant to MCR 2.116(C)(10). *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). In reviewing a motion for summary disposition brought pursuant to subrule (C)(10), the pleadings, affidavits, depositions, admissions, and other admissible evidence must be considered in a light most favorable to the nonmoving party. *Id*. Our review is limited to the evidence that was presented below at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Summary disposition is properly granted under MCR 2.116(C)(10) when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Kennedy*, *supra* at 712.

In Michigan, words that falsely impute the commission of a crime constitute defamation per se, and are actionable even in the absence of an ability to prove actual or special damages. MCL 600.2911(1); *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 728; 613 NW2d 378 (2000); *Tumbarella v Kroger Co*, 85 Mich App 482, 493; 271 NW2d 284 (1978). At the time this action was filed, it was a criminal offense to hunt and kill albino deer in Michigan. See former DNR Order 3.100(2).[4] Accordingly, plaintiff argues that defendants' letters to the editor, which either directly or impliedly accused him of killing an albino deer, constituted defamation per se.

The problem with plaintiff's theory of liability, however, is that defendants' letters to the editor—although potentially false in the strictest sense of that term—were not materially false. In a defamation case, we "independently review the whole record . . . to consider whether material falsity was shown." *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 258; 487 NW2d 205 (1992).

Although a false accusation of criminal activity is defamation per se, a defendant cannot be held liable for making a statement that is substantially true. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 333; 583 NW2d 725 (1998). "[T]he 'substantial truth doctrine' . . . states that a statement or defamatory implication need only be substantially accurate as opposed to being literally and absolutely accurate." *Kevorkian v American Med Ass'n*, 237 Mich App 1, 9-10; 602 NW2d 233 (1999). Similarly, a plaintiff may not base his claim of falsity on a misuse of formal legal terminology by nonlawyers. *Rouch*, *supra* at 264; see also *Kevorkian*, *supra* at 10. This is because "the popular sense of a term may not be technically accurate." *Rouch*, *supra* at 264.

The words "albino" and "piebald" acquired unique legal definitions under former DNR Order 3.100(2). Former DNR Order 3.100(2) drew a legal distinction between albino deer and piebald deer, making it unlawful to shoot an albino, but legal to shoot a piebald. However, as evidenced by the deposition testimony in this case, the DNR considered there to be at least some degree of overlap between the categories of "albino" and "piebald." For instance, DNR officers testified in this case that even a genetically albino deer might have qualified as a piebald under former DNR Order 3.100(2) in certain cases. Such was apparently true in the case at bar, where

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[4] See also footnote 1, *supra*.

the evidence suggested that although plaintiff's deer may have been a genetic albino, it also met the legal definition of a piebald.

Defendants have never been required "to prove that a publication is literally and absolutely accurate in every minute detail," and liability may not be imposed for slight inaccuracies. *Rouch*, *supra* at 258-259. On the facts of this case, it is beyond serious factual dispute that defendants' description of plaintiff's deer as an "albino" was "substantially accurate," even if that description was not "literally and absolutely accurate." *Kevorkian*, *supra* at 9-10. Moreover, it is eminently likely that the nonlawyer defendants, who described plaintiff's legally piebald deer as an "albino," were unfamiliar with the legal distinction between albinos and piebalds in this state. Even plaintiff, himself, implicitly recognized the confusion surrounding this legal distinction when he testified at his deposition that he had publicly appeared with his deer for the very purpose of explaining the difference between albinos and piebalds. Although defendants' use of the term "albino" may not have been "technically accurate," such a misunderstanding or conflation of the formal legal distinctions between albinos and piebalds was insufficient to create liability. *Rouch*, *supra* at 264.

Further, we are satisfied that plaintiff made himself a "limited public figure" for purposes of this particular case. It is undisputed that plaintiff sought out significant media attention. He appeared with his deer at various public venues, in several newspaper and magazine articles, and in at least one television report. Plaintiff, as a limited public figure, was "prohibited from collecting damages from defendants for libel unless [he could] show . . . that defendants made the complained of publication[s] with actual malice." *Lins v Evening News Ass'n*, 129 Mich App 419, 432; 342 NW2d 573 (1983). "Actual malice means publication with knowledge of falsity or with reckless disregard of truth or falsity." *Id.*

The burden of proof was on plaintiff to show, by offering specific evidence, the existence of a genuine factual dispute concerning whether defendants' published statements were made with actual malice. *Id*. As noted above, there was some degree of controversy with respect to whether defendants' various descriptions of plaintiff's deer as an "albino" were technically accurate. However, it appears beyond dispute that defendants' acted in good faith when they described plaintiff's deer as an "albino"; there was quite simply no evidence that defendants acted with "reckless disregard of the truth or falsity" when describing plaintiff's deer in this manner. *Id*. Plaintiff failed to satisfy his burden of establishing a genuine issue of material fact concerning whether defendants acted with actual malice when describing his deer as an "albino."

In addition to describing plaintiff's deer as an "albino," the allegedly defamatory letters to the editor suggested that defendants had been feeding and caring for the deer for "years." Contrary to plaintiff's argument, the evidence clearly established that defendants truly and honestly believed that plaintiff had shot the very deer that they had been caring for in the neighborhood. In other words, there was no evidence that defendants acted with knowledge of falsity or with reckless disregard of truth or falsity when they stated that they had been caring for the deer for "years." *Id*.

Defendants' letters to the editor also variously suggested (1) that plaintiff had killed the deer for a "trophy," (2) that plaintiff was an unethical and irresponsible hunter, (3) that the deer was a "pet," (4) that no responsible hunter would have shot the deer, and (5) that plaintiff had killed the deer with a pocketknife or a stick. These were either subjective statements of opinion,

and consequently not provable false, or mere satire and "rhetorical hyperbole." *Ireland v Edwards*, 230 Mich App 607, 617-619; 584 NW2d 632 (1998). A reasonable reader or listener could not have interpreted these statements as stating actual facts about plaintiff, and the statements were therefore not actionable. *Id.* at 618-619; see also *Milkovich v Lorain Journal Co*, 497 US 1, 16-17; 110 S Ct 2695; 111 L Ed 2d 1 (1990); *Hustler Magazine, Inc v Falwell*, 485 US 46, 50; 108 S Ct 876; 99 L Ed 2d 41 (1988).

Plaintiff, as the nonmoving party, failed to carry his burden of establishing the existence of genuine issues of fact concerning whether any of the statements contained in defendants' letters to the editor were actionable. See *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Summary disposition was properly granted in favor of defendants.

V

Lastly, plaintiff argues that the trial court misinterpreted former DNR Order 3.100(2), that the trial court made impermissible findings of fact and credibility determinations, that the trial court ascribed undue weight to certain evidence, and that the trial court improperly failed to consider other evidence. In light of our resolution of the above issues, however, we decline to address the merits of these remaining arguments.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly