

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES NYSTROM,

Plaintiff-Appellant,

v

DAR LEAF, THOMAS EVANS, and J-AD
GRAPHICS, INC,

Defendants-Appellees.

UNPUBLISHED

April 27, 2010

No. 290246

Barry Circuit Court

LC No. 07-000520-NO

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition on plaintiff's complaint alleging conspiracy, intentional infliction of emotional distress and defamation. We affirm.

This action arises out of allegations of wrongdoing by plaintiff in his position as director of 911 Central Dispatch in Barry County. Central to the dispute are allegations that plaintiff paid his employees "Christmas bonuses" by authorizing the payment of 10 overtime hours that were not, in fact, worked by the employees in a December paycheck over the course of approximately five years, as well as authorizing one hour of overtime pay, again allegedly time not actually worked, by supervisors, in every pay period over an extended period of time.

Apparently, these allegations were originally investigated by the Michigan State Police and reviewed by the Attorney General and, according to plaintiff, he was cleared of any wrongdoing and no criminal charges were brought. Nevertheless, defendant Leaf, the Barry County Sheriff, conducted his own investigation, which resulted in at least one police report detailing an interview with a witness who substantiated the allegations against plaintiff. Defendant Evans is the Barry County prosecutor. Pertinent to this case is a letter written by Evans to the administrative board that oversees the Barry County central dispatch operations informing the board that plaintiff had authorized the payment of the overtime for unworked hours without the approval of the board, that this constituted embezzlement and that the board needed to take action. Plaintiff also complains of statements made by Evans shortly thereafter at a press conference.

Defendant J-AD Graphics publishes the local newspaper, the Hastings Banner, and published a number of articles and editorials regarding plaintiff and the central dispatch operations. Plaintiff particularly complains of an editorial printed in the Banner on July 5, 2007, and authored by Fred Jacobs, J-AD's vice-president.

The trial court granted summary disposition in favor of defendants, concluding that plaintiff had not brought forth sufficient evidence that would establish actual malice by clear and convincing evidence. Plaintiff appeals from that decision.

Plaintiff's first argument on appeal is that the trial court failed to apply the correct standard in reviewing the motion for summary disposition. Specifically, plaintiff complains that the trial court did not properly apply the standard set forth in *Anderson v Liberty Lobby, Inc*, 477 US 242; 106 S Ct 2505; 91 L Ed 2d 202 (1986). While the trial court may not have cited the *Anderson* decision in its opinion, it is clear to us from reading the trial court's opinion on the summary disposition motion, as well as its opinion denying reconsideration, that it applied the standard set forth in *Anderson*.

The Court in *Anderson* reaffirmed the principle that in cases where a public figure is involved,¹ the plaintiff must show actual malice by clear and convincing evidence. Accordingly, to survive summary disposition, the plaintiff must make a showing of evidence from which a reasonable jury could conclude by clear and convincing evidence that the defendant acted with actual malice. *Id.* at 255-256. A reading of the trial court's opinion reflects that it did, in fact, apply this standard.

The real question in this case is the second issue raised by plaintiff, namely, whether in light of this standard, defendants are entitled to summary disposition. We review the trial court's decision de novo and we agree with the trial court that defendants were entitled to summary disposition. *De Sanchez v Dep't of Mental Health*, 467 Mich 231, 235; 651 NW2d 59 (2002). A motion under MCR 2.116(C)(10) should be granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Actual malice requires a showing that a defendant made the defamatory statement with actual knowledge of its falsehood, or in reckless disregard for the truth or falsity of the statement. *Anderson, supra* at 204. Plaintiff presents no evidence from which it could be concluded that defendants Leaf and Evans acted with actual malice. While it is true that the MSP investigation allegedly cleared plaintiff of any wrongdoing, it is also true that the sheriff's own investigation yielded a witness who substantiated the allegations. Plaintiff also points to the fact that the investigation was not yet concluded before Evans made his announcement, that there were other individuals to be interviewed, that the witness who substantiated the allegations had a motive to lie based upon a desire to "get plaintiff," and even that Leaf had made various statements showing an animosity towards plaintiff.

¹ The parties do not dispute that plaintiff is a public figure and, therefore, the actual malice standard applies.

While all of plaintiff's "evidence" may demonstrate a "rush to judgment" and perhaps even poor judgment in believing the substantiating witness, it does not establish evidence from which a jury could reasonably find actual malice by clear and convincing evidence. That is, at best, plaintiff may show that Leaf and Evans had an unreasonable desire to believe their substantiating witness. But that does not establish that they knew the witness made a false statement or that the evidence in support of plaintiff so overwhelmed the statement of the witness that believing her was so unreasonable as to constitute reckless disregard for the truth.

Indeed, plaintiff in his deposition concedes the truthfulness of the basic factual allegations—that employees were paid an additional 10 overtime hours in the last pay period of November or the first pay period of December each year and that those hours were not worked in those pay periods. Rather, plaintiff took the position that he had authorized those hours to make up for the fact that the employees were required to report to work each day 15 minutes before their shift began in order to ensure a smooth transition from one shift to another. Thus, plaintiff's position would seem to be not that he had authorized pay for hours never worked, but that he paid those hours in the wrong pay period (and for less time than actually worked as 15 minutes a day added up to well over the extra 10 hours paid at the end of the year). This position by plaintiff further establishes that defendants did not act with actual malice.

Turning to the allegations against defendant J-AD, we are at a loss to find any allegation that J-AD actually defamed plaintiff, much less that it acted with actual malice. Plaintiff's argument on appeal focuses on a July 5, 2007, editorial, which plaintiff describes as "outrageous." While plaintiff's argument identifies several unfavorable statements of opinion regarding plaintiff, plaintiff does not identify a single factual statement that, if not true, is defamatory. The closest plaintiff comes to identifying a potentially defamatory statement is a reference to a "bogus investigation" conducted earlier that year that "seems to have been the work of a couple of Charlie's friends who didn't want to find anything." This is presumably a reference to the MSP investigation that cleared plaintiff. But even if defamatory, it would seem to defame the investigators, not plaintiff.

Plaintiff also points to an anonymous letter to the editor critical of plaintiff to establish defendant's actual malice. But that letter is clearly identified as a letter to the editor and not the work of the newspaper and there is no indication that the newspaper confirms any factual statements or shares any opinion expressed in the letter. Moreover, plaintiff does not identify any statement of fact in the letter that is defamatory to plaintiff. At best, it supports plaintiff's claim that the newspaper has an animus towards plaintiff. But while animosity may supply a motive to defame, it hardly establishes actual malice.

For these reasons, we conclude that the trial court properly granted summary disposition in favor of defendants. In light of this conclusion, we need not address the alternative argument of defendants Leaf and Evans that they were also entitled to summary disposition based upon immunity, an argument raised below but not addressed by the trial court. Furthermore, because plaintiff's argument on appeal focuses on the issue of actual malice with regard to the claim of defamation, we see no need to address the claims regarding conspiracy and intentional infliction of emotional distress. As noted by the trial court in its opinion granting summary disposition,

these claims are dependent upon the defamation claim and if the defamation claim fails, so must the others.

Affirmed. Defendants may tax costs.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O'Connell