

STATE OF MICHIGAN
COURT OF APPEALS

JOHN H. UNDERHILL,

Plaintiff-Appellant,

v

JAMES T. SEIBERT,

Defendant-Appellee.

UNPUBLISHED

May 20, 2010

No. 291639

Alger Circuit Court

LC No. 07-004554-CZ

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

In this defamation action, plaintiff John Underhill appeals as of right from an order granting summary disposition to defendant James Siebert under MCR 2.116(C)(8) and (10). We conclude that the trial court erred in granting Siebert's motion under MCR 2.116(C)(8). But because the submitted evidence establishes that (1) Underhill was a limited-purpose public figure and (2) Underhill cannot establish that Siebert's statements were made with actual malice, summary disposition under MCR 2.116(C)(10) was proper. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Siebert is the former treasurer for Burt Township. In 2006, it was discovered that Burt Township officials had not forwarded employee withholding taxes to the Internal Revenue Service for several years, resulting in substantial penalties and interest. Underhill, an attorney, attended a township board meeting and demanded an investigation. The township ultimately hired Underhill as township attorney to investigate the matter. As the trial court stated in its opinion, "[o]ver the course of the next several months, the rumor mill apparently went into overdrive and the matter of failure to make payroll contributions apparently morphed into an all out investigation of matters personal to various Board members." It is apparent that Underhill believed that Siebert, as township treasurer, was ultimately responsible for the withholding tax matter, as well as other improprieties. However, an auditor found no evidence of embezzlement, no criminal charges were ever brought, and the township board ultimately voted for Underhill to end his investigation.

In November 2006, Siebert sent an email to John Pepin, a reporter for the *Marquette Mining Journal*, who had previously interviewed Siebert and written an article about the investigation. The email stated in part that an auditor had investigated the township's financial situation, had found no evidence of embezzlement, and had opined that the problem was with

“the system,” not with the people involved. Siebert asserted that “[a]nyone with any concern for this community would then have ended the investigation.” Siebert then continued with the following statement, which is the subject of this defamation action:

However, Queen Karen Bryz^[1] and King John Underhill not only continued [the investigation] but made it a witch hunt, according to Judge Start [sic] “a one man grand jury.” They delayed reporting the results of the audit and fed the people distorted information, []half truths, no truths and downright lies in order to justify their existance [sic] and continue to be in charge.

On November 26, 2006, Pepin wrote a newspaper article concerning the investigation that stated, in pertinent part:

Seibert said an auditor hired to assess the township’s financial situation reported publicly he found no evidence of embezzlement. Seibert said Bryz and Underhill should have then ended the probe, but they didn’t.

“They delayed reporting the results of the audit and fed the people distorted information, half-truths, no truths and downright lies in order to justify their existence and continue to be in charge,” Seibert said.

Underhill thereafter filed this defamation action against Siebert. Underhill alleged that Siebert was quoted in the local newspaper as making untrue and malicious statements about Underhill, “as set out in the attached exhibit A.” Exhibit A to the complaint was a copy of Pepin’s newspaper article. Underhill alleged that Siebert had refused to publish a retraction. Underhill also alleged that he had suffered damages as a result of the defamation. Underhill did not quote the defamatory statements in the complaint, nor did he mention Siebert’s email to Pepin.

Siebert moved for summary disposition, alleging that Underhill had failed to plead his defamation claim with sufficient specificity. Siebert also alleged that Underhill was a limited public figure and there were no allegations or evidence that Siebert had acted with actual malice. Underhill responded, offering to file an amended complaint setting out the defamatory statements with more specificity. Underhill also conceded that he was a limited-purpose public figure, but proffered facts that he believed showed that Siebert acted with malice. After hearing oral arguments on the motion, the trial court decided that Siebert’s motion was premature.

Underhill then filed an amended complaint that added numerous allegations concerning the facts of the underlying financial controversy. Concerning the defamation, Underhill alleged that on November 8, 2006, Siebert sent Pepin an email, and Underhill attached the email to the complaint. Underhill also quoted in his complaint the defamatory statement contained in the email. Underhill then alleged that on November 26, 2006, the newspaper published an article “quoting the accusations from Siebert’s email as cited above.” Underhill attached the newspaper

¹ Karen Bryz became township supervisor and manager during the investigation.

article to his complaint. Underhill alleged that Siebert's statements were false and were made with malice. Underhill alleged that Siebert's attacks were part of a pattern of conduct designed to obscure any investigation into Siebert's alleged wrongdoings. Underhill alleged that Siebert had refused to publish a retraction of the statements and that Underhill had suffered damages.

Siebert again moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Siebert argued that, despite filing an amended complaint, Underhill had failed to plead defamation with sufficient specificity. Siebert also argued that Underhill was unable to show actual malice. Underhill responded, arguing that his amended complaint was sufficiently specific. Underhill also now argued that there was a factual dispute concerning whether he was a public figure at the time that Siebert made his defamatory statements because he had already resigned. In any event, Underhill argued, there was evidence that Siebert acted with malice, creating a question of fact for the jury, and Siebert had failed to show otherwise.

During oral arguments on the motion, defense counsel focused on deposition evidence indicating that the challenged statements were true, and that Siebert believed them to be true. Defense counsel also argued that Underhill had conceded the public figure issue in his deposition. And defense counsel withdrew his specificity argument, stating that Underhill had corrected that defect in his amended complaint.

The trial court found that Underhill's amended complaint was no more specific than the first concerning the alleged defamation. The trial court added that Underhill had "misrepresented" the allegedly defamatory statements by quoting from Siebert's email to Pepin rather than the newspaper article. "The only conclusion the Court can reach, based on the Underhill's pleadings, is that they lack the requisite detail to support a claim for libel and, therefore, the claim must be denied."

The trial court also found that Underhill had admitted to being a limited-purpose public figure. The trial court added that, even if he had not so conceded, it would nevertheless conclude that Underhill was a limited-purpose public figure because he inserted himself into the controversy concerning the township's financial problems. According to the trial court, this conclusion was confirmed by the fact that Underhill resigned his position as township attorney when the investigation was terminated. The trial court went on to find that Siebert's statements were not made with malice. The trial court explained that Siebert's email reflected an intent to provide Pepin with a summary of Siebert's perspectives and opinions concerning the Burt Township controversy, and "fails to support a claim by clear and convincing evidence that actual malice was intended." Even the particular statement accusing Underhill of delaying the reporting of the results of the audit was an expression of opinion rather than an expression of fact made with reckless disregard of its truth or falsity. According to the trial court, holding Siebert liable for such expressions of opinion would have a chilling effect on First Amendment expression. The trial court was "satisfied that the specific facts necessary to maintain an action for libel are unsupported and the general allegations are clearly unenforceable." Therefore, the trial court dismissed Underhill's amended complaint with prejudice. Underhill now appeals.

II. SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)

A. STANDARD OF REVIEW

Underhill argues that he did state claims on which relief could be granted and that the trial court erred in finding that his amended complaint was not “specific enough.”

Under MCR 2.116(C)(8), a party may move for summary disposition on the ground that the opposing party has failed to state a claim on which relief can be granted. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone.² “All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.”³ The motion “may be granted only where the claims alleged are ‘so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.’”⁴ A trial court’s decision on a motion for summary disposition is reviewed de novo.⁵

B. ANALYSIS

The elements of libel 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 the publication.”⁶ Claims of libel must be pleaded with specificity.⁷ The plaintiff must specifically identify the statements that he considers to be defamatory.⁸

Although Underhill’s original complaint failed to quote the allegedly defamatory statements, he filed an amended complaint in which he quoted the portion of Siebert’s email to Pepin that he alleged was defamatory. Moreover, Siebert was evidently aware of the precise nature of Underhill’s claim because, after Underhill filed his amended complaint, he withdrew his specificity objection. Because Underhill specifically identified the statements that he was alleging were defamatory, we conclude that the trial court erred in granting Siebert’s motion under MCR 2.116(C)(8).

² *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

³ *Id.*

⁴ *Id.*, quoting *Wade v Dept of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

⁵ *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994).

⁶ *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992).

⁷ *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 52; 495 NW2d 392 (1992).

⁸ *Id.* at 52-53.

III. SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

A. STANDARD OF REVIEW

Underhill argues that the trial court erred when it granted Siebert's motion for summary disposition to the extent that it found that no genuine issue of material fact existed.

Although the trial court's opinion refers only to MCR 2.116(C)(8), Siebert also moved for summary disposition under MCR 2.116(C)(10). Underhill responded to the motion by submitting documentary evidence in an attempt to establish a genuine issue of material fact for trial, and the trial court referred to evidence outside the pleadings when granting the motion, thereby implicating MCR 2.116(C)(10). And, where, as here, the trial court grants a motion for summary disposition brought pursuant to both MCR 2.116(C)(8) and (C)(10), and it is clear that the court looked beyond the pleadings, this Court "will treat the motions as having been granted pursuant to MCR 2.116(C)(10)," which "tests whether there is factual support for a claim."⁹

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.¹⁰ The non-moving party then has the burden to produce admissible evidence to establish disputed facts.¹¹ The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.¹² We review de novo the trial court's ruling on a motion for summary disposition.¹³

B. PUBLIC FIGURE STATUS

We reject Underhill's argument that there is a question of fact whether he was a public figure at the time the statements were made. In response to Siebert's first motion for summary disposition, Underhill conceded that he was a limited-purpose public figure and, accordingly, that it would be necessary to show that Siebert made the challenged statements with actual malice. And a party may not seek redress on appeal by taking a position contrary to that argued in the trial court.¹⁴

Regardless, a person who "project[s] himself into the arena of public policy, public controversy and pressing public concern" is a public figure.¹⁵ A public figure is deemed to have

⁹ *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

¹⁰ MCR 2.116(G)(3)(b) and (4); *Maiden*, 461 Mich at 120.

¹¹ *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

¹² MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

¹³ *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

¹⁴ *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997).

¹⁵ *Hayes v Booth Newspapers, Inc*, 97 Mich App 758, 773-774; 295 NW2d 858 (1980).

“voluntarily expose[d] [himself] to the risk of defamation by injecting [himself] into public controversy.”¹⁶ In this case, Underhill voluntarily agreed to investigate allegations of public wrongdoing involving Burt Township, and the allegedly defamatory statements related to Underhill’s handling of this matter, which was a highly public concern within the township. Thus, there is no genuine issue of material fact concerning Underhill’s status as a public figure.

C. MALICE

“Where a public figure is involved in a defamation case, the public figure must prove by clear and convincing evidence that the publication was a defamatory falsehood and was made with actual malice, i.e., with knowledge of falsity or with reckless disregard for the truth.”¹⁷

Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. ‘Reckless disregard’ is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published.^[18]

Clear and convincing evidence is “the most demanding standard applied in civil cases.”¹⁹ “This showing must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.”²⁰

Here, Underhill erroneously argues that actual malice is always a question of fact. Rather, “[w]hether the evidence is sufficient to support a finding of malice constitutes a question of law.”²¹ Thus, in the context of a motion for summary disposition, a reviewing court must decide whether the submitted evidence, viewed most favorably to the plaintiff, is sufficient to permit a trier of fact to find actual malice, by clear and convincing evidence.²²

¹⁶ *Kevorkian v American Med Ass’n*, 237 Mich App 1, 11; 602 NW2d 233 (1999) (internal quotation and citation omitted).

¹⁷ *Id.* at 9; see also *Tomkiewicz v Detroit News, Inc*, 246 Mich App 662, 676-677; 635 NW2d 36 (2001)

¹⁸ *Tomkiewicz*, 246 Mich App at 677 (internal quotations and citation omitted).

¹⁹ *Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009).

²⁰ *Id.* (internal quotations and citation omitted).

²¹ *Tomkiewicz*, 246 Mich App at 677.

²² *Id.*

In this case, Underhill submitted voluminous evidence in opposition to Siebert's motion. For the most part, the evidence focused on providing factual support for Underhill's beliefs of wrongdoing by township officials and on whether Siebert's statements that Underhill had lied and delayed reporting the audit results could literally be proven as false. However, whether Siebert acted with malice does not depend on the literal truth or falsity of the allegedly defamatory statements, but rather on Siebert's knowledge when the statements were made. We agree with Siebert that the submitted evidence fails to support a finding of malice.

Most telling is the surrounding context of the allegedly defamatory statements, in which Siebert explained that an independent audit had uncovered no evidence of wrongdoing and that the township board had become impatient with Underhill's investigation and voted, by a four to one margin, to end the investigation. Moreover, the submitted evidence shows that Underhill was aware of the deep division within the community and of the fact that certain people were strongly opposed to continuing the investigation. The evidence also shows that others within the community shared Siebert's beliefs that Underhill had unjustifiably delayed reporting the audit results and had distorted the truth. Although it is apparent from the submitted evidence that Underhill strongly believes that he was justified in conducting his investigation, and conducted it in a proper manner, it is also apparent that Siebert strongly believed that his accusations against Underhill were true and justified, that they were supported by objective facts, and that they were shared by others in the community. Against this backdrop, even if a trier of fact could ultimately find that Siebert's statements were not literally true, the evidence did not clearly and convincingly support a finding that Siebert acted with knowledge that his statements were false, or that he in fact entertained serious doubts concerning the truth of the statements.²³

We conclude that Siebert was entitled to summary disposition under MCR 2.116(C)(10) because the submitted evidence demonstrates that (1) Underhill was a limited-public figure and (2) Underhill could not establish that Siebert made the challenged statements with actual malice. In light of this conclusion, it is unnecessary to address Underhill's additional arguments regarding the elements of publication and whether the challenged statements are actionable statements of opinion.

IV. DISQUALIFICATION

Underhill argues that the trial judge should have disqualified himself from hearing this case because his prior service as township attorney created an appearance of impropriety. "Generally, to preserve this issue for appellate review, a motion to disqualify must be filed within 14 days after the moving party discovers the basis for disqualification[.]"²⁴ In this case,

²³ As this Court observed in *Ireland v Edwards*, 230 Mich App 607, 624; 584 NW2d 632 (1998), it is possible "that this result effectively protects statements that may very well have been false." "However, the First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* (internal quotations and citation omitted).

²⁴ *Kloian v Schwartz*, 272 Mich App 232, 245; 725 NW2d 671 (2006); see also MCR 2.003(D)(1)(a).

Underhill was aware of the trial judge's prior service as township attorney, but never filed a motion for disqualification or argued that an appearance of impropriety should preclude the judge from hearing this case. Therefore, we decline to address this issue.²⁵

We affirm.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Stephen L. Borrello

²⁵ *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 291; 369 NW2d 487 (1985).