

STATE OF MICHIGAN
COURT OF APPEALS

ROLAND J. JERSEVIC,

Plaintiff-Appellant,

v

WTCF/FOX,

Defendants-Appellees.

UNPUBLISHED

March 31, 2000

No. 213671

Saginaw Circuit Court

LC No. 97-019941 NZ

Before: Talbot, P.J., and Gribbs and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals from the circuit court order granting summary disposition to defendants and dismissing plaintiff's complaint in its entirety. We affirm.

This action arose during the pendency of another legal proceeding. Plaintiff was an elected member of the Michigan House of Representatives when Christina Hakes, plaintiff's former girlfriend and plaintiff's former friend Scott Kuhl tried to extort \$100,000 from plaintiff in return for videotapes of plaintiff engaged in sexual activity with Hakes and other women. Plaintiff reported the extortion attempt, which resulted in criminal proceedings. Plaintiff also filed a civil lawsuit to recover the tapes. There were numerous media reports regarding the legal proceedings, including the information that plaintiff "could not recall" having sex with Hakes while her hands were bound above her head, and plaintiff's denial that he had given Hakes a sexually transmitted disease. The court file itself was sealed from public view but, after news agencies successfully argued that the public interest outweighed any privacy concerns, the trial court lifted the suppression of the court file.

During the course of the criminal extortion trial of Hakes and Kuhl, the prosecution brought an emergency motion for a gag order. The Saginaw News and the defendant in the instant case, WTCF/Fox, opposed the gag order, and the trial court denied the prosecution's emergency motion and also vacated an ex parte gag order previously entered. Three days after the gag order was lifted, employees of defendant conducted an on-air interview with Hakes.

Plaintiff filed this action alleging that the purpose of the interview was to violate his right to privacy, damage his name, reputation and character, and to prevent his re-election as State

Representative. Plaintiff sought damages of one million dollars. Following a hearing on defendant's motion for summary disposition, and after addressing the merits of each of plaintiff's allegations in a lengthy written opinion, the trial court dismissed plaintiff's claim.

On appeal, plaintiff argues that the trial court erred in dismissing plaintiff's claim of civil extortion and conspiracy. We do not agree. As the trial court noted, the extortion in this case occurred, arrests were made, the videotapes were confiscated, and the issue of plaintiff's sexual matters had been made public long before Hake's interview on defendant radio station. Further, plaintiff failed to allege any nexus between the extortion plot and defendant.

Nor did the trial court err in granting summary disposition on plaintiff's claim that his right to privacy had been violated. In order to sustain such a claim, plaintiff must demonstrate that the disclosed information is highly offensive to a reasonable person and that the information is of no legitimate concern to the public. *Winstead v Sweeney*, 205 Mich App 664, 668; 517 NW2d 874 (1994). The information published must not have been previously exposed to the public eye. *Id.* Where the media is concerned, if the subject matter of the publicity is of legitimate public concern, there is no invasion of privacy. *Id.*, quoting 3 Restatement Torts, 2d, § 652D, comment d, p 388. Here, a wide range of questions concerning plaintiff's sex life, the effect of the explicit videotapes on his chances for reelection, and what conclusions to draw about plaintiff's character from the disclosures about his sexual activities, were in the public domain long before defendant's interview of Hakes. Although plaintiff alleges that certain unspecified private matters were discussed during the interview that had not previously been published, the question of plaintiff's private character had, beyond dispute, become a matter of public concern and media debate.

There is no merit to plaintiff's claim that the trial court abused its discretion in denying him the opportunity to amend his complaint. Plaintiff filed neither a written motion for leave to amend nor a proposed amended complaint. See MCR 2.118(A)(4); *Lown v JJ Eaton Place*, 235 Mich App 721, 726; 598 NW2d 633 (1999). Further, the trial court concluded that amendment would be futile. *Burse v Wayne Co Medical Examiner*, 151 Mich App 761, 768; 391 NW2d 479 (1986). We find no abuse of discretion.

Nor is there any merit to plaintiff's claim that the trial court improperly dismissed his claim for defamation. Plaintiff specifically cites as defamatory Hakes' statement during the interview that plaintiff gave her a sexually transmitted disease, and a question concerning rumors that plaintiff is bisexual. Plaintiff also argues at length that the question whether he was bisexual implied that he was homosexual and that the implication is false.

Plaintiff concedes that he was a public figure at the time of the interview. It is well settled that, when someone is a candidate for public office, as plaintiff was, he deliberately places his character and conduct before the public for their discussion and consideration. *Robbins v Evening News Assn*, 373 Mich 589, 591; 130 NW2d 404 (1964). Although plaintiff argues that defendant impugned his "chastity," his chastity was clearly at issue in the public forum long before this interview. Because plaintiff was a state representative and a candidate for reelection, he must be able to show that defendant acted with actual malice. *Hayes v Booth Newspapers Inc*, 97 Mich App 758, 773; 295

NW2d 858 (1980). A declarant has actual malice if he or she has knowledge of the falsity of the defamatory material or makes the statement with reckless disregard for whether it is false. *Id.*; MCL 600.2911(6); MSA 27A.2911(6). Actual malice is to be distinguished from a bad or corrupt motive or some personal spite or desire to injure the plaintiff. *Hayes, supra* at 774. The plaintiff must be able to prove that “the defendant in fact entertained serious doubts as to the truth of his publication.” *Id.* at 775. Even assuming that any implication about plaintiff being bisexual or having a sexually transmitted disease is in fact false, plaintiff has not sustained by clear and convincing proof that the defamatory falsehoods were published with actual malice. To the extent that plaintiff argues that “at least twenty” additional false and defamatory statements were made during the interview, general allegations of malice are insufficient to establish a genuine issue of material fact. *Gonyea v Credit Union*, 192 Mich App 74, 79-80; 480 NW2d 297 (1991).

Affirmed.

/s/ Michael J. Talbot

/s/ Roman S. Gibbs

/s/ William C. Whitbeck