STATE OF MICHIGAN

COURT OF APPEALS

STEPHEN THOMAS PADGETT and LYNN ANN PADGETT, Plaintiffs/Counterdefendants-Appellants,	UNPUBLISHED December 23, 2003
v	No. 242081 Oakland Circuit Court
JAMES FRANCIS GIOVANNI and COLLEEN GIOVANNI, a/k/a COLLEEN KENNEDY, Defendants/Counterplaintiffs-Appellees.	LC No. 00-026755-CZ

Before: Wilder, P.J., Griffin, and Cooper, JJ.

PER CURIAM.

Plaintiffs commenced this action against defendants, their neighbors, alleging claims for defamation, intentional infliction of emotional distress, trespass, nuisance, and negligence. Plaintiffs also sought an injunction requiring defendants to remove a wall and patio that allegedly were constructed in violation of various deed restrictions. The trial court granted defendants summary disposition pursuant to MCR 2.116(C)(10), and dismissed plaintiffs' complaint.[1] Plaintiffs' motion for rehearing was denied. Plaintiffs now appeal as of right. We affirm.

I

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition is properly granted if there is no genuine issue of

[1] Defendants filed a countercomplaint, which was also dismissed on summary disposition. The dismissal of the countercomplaint is not at issue in this appeal.

material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood,* 461 Mich 109; 597 NW2d 817 (1999).

Initially, we reject plaintiffs' argument that defendants were not entitled to summary disposition because they failed to properly support their motion with admissible evidence. In the trial court, plaintiffs objected only to certain photographs that defendants submitted. The trial court did not rely on those photographs as a basis for dismissing any of plaintiffs' claims. It was not until plaintiffs filed their motion for rehearing that they first challenged the remaining evidence submitted by defendants. Plaintiffs argue that defendants were required to submit affidavits in support of their summary disposition motion. We disagree. MCR 2.116(G)(3) is not limited to affidavits, but provides that depositions, admissions, "or other documentary evidence" may be filed in support of a motion for summary disposition. Here, defendants' motion was supported by "other documentary evidence."

In a related argument, plaintiffs assert that the additional evidence submitted by defendants, consisting of documents, other photographs, diagrams, and letters, was inadmissible and, therefore, could not properly be considered. However, plaintiffs have not sufficiently explained their position that the evidence was inadmissible. "A party may not leave it to this Court to search for a factual basis to sustain or reject its position." *Great Lakes Division of Nat'l Steel Corp v City of Ecorse,* 227 Mich App 379, 424; 576 NW2d 667 (1998). Thus, plaintiffs have failed to establish that the trial court erroneously considered the documentary evidence submitted by defendants in support of their motion.

II

Plaintiffs' complaint states that defendants wrongly accused plaintiff Stephen Padgett of trespassing on defendants' property as Stephen Padgett was working in his yard. Plaintiffs allege that defendants reported this incident to the police and also informed neighbors that Mr. Padgett had trespassed on their land. Plaintiffs' complaint included claims for defamation or defamation per se, as well as intentional infliction of emotional distress, in connection with this incident.

We conclude that the trial court properly granted summary disposition of plaintiffs' claims for defamation and defamation per se. Although the Legislature codified this tort in MCL 600.2911, that statute does not disclose that the Legislature adopted a definition for defamation per se that varies from the common law with regard to a statement imputing the commission of a crime. Instead, the statute only preserves common-law slander per se involving accusations of criminal conduct and, therefore, is to be read in light of previously established common-law principles governing slander per se. *People v Gahan,* 456 Mich 264, 272; 571 NW2d 503 (1997); *Kefgen v Davidson,* 241 Mich App 611, 618 n 4; 617 NW2d 351 (2000).

Consequently, it was not improper for the trial court herein to rely on our Supreme Court's decision in *Hinchman v Knight,* 132 Mich 532; 94 NW 1 (1903), in dismissing plaintiffs' claim of defamation per se. In *Hinchman, supra* at 536-537, the Supreme Court refused to vacate a jury's verdict in response to the defendant's claim that he had only accused the plaintiff of committing a trespass. The Court stated that if the defendant had only accused the plaintiff of committing a trespass, the allegation would have been too trivial to support a claim for slander per se, thereby requiring the plaintiff to prove special damages. The Court upheld the jury's

verdict in that case, however, because it concluded that the facts showed that the defendant did more than just accuse the plaintiff of a trespass.

Applying the principles set forth in *Hinchman* to the present case, the trial court properly concluded that an accusation of trespass is insufficient to support a claim of defamation per se.

Nonetheless, plaintiffs could still establish a claim for defamation based on negligently published statements if they could prove economic damages. MCL 600.2911(7).[2] In the trial court, however, Stephen Padgett only alleged that he suffered emotional distress as a result of defendants' statements. As the trial court noted, he offered "no medical bills, no wage loss, or other economic damages associated with the alleged defamatory" statement. His allegations of emotional distress damages are otherwise insufficient to establish economic damages under MCL 600.2911(7). Although Stephen Padgett now argues that the attorney fees he has incurred as a result of bringing this lawsuit qualify as economic damages, we disagree. Those damages are not the direct result of the allegedly defamatory statements, but rather a result of pursing this litigation.

Plaintiffs alternatively argue that they were not required to prove economic damages, but could recover for their emotional distress, because defendants maliciously accused Stephen Padgett of trespassing on their property. Although MCL 600.2911(7) requires proof of economic damages when a private person is defamed by a negligently published falsehood, a private person may recover actual damages, including damages to reputation or feelings, if the person proves that the defamatory statements were made with actual malice. *Glazer v Lamkin*, 201 Mich App 432, 436-437; 506 NW2d 570 (1993).

To show actual malice, a plaintiff must prove that the defendant made the statement with knowledge that it was false or with reckless disregard of the truth. *Id.* at 438. General allegations of malice are insufficient to show a genuine issue of material fact. *Id*. The complaint must allege specific facts which, if proved, would support an inference of actual malice. *Smith v Fergan*, 181 Mich App 594, 597; 450 NW2d 3 (1989). Ill will, spite, and hatred, standing alone, do not amount to actual malice. *Tomkiewicz v The Detroit News, Inc*, 246 Mich App 662, 677; 635 NW2d 36 (2001). Here, the record discloses that plaintiffs failed to produce evidence of actual malice. The alleged facts would not justify a reasonable jury in concluding that defendants acted with the requisite malice or reckless disregard for the truth. Accordingly, the trial court did not err in dismissing plaintiffs' claim for either defamation or defamation per se.

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[2] MCL 600.2911(7) provides:

> (7) Action involving private individual; facts concerning falsehood; recovery. An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.

III

We conclude that the trial court also properly dismissed plaintiffs' claim for intentional infliction of emotional distress. This claim is similarly based on the allegedly false accusations that Stephen Padgett trespassed on defendants' property. We agree with the trial court that defendants' conduct, even if true, does not rise to the level of extreme or outrageous conduct necessary to support an action for intentional infliction of emotional distress. *Graham v Ford,* 237 Mich App 670, 674-675; 604 NW2d 713 (1999); *Teadt v Lutheran Church Missouri Synod,* 237 Mich App 567, 582; 603 NW2d 816 (1999). Moreover, we are not persuaded that plaintiffs produced evidence of severe emotional distress. *Haverbush v Powelson,* 217 Mich App 228, 235; 551 NW2d 206 (1996).

IV

Plaintiffs' complaint also alleges that defendants' placement of a sump pump discharge pipe caused discharged water to invade plaintiffs' property, thereby damaging plaintiffs' driveway. Plaintiffs' complaint contained counts for trespass, nuisance, and negligence, in connection with the discharge pipe.

"Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Adams v Cleveland-Cliffs Iron Co,* 237 Mich App 51, 67; 602 NW2d 215 (1999).

Plaintiffs' theory was that defendants' sump pump was directed at their land so that the water from the sump pump was physically intruding onto their property. We agree that plaintiffs failed to produce evidentiary support for this theory. Defendants submitted evidence that the city had inspected their discharge pipe and found it to be in compliance with the city's ordinances. Although the affidavit of plaintiffs' expert raised the possibility that an accumulation of water on defendants' property might affect plaintiffs' land, it fell short of establishing that water was collecting on plaintiffs' property because of the placement of defendants' sump pump. Evidence that water was pooling at a portion of defendants' property near plaintiffs' land was insufficient to show that water was actually intruding upon plaintiffs' property, or that the placement of defendants' sump pump was causing water to run under plaintiffs' driveway. "A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact." *Cloverleaf Cab Co v Phillips Petroleum Co,* 213 Mich App 186, 192-193; 540 NW2d 297 (1995). Absent competent evidence of a physical intrusion, plaintiffs failed to establish factual support for their trespass claim. *Gelman Sciences, Inc v The Dow Chemical Co,* 202 Mich App 250, 253; 508 NW2d 142 (1993). Thus, the trial court properly granted defendants summary disposition of plaintiffs' claim for trespass.

Similarly, regarding plaintiffs' negligence claim, plaintiffs failed to show that water from defendants' sump pump was damaging the foundation to their driveway and, therefore, plaintiffs failed to establish factual support for a claim of negligence. *Zdrojewski v Murphy,* 254 Mich App 50, 63; 657 NW2d 721 (2002). Plaintiffs failed to produce competent evidence for their allegation that water was flowing underneath their driveway and eroding the foundation. In this

regard, Stephen Padgett's affidavit is conclusory and self-serving and, therefore, insufficient to properly establish a genuine issue of fact concerning damages. Additionally, plaintiffs' expert did not state in his affidavit that the driveway had been damaged as a result of the discharge of water from defendants' sump pump. The trial court therefore properly granted summary disposition in favor of defendants on plaintiffs' negligence claim.

The trial court also did not err in dismissing plaintiffs' nuisance claim. "To prevail in nuisance, a possessor of land must prove *significant harm* resulting from the defendant's *unreasonable interference* with the use or enjoyment of the property." *Adams, supra* at 67 (emphasis in original). As previously discussed, plaintiffs failed to present competent evidence establishing a genuine issue of material fact as to whether defendants' sump pump caused significant harm to plaintiffs' driveway.

V

Plaintiffs' complaint also requested an injunction requiring defendants to remove a wall and patio, which plaintiffs alleged were constructed in violation of their subdivision's deed restrictions. We agree with the trial court that plaintiffs failed to establish a genuine issue of material fact regarding the existence of a violation. The deed restrictions on which plaintiffs rely apply to dwellings only, not patios, decks, or terraces. Furthermore, even if the setback requirements in the deed restrictions applied, the submitted evidence showed that defendants were in compliance with those restrictions. The subdivision's board approved defendants' plans for the patio and patio wall in 1992.

Plaintiffs also failed to establish a genuine issue of material fact that defendants violated the deed restriction regarding fences, which requires that all fences be approved. Notwithstanding Michael Kerrigan's affidavit advancing his personal interpretation of the deed restrictions, it is undisputed that the subdivision's board approved defendants' plans to construct the patio with the decorative wall at issue. Thus, even if the wall could be considered a fence, the board approved it. Plaintiffs therefore failed to show that defendants were in violation of the restriction on fences.

VI

Finally, plaintiffs argue that the trial court erred by refusing to grant them leave to amend their complaint after granting summary disposition to defendants. When a trial court grants summary disposition under MCR 2.116(C)(8), (9), or (10), it must give the nonmoving party an opportunity to amend their pleading pursuant to MCR 2.118, unless it would be futile to do so. *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001).

On appeal, plaintiffs merely state that the trial court should have granted them leave to amend their complaint. Plaintiffs did not fully explain below what meritorious issues they desired to raise in an amended complaint, nor do they do so on appeal. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for their claim. *Korth v Korth*, 256 Mich App 286, 294; 662 NW2d 111 (2003). Therefore, this issue does not warrant appellate relief.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Jessica R. Cooper