STATE OF MICHIGAN

COURT OF APPEALS

KEITH TODD,

Plaintiff-Appellant,

v

NBC UNIVERSAL (MSNBC),

Defendant-Appellee

and

EASTPOINTE POLICE DEPARTMENT, and A-ONE LIMOUSINE,

Defendants.

UNPUBLISHED
December 10, 2015

No. 323235
Wayne Circuit Court
LC No. 14-004589-CZ

Before: SERVITTO, P.J., and WILDER and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant NBC Universal's (hereinafter defendant)[1] motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arose as a result of defendant's production and airing of an episode of a television show on its cable television channel. On August 7, 2011, defendant aired an episode of "Caught on Camera: Dash Cam Diaries 3." The episode incorrectly identified plaintiff as the perpetrator of a crime, using his name and photograph, when in fact the perpetrator was an entirely different person named Todd Keith, not Keith Todd. The episode was periodically re-aired. According to plaintiff, he became aware of it around November 15, 2013, when his uncle and friends saw and alerted him to it, and at some point he personally viewed the episode as well.

[1] Defendant asserts that its legal name is MSNBC Cable L.L.C., not NBC Universal (MSNBC). Because the trial court and the record have referred to defendant as NBC Universal (MSNBC), we will continue to do so for consistency.

The episode was re-aired again on January 5, 2014. On February 4, 2014, plaintiff's counsel emailed defendant informing it of its mistake and demanding a video retraction within 14 days. On February 23, 2014, defendant aired a version of the episode that correctly identified the perpetrator, and included a graphic and voice-over that stated: "When this report previously aired, we included the wrong name and photograph of the suspect. The man previously named and shown had no relation to the crime. We regret this error."

On April 9, 2014, plaintiff filed a complaint against defendant, as well as defendants Eastpointe Police Department and A-1 Limousine, alleging defamation (Count I), intentional infliction of emotional distress (Count II), negligent infliction of emotional distress (Count III), and negligence (Count IV). (*Id.*) On May 30, 2014, defendant moved for summary disposition on all claims pursuant to MCR 2.116(C)(7) and (C)(8). Defendant alleged that Counts I through IV were time-barred by the statute of limitations governing defamation, and furthermore, that Counts II and III failed to state a claim upon which relief could be granted. On July 3, 2014, Eastpointe Police Department moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). A-1 never answered plaintiff's complaint, although counsel for A-1 did enter an appearance after plaintiff moved for entry of a default judgment against A-1, and appeared at the summary disposition hearing, arguing orally that plaintiff's claims against A-1 were barred by the statute of limitations for defamation.[2]

On July 30, 2014, the trial court entered an order granting summary disposition in favor of all defendants on all of plaintiff's claims. The trial court held that the statute of limitations for defamation applied to all claims in the action because "all of [plaintiff's] counts really revolve around this airing of this one episode in 2011." Further, because the original airdate of the episode in question was August 7, 2011, 27 months before plaintiff filed his complaint, the court held that all of the claims were barred by the one-year statute of limitations applicable to defamation claims.

On August 15, 2014, plaintiff filed with the trial court a Motion for Leave to File an Amended Complaint, an accompanying brief, and a proposed amended complaint that would have alleged false light invasion of privacy (Count I) and appropriation (Count II) against defendant. The trial court declined to hear plaintiff's motion. On August 19, 2014, plaintiff filed a timely appeal of the trial court's order granting summary disposition to defendant on plaintiff's intentional infliction of emotional distress claim, and on appeal additionally challenged the trial court's declination to consider plaintiff's motion to amend his complaint to assert additional claims.[3]

---

[2] It appears from the record that the trial court never ruled on plaintiff's motion for a default judgment.

[3] Plaintiff has not appealed the trial court's order granting summary disposition to defendant on plaintiff's claims for defamation, negligent infliction of emotional distress, or negligence, or the trial court's order granting summary disposition to Eastpointe Police Department and A-1 Limousine.

II. STANDARD OF REVIEW

MCR 2.116(C)(7) allows for a grant of summary disposition on the ground that a claim is barred by an applicable statute of limitations. A trial court's grant or denial of summary disposition based upon MCR 2.116(C)(7) is reviewed de novo on appeal. *Fields v Suburban Mobility Auth for Regional Transp*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket No. 318235), slip op at 1. If there is no factual dispute, whether a plaintiff's claim is barred by MCR 2.116(C)(7) is a question of law for the court to decide. *Id*.

MCR 2.116(C)(8) states that a party may move for summary disposition when "[t]he opposing party has failed to state a claim on which relief can be granted." A grant or denial of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). All factual allegations in support of the claim are accepted as true and are construed in the light most favorable to the nonmoving party. *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012).

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiff argues that the trial court should not have dismissed as time-barred his intentional infliction of emotional distress claim. We agree, in part.

A. STATUTES OF LIMITATION

Plaintiff alleged two causes of action that are pertinent here—intentional infliction of emotional distress and defamation. Intentional infliction of emotional distress is governed by the three-year statute of limitations applicable to tort claims. MCL 600.5805(10); *Campos v Oldsmobile Div, Gen Motors Corp*, 71 Mich App 23, 26; 246 NW2d 352, 353 (1976). Libel and slander (i.e., defamation) claims are governed by a one-year statute of limitations. MCL 600.5805(9). The trial court dismissed both claims in this case based on the one-year statute of limitations applicable to defamation claims, noting that "all of [plaintiff's] counts really revolve around this airing of this one episode in 2011."

The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905, 908 (1985). Defamation, by contrast, requires "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) at least negligent fault [by] the publisher, and (4) either actionability of the statement irrespective of special harm . . . or the existence of special harm caused by publication." *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420, 421 (2005).

This Court has recognized that intentional infliction of emotional distress is "a separate and distinct cause of action" from defamation. *Campos*, 71 Mich App at 26. Moreover, it "need not be parasitic to a separate cause of action as an aggravating element of damages." *Id*. Rather, the two causes of action serve different interests, and thus are independently actionable. Notwithstanding the confusion that "undoubtedly arises because of the fact that mental suffering is an element of damages recoverable in a defamation action," this Court has stated that "the interest protected by the two forms of action are different and must be recognized as such. The

same conduct, falsely accusing another of crime, may give rise to two causes of action depending on the interest which was injured." *Id*. at 25-26.

More specifically,

> The basis for . . . intentional infliction of mental distress is that one has a legally protected right to be free from serious, intentional and unprivileged invasions of mental and emotional tranquility. . . . Slander, on the other hand, embodies the public policy that individuals should be free to enjoy their reputations unimpaired by defamatory attacks. . . . The gist of the action is damage to reputation. [*Id*. at 25.]

Thus, even when "the factual basis for both causes of action . . . is the same," an intentional infliction of emotional distress claim (or a portion of it) may survive (notwithstanding the expiration of the one-year defamation statute of limitations) if "the type of interest which was allegedly injured is sufficiently different to warrant application of the longer period." *Id*. at 26. That is, when a complaint alleges injuries to a plaintiff's "own mental well-being, as distinguished from other's reactions," those allegations are not barred by the one-year statute of limitations of MCL 600.5805(6). *Id*.

In this case, plaintiff pleaded two distinct tort theories of recovery. Each tort has distinct elements relating to distinct types of interests, such that the facts of the case could "support either of [the] two distinct actions. . . ." *Wilkerson*, 101 Mich App at 631-32. Although the general factual basis for plaintiff's defamation claim and that for his intentional infliction of emotional distress claim are the same, we conclude that "the type of interest which was allegedly injured is sufficiently different to warrant application of" a distinct statute of limitations, as to certain aspects of plaintiff's claim. *Campos*, 71 Mich App at 26. In his complaint, plaintiff alleges injuries to both his reputation and his emotional well-being. Taking the allegations in the complaint as true, plaintiff not only learned of the airing of the episode from others, but also witnessed it first-hand, causing him severe emotional distress. He experienced symptoms including "shaking hands, sleeplessness, increased anxiety, headaches, crying spells, nausea, cold sweats, loss of appetite, [and] dizziness." The three-year statute of limitations thus applies to plaintiff's claim for intentional infliction of emotional distress, insofar as it relates to alleged interference with his own mental well-being, because of the different interests protected by each distinctly recognized tort. *Wilkerson*, 101 Mich App at 634. The trial court therefore erred in dismissing the claim in its entirety. MCL 600.5805(10); *Campos*, 71 Mich App at 26. However, as this Court noted in *Campos*, portions of plaintiff's complaint that allege reputational injury based on the reactions of others are barred by the one year-limitations period for defamation. *Campos*, 71 Mich App at 26.

We note that, in arguing otherwise, defendant directs us to certain non-Michigan cases, principally, *Ghrist v CBS Broadcasting, Inc*, 40 F Supp 3d 623 (WD Pa 2014). However, in addition to being arguably inconsistent with *Campos*, *Ghrist* is based on Pennsylvania law, which it appears may not be coextensive with Michigan's. *Id*. at 630. Moreover, the Court in *Ghrist* stressed that the plaintiff had not in his complaint alleged injury to his own well-being, but had done so only in a brief, and, as the court noted, a pleading cannot be amended in a brief. We thus find *Ghrist* distinguishable and unpersuasive. *Id*.

For these reasons, we hold that the trial court should not have granted summary disposition on plaintiff's intentional infliction of emotional distress claim, insofar as it alleges interference with plaintiff's own mental well-being, pursuant to MCR 2.116(C)(7).[4]

B. ALTERNATIVE GROUNDS

While acknowledging that the trial court did not reach the issue, defendant alternatively argues that this Court should hold as a matter of law that plaintiff failed to state a claim on which relief can be granted, and thus affirm the trial court's dismissal of plaintiff's intentional infliction of emotional distress claim, albeit under MCR 2.116(C)(8). We agree.

Summary disposition of a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8); *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005); *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Bailey*, 494 Mich at 603. All well-pleaded factual allegations are accepted as true and construed in the light most favorable to the nonmoving party. *Gorman v American Honda Motor Co*, 302 Mich App 113, 131; 839 NW2d 223 (2013). However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994). Further, a legal conclusion is insufficient to state a cause of action; only factual allegations, not legal conclusions, are to be taken as true under MCR 2.116(C)(8). If a motion for summary disposition should have been brought under MCR 2.116(C)(8), but was brought under another sub-rule, review is not precluded if the record permits review under the correct sub-rule. *Robert A Hansen Family Trust v FGH Industries, LLC*, 279 Mich App 468, 477 n 6 (2008).

Again, the elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Roberts*, 422 Mich at 602. According to plaintiff's complaint, defendant aired the show in question, with the plaintiff's name and photograph displayed, on November 15, 2013 and January 5, 2014 (in addition to its initial airing on August 7, 2011). The show has been aired

[4] Our review of the record before this Court also does not support defendant's contention that the claim of intentional infliction of emotional distress was used to "get around" the time barring of defamation, or that plaintiff's claim for intentional infliction of emotional distress was merely a wrongly-labeled defamation claim. However, we recognize that, were this case to be remanded to the trial court for further proceedings on plaintiff's intentional infliction of emotional distress claim, insofar as it alleges interference with plaintiff's own mental well-being, the court could face a difficult task in segregating out those aspects of plaintiff's claim, claimed damages, and proofs, that relate only to plaintiff's own mental well-being, as opposed to injury to his reputation (which are barred). Nonetheless, at this stage of the proceedings, where factual issues appear to exist regarding the nature of plaintiff's injuries and resulting damages, and where discovery has not yet occurred, we decline to find plaintiff's claim for injury to his own mental well-being to be barred on statute of limitations grounds.

multiple times, as well as being made available for sale. These broadcasts not only wrongly depicted plaintiff in relation to the singular event captured in the episode, but additionally referred to plaintiff as having committed other crimes and as a "habitual car thief." Plaintiff alleges that defendant's conduct was "extreme, outrageous, and of such character as not to be tolerated by a civilized society," and that defendant acted intentionally or recklessly. Finally, plaintiff alleges not only that he has been "publically humiliated," but that he "suffered severe emotional distress" due to "the publication of his name coupled with his picture being aired on national television with the clear statement that he was involved in criminal acts."

> Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Accordingly, liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. [*Lucas v Awaad*, 299 Mich App 345, 359; 830 NW2d 141 (2013) (quotation marks, brackets, and citation omitted).]

Thus, "[t]he threshold for showing extreme and outrageous conduct is high," and "[n]o cause of action will necessarily lie even where a defendant acts with tortious or even criminal intent." *VanVorous v Burmeister*, 262 Mich App 467, 481; 687 NW2d 132 (2004). "The test to determine whether a person's conduct was extreme and outrageous is whether recitation of the facts of the case to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' " *Lewis v LeGrow*, 258 Mich App 175, 196; 670 NW2d 675 (2003). Generally, it is the trial court's duty to determine whether the defendant's conduct is extreme and outrageous. *Id*. at 197. However, if reasonable minds could differ on the subject, it is a question of fact for the jury. *Id*.

Were it to have considered the issue, the trial court properly should have granted summary disposition, under MCR 2.116(C)(8), on the intentional infliction of emotional distress claim. While the conduct at issue may have been unpleasant and even disturbing, the threshold for proving extreme and outrageous conduct is great. *VanVorous*, 262 Mich App at 481. Plaintiff asserted that defendant mistakenly disseminated false information about him that incorrectly identified him as a criminal. While unfortunate, this conduct is akin to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Lucas*, 299 Mich App at 359. It does not rise to the level of intentional infliction of emotional distress. *VanVorous*, 262 Mich App at 481. Simply stated, this conduct was not "beyond all possible bounds of decency" or "atrocious and utterly intolerable in a civilized community." *Lucas*, 299 Mich App at 359. Thus, summary disposition is proper regarding plaintiff's claim of intentional infliction of emotional distress. See *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 313; 696 NW2d 49 (2005) (we will affirm a summary disposition order if the trial court reached the correct result, even if for the wrong reasons).

IV. DENIAL OF MOTION TO AMEND

On August 15, 2014, 16 days after the trial court issued its summary disposition order in this matter, plaintiff filed a motion to amend his complaint to assert claims for false light invasion of privacy and appropriation. On August 19, 2014, plaintiff filed a claim of appeal. On August 26, 2014, plaintiff filed a notice of presentment of a 7-Day Order, in accordance with MCR 2.602(B), relative to his motion to amend. Defendant responded by filing an Objection to 7-Day Order on September 3, 2014. While there was some communication among the trial court's law clerk, plaintiff, and the clerk's office, the trial court never ruled upon plaintiff's motion to amend, and did not hold a hearing on the motion. Instead, the court expressly declined to hear plaintiff's motion.

Denials of motions for leave to amend the pleadings are reviewed for abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). "To constitute an abuse of discretion, the result must be so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion of bias." *Franchino v Franchino*, 263 Mich App 172, 193; 687 NW2d 620 (2004), citing *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). "Motions to amend should be denied only for specific reasons such as 'undue delay, bad faith . . . repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility.'" *Franchino v Franchino*, 263 Mich App 172, 189-190; 687 NW2d 620 (2004). While delay itself is not sufficient grounds for denial of a motion to amend, it is proper to deny the motion where the delay causes the opposing party actual prejudice. *Amburgey v Sauder*, 238 Mich App 228, 247; 605 NW2d 84 (1999). An opposing party may be prejudiced when a party waits until after a motion for summary disposition is filed on the basis of claims asserted in the original complaint to raise the issue of amendment to add new and distinct legal theories. *Weymers*, 454 Mich at 661; *Franchino*, 263 Mich App at 193.

In *Midura v Lincoln Consol Schools*, 111 Mich App 558, 561; 314 NW2d 691 (1981), this Court stated that "entry of a grant of summary judgment does not preclude amendment of the complaint. Plaintiff could amend her pleadings, but only by leave of the Court."[5] Accordingly, the trial court's grant of summary disposition did not in itself foreclose plaintiff's amendment of his complaint.

Nonetheless, where, as here, plaintiff did not even seek leave to amend his complaint until after the trial court had granted summary disposition, we hold that the trial court did not abuse its discretion in declining to consider the late-requested amendment. Plaintiff's motion to amend came after the case was dismissed and attempted to add two new claims based on the same conduct as had been alleged in plaintiff's initial complaint. Plaintiff offered, and offers this Court, no reason why these claims could not have been included in the original complaint or added while the case was pending. We conclude that the trial court's refusal to hear plaintiff's

[5] *Midura* was decided pursuant to GCR 1963, 117.2(1), which is now MCR 2.116(C)(8). The two court rules are substantively identical. *Hoffman v Genessee County*, 157 Mich App 1, 5; 403 NW2d 485 (1987).

motion was not "palpably and grossly violative of fact and logic" as to require reversal. *Franchino*, 263 Mich App at 193. The fact that the trial court did not specify its rationale for declining to consider plaintiff's motion to amend also does not require reversal. Plaintiff cannot demonstrate that "the *outcome* of the proceedings likely would have been different" if the trial court had considered his motion. See *Richard v Schneiderman & Sherman, PC (On Remand)*, 297 Mich App 271, 276-277; 824 NW2d 573 (2012).

Affirmed.

/s/ Deborah A. Servitto
/s/ Kurtis T. Wilder
/s/ Mark T. Boonstra