STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL WILLIAMS, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED February 21, 2012
v	No. 301154 Wayne Circuit Court
NEW WORLD COMMUNICATIONS OF DETROIT, INC., d/b/a WJBK-TV, and ROB WOLCHEK, Defendants-Appellees/Cross-Appellants.	LC No. 09-020833-NZ

Before: OWENS, P.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

In this defamation and invasion-of-privacy action, plaintiff appeals by right the circuit court's grant of summary disposition in favor of defendants. Defendants cross-appeal the circuit court's denial of their request for sanctions under MCR 2.114, MCR 2.625, and MCL 600.2591. We affirm in full.

Plaintiff wrote and self-published a book to commemorate the 2008 election of President Barack Obama. Plaintiff retained the services of Select Graphics, a southeast Michigan printing company, to print his book. When plaintiff failed to pay Select Graphics for the printing services that it had rendered, Select Graphics commenced a lawsuit against him in the Wayne Circuit Court. Defendant WJBK-TV learned of the existence of this lawsuit and decided to broadcast a story concerning plaintiff and his book. WJBK-TV reporter Rob Wolchek interviewed Diane Angelosante, one of the co-owners of Select Graphics. During an on-camera interview, Angelosante informed Wolchek that plaintiff had not paid for the printing of his book and that plaintiff had "promptly" written "a bad check" to the company. WJBK-TV broadcast the interview with Angelosante on July 9, 2009, and inducted plaintiff into its "Hall of Shame" at that time. The central theme of the television broadcast was that although plaintiff had been promoting his book as a great success, he had not even paid the book's printer.

On August 24, 2009, plaintiff sued defendants WJBK-TV and Rob Wolchek in the Wayne Circuit Court, setting forth claims entitled "defamation" and "invasion of privacy." Plaintiff alleged that certain unknown employees of WJBK-TV, one of whom had represented herself as a Wayne State University journalism student, had "ambushed" him at a Cobo Hall

tradeshow and an area grocery store in order to obtain footage of him. According to plaintiff, the reporters who "ambushed" him did not identify themselves as employees of WJBK-TV. Thereafter, plaintiff allowed Wolchek to interview him at his home. Wolchek surreptitiously obtained additional footage of defendant during this subsequent interview. Plaintiff alleged that defendants later broadcast the footage that they had obtained in an effort to "falsely portray [him] as someone who would avoid responsibility for his actions."

Plaintiff alleged that WJBK-TV's "Hall of Shame" report of July 9, 2009, contained "numerous false statements about plaintiff, including but not limited to the statement that after [Angelosante] delivered the books to plaintiff, plaintiff 'promptly wrote her a bad check and took off on a press tour.'" Plaintiff asserted that WJBK-TV's "Hall of Shame" report had been maliciously broadcast without regard for the truthfulness of its contents. He also asserted that, because it is a criminal offense to write a bad check, defendants had falsely and maliciously accused him of a crime, thereby committing defamation per se.

On March 15, 2010, defendants moved for summary disposition pursuant to MCR 2.116(C)(10). According to defendants, plaintiff had previously written numerous checks that were dishonored for non-sufficient funds ("NSF"), including several written to Select Graphics. Indeed, an official from plaintiff's credit union testified at her deposition that plaintiff wrote 98 checks between May 2008 and August 2009 that were initially dishonored for non-sufficient funds. Of these 98 checks, 65 of them never cleared. Moreover, plaintiff admitted at his own deposition that he had written NSF checks to Select Graphics in the past.[1] Defendants attached photocopies of several checks written by plaintiff to Select Graphics that were returned and stamped "Not Sufficient Funds." Given plaintiff's own admission that he had written NSF checks to Select Graphics in the past, defendants argued that their "Hall of Shame" report was substantially true and that plaintiff's complaint against them was frivolous. Defendants requested sanctions, including their attorney fees, under MCR 2.114, MCR 2.625, and MCL 600.2591.

In response, plaintiff argued that even though he had written several NSF checks to Select Graphics in the past, he had not paid for the printing of his Obama book with a bad check. He explained that at least one of the checks he had written for the printing of the Obama book was dishonored because of an error by his credit union—*not* because of insufficient funds. Plaintiff also opposed defendants' request for sanctions, arguing that his defamation action was not frivolous or intended to harass or embarrass defendants.

On April 2, 2010, the circuit court held oral argument and took the matters under advisement. On October 26, 2010, the circuit court issued a thorough and detailed opinion and order granting defendant's motion for summary disposition and denying defendants' request for sanctions. The court ruled that even if there had been some minor inaccuracies in defendant's "Hall of Shame" report, the broadcast had been substantially true and was not actionable in

[1] Specifically, plaintiff admitted that some of the checks he had written to Select Graphics in the past had "bounce[d]." Plaintiff also testified that he could not confirm whether he had paid Select Graphics in full for all the work it had completed.

defamation. The court further ruled that plaintiff's defamation action, while ultimately unsuccessful, was neither frivolous nor intended to harass, and was not devoid of arguable legal merit at the time it was filed.

We review de novo the circuit court's decision to grant a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We review for clear error the circuit court's determination whether to impose sanctions under MCR 2.114. *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). We similarly review for clear error the circuit court's decision whether to impose sanctions under MCR 2.625 and MCL 600.2591. *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002).

On appeal, plaintiff argues that the circuit court erred by ruling that WJBK-TV's "Hall of Shame" report was substantially true and not maliciously broadcast without regard for the truth of its contents. In addition, plaintiff contends that defendants' broadcast constituted defamation per se because it effectively accused him of having committed a criminal offense, and that the television broadcast "was not privileged." He further contends that defendants invaded his privacy when they pursued him and attempted to film him at a Detroit tradeshow, an area grocery store, and his home. Defendants argue that the circuit court improperly denied their request for sanctions. They contend that the court clearly erred by finding that plaintiff's defamation action was not frivolous, intended to harass, or devoid of arguable legal merit.

As noted earlier, the circuit court issued a thorough and detailed opinion and order in this case. The circuit court thoughtfully and cogently addressed the merits of plaintiff's claims and defendants' request for sanctions. We set forth at length Judge MacDonald's excellent analysis, which we adopt as our own:

> **I. Introduction**
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> On July 9, 2009, Defendants WJBK-TV and reporter Rob Wolchek broadcast a story, as part of WJBK's "Hall of Shame" series, regarding a business dispute between Michael Williams and Select Graphics Corporation, the printer of a book Mr. Williams had self-published. The story alleged that Mr. Williams had not paid Select Graphics for its services and included an interview with the owner/principal of the company, Diane Angelosante, who alleged that Mr. Williams owed her almost $50,000 in printing costs and wrote her several bad checks, producing seven checks to reporter Wolchek that had been returned for non-sufficient funds (NSF).
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> On August 24, 2009, Plaintiff Williams filed this libel action, alleging that the "Hall of Shame" story was false and defamatory. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). After a hearing on April 2, 2010, the Court took the motion under advisement.
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> **II. Background Facts**
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> Michael Williams and his companies, Poster Kraze and Retail City Dot Com, have done business with Select Graphics Corporation for a number of years, most recently and most consistently between the approximate dates of June 11,

2008 and March 11, 2009. In particular, Plaintiff engaged the services of Select Graphics in late 2008 to print a book that he was self-publishing about the election of President Obama.

On June 24, 2009, Select Graphics filed a lawsuit against Michael Williams and his companies alleging that they owed Select Graphics $49,104, to which Mr. Williams responded with a counterclaim alleging that Select Graphics'[s] printing work was late and poorly done and that the company profited from selling some of the books without paying Mr. Williams. A statement of account attached to Select Graphic[s's] complaint in that case indicates two unpaid invoices for $1,315 and $25,988, with a returned check fee of $35 for each, dated March 10, 2009 and March 19, 2009, respectively.

After being contacted by Ms. Angelosante and then contacting Mr. Williams, Defendants decided to induct Mr. Williams into their "Hall of Shame." Since the broadcast, the segment remains available for viewing on the station's website.

III. Standard of Review

MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits and other documentary evidence, when viewed in a light most favorable to the non-moving party, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may not make factual findings or weigh credibility in deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Summary disposition is an essential tool courts must use to protect First Amendment rights. [*Ireland v Edwards*, 230 Mich App 607, 613; 584 NW2d 632 (1998).] Although the proferred evidence must be viewed in the light most favorable to the nonmoving party, in cases involving constitutionally protected discourse, a reviewing court is required to make an independent examination of the record to ensure against forbidden intrusions into the field of free expression. *Rouch v Enquirer & News of Battle Creek (Rouch II)*, 440 Mich 238, 253[-254]; 487 NW2d 205 (1992).

IV. Law

To establish a claim of libel, Plaintiff must demonstrate (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 publication. [*Id.*] at 251.

> In addition to satisfying Michigan's common-law requirements for a libel cause of action, a litigant must comply with constitutional requirements. . . . [A]nalysis under the constitution has focused on three elements: "the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant, and the public or private character of the speech."

Id. at 251-252 (citations omitted).

It also is well settled that truth is an absolute defense to an action for defamation, even where the speaker is motivated by personal animus. *Rouch v Enquirer & News (Rouch I)*, 427 Mich 157, 203-206; 398 NW2d 245 (1986)[.] Moreover, "truth" need only mean substantial truth. Thus, as long as the "gist" or "sting" of the statement is substantially true, the defendant is not liable provided the inaccuracy "does not alter the complexion of the charge and would have no different effect on the reader than that which the literal truth would produce . . . ." *Fisher v Detroit Free Press*, 158 Mich App 409, 414; 404 NW2d 765 (1987)[.] Minor inaccuracies are considered immaterial. *Duran v Detroit News*, 200 Mich App 622, 633; 504 NW2d 715 (1993).

V. Analysis

In this case, Plaintiff alleges that the July 9, 2009, "Hall of Shame" episode contains "numerous false statements" but that "the most significantly damaging" was Diane Angelosante's statement that after she delivered the books to Plaintiff, Plaintiff "promptly wrote her a bad check and took off on a press tour." Plaintiff contends that because it is a crime in Michigan to write a bad check, Defendants falsely charged Plaintiff with criminal activity, thereby committing defamation per se.

Plaintiff does not dispute that over the course of his business relationship with Select Graphics, he wrote at least seven checks to the company that were returned for non-sufficient funds, four of which were written in 2008 and one in 2009. Plaintiff believes it significant that between the NSF check he wrote to Select Graphics in November 2008, and the NSF check in March 2009, his checks to the printing company were "good." He also contends that the returned March 2009 check was the result of bank (credit union) error and therefore not his fault and that he continued to pay the company with good checks thereafter.

Plaintiff appears to be arguing that during the period involving the printing of his book, which he says was the subject of the Hall of Shame segment, Plaintiff's checks to Select Graphics cleared, except for one check in March 2009 which was incorrectly held by the bank. The business relationship between

Plaintiff and Select Graphics that pre-dates the printing of the book, Plaintiff argues, is unrelated and irrelevant, no matter how many NSF checks Plaintiff wrote to the company. In addition, Plaintiff asserts that Defendants were not reporting about and indeed were unaware of Plaintiff's "unrelated history" of writing NSF checks to Select Graphics or anyone else. Therefore, Plaintiff argues, Defendants should not be allowed to benefit, i.e. to escape liability, based on their after-the-fact discovery.

As emotionally sympathetic as this argument may be, it simply is not supported by the law. In this case, Diane Angelosante's statement on the "Hall of Shame" segment seemingly indicates that Plaintiff knowingly, or at least through some fault of his own, wrote her a check for book-printing costs that he lacked funds to cover. Technically, it is accurate that the March 2009 check did not clear. Angelosante's statement gives the impression that it was Plaintiff's fault[,] which is inaccurate as it was Credit Union error that was the cause.

However, in light of the fact that Plaintiff previously had written NSF checks to Select Graphics, Angelosante's statement is substantially true. The gist or sting of the statement is that Plaintiff wrote a bad check to Angelosante's company which is true. The "inaccuracy" that it was neither the most recent check nor a check related to printing costs for the book "does not alter the complexion of the charge" and would have no different effect on the viewer than that which the literal truth would produce. In fact, the effect on the viewer of learning the literal truth, i.e. that Plaintiff previously had written seven NSF checks to Angelosante's company, might have been far more negative than learning of one NSF check, even if that one check was neither Plaintiff's fault nor related to the printing of Plaintiff's book. See *Koniak v Heritage Newspapers (On Remand)*, 198 Mich App 577[, 580-581]; 499 NW2d 346 (1993) (an erroneous story reporting that a man had been charged with thirty to fifty rapes was substantially true and had the same effect on the reader as a literally accurate account of six rapes would have had).

Similarly, reporter Wolchek's use of the word "promptly," as in "promptly wrote her a bad check," is legally irrelevant because as long as the check was "bad," whether it was written immediately or several weeks later is immaterial to its substantial truth.

It is also the law in Michigan that reporting matters of public record is statutorily privileged and therefore unactionable. MCL 600.2911(3) provides:

> Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report.

To be "fair and true," a report need only be substantially accurate rather than literally accurate, and journalists are not expected to be lawyers when reporting on legal matters. *Koniak*, [198 Mich App] at 583. Nor are reporters required to have reviewed the public record themselves in order for the privilege to apply, so long as the news report is consistent with the public record. *Nichols v Moore*, 396 F Supp 2d 783, 789 (ED Mich, 2005).

The case law consistently holds that factual accuracy is not required. Provided the gist of the allegedly libelous statement is accurate and the literal truth would have no appreciably different effect on the intended audience (reader, viewer, listener), the statement is not actionable in libel. *Rouch II*, [440 Mich at 269-271] (privilege applied to false published statement that plaintiff had been charged with crime when he was only arrested and later released without ever being formally charged); *Koniak*, [198 Mich App at 582-583] (story reporting plea of "no contest" which was taken under advisement and later dismissed was substantially the same as reporting a "conviction").

In this case, reporter Wolchek's report on the collection lawsuit against Plaintiff, including the two NSF returned check fees, was substantially accurate regardless of the literal truth of the allegations or the outcome of the underlying lawsuit, and finds further support in Plaintiff's deposition admission that he did write NSF checks to Select Graphics.

Plaintiff's complaint also includes an invasion of privacy count, supported by the same factual allegations as the libel claim. Thus, Plaintiff alleges that Defendants intruded into his private affairs and disclosed embarrassing private facts when they interviewed him "under false pretenses" by sending an interviewer who identified herself as a Wayne State University journalism student and when they "ambushed" Plaintiff while he was shopping at a grocery store near his home. In a third instance, Plaintiff apparently invited Mr. Wolchek to his residence to show him proof of payments to Select Graphics on condition that the meeting not be filmed but then refused the meeting when Wolchek appeared with cameramen and equipment in tow.

In *American Transmissions Inc v Channel 7 of Detroit Inc*, 239 Mich App 695[, 708-709]; 609 NW2d 607 (2000), the [C]ourt held that while the person posing as a transmission customer may have misrepresented her purpose, she did not invade private space where she entered only those areas of the shop that were open to anyone looking for transmission repair services and did not reveal the intimate details of anyone's life when she videotaped a professional discussion between one of the shop's employees and herself.

Similarly, in this case, Plaintiff was interviewed by the journalism student in Cobo Hall in one instance and approached on a public street in another, as well as having agreed to meet the reporter at Plaintiff's home. The attempts to talk to Plaintiff were made in relation to a book he published and was marketing to the public. Neither the self-published book nor the lawsuit that was filed against

Plaintiff by Select Graphics involved private matters. See *Porter v City of Royal Oak*, 214 Mich App 478, 489; 542 NW2d 905 (1995) (public disclosure of private facts does not include matters already part of the public record or otherwise open to the public eye).

Finally, while Defendants' motion for summary disposition is granted, Defendants' request for sanctions must be denied. Defendants argue that Plaintiff's refusal to be educated in either the law (libel actions being disfavored as a tool to protect First Amendment rights) or the facts (evidence of Plaintiff's bad checks) merits an award of sanctions and attorney fees, pursuant to MCR 2.625(A) and MCR 2.114, as yet another means of discouraging frivolous libel actions.

MCR 2.625(A)(1) allows the court to award costs to the prevailing party unless otherwise prohibited by statute or court rule. MCR 2.625(A)(2) provides that, "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 provides that "[u]pon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney." MCL 600.2591(3) defines "frivolous" as meeting one of the following conditions:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
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> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
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> (iii) The party's legal position was devoid of arguable legal merit.

The determination whether a claim is frivolous must be based on the circumstances at the time the claim was asserted. *Jericho Constr, Inc v Quadrants, Inc*, 257 Mich App 22[, 36]; 666 NW2d 310 (2003).

MCR 2.114(E) provides for the imposition of sanctions as a means of deterring parties and attorneys from filing pleadings or asserting claims that have not been sufficiently investigated or which are intended to serve an improper purpose. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711[, 719]; 591 NW2d 676 (1998). Whether the inquiry was reasonable is determined by an objective review of the effort taken to investigate the claim before filing suit. *Attorney Gen v Harkins*, 257 Mich App 564[, 576]; 669 NW2d 296 (2003).

It remains unclear in this case why the WJBK "Hall of Shame" targeted Michael Williams and his self-published book about press coverage of President

> Obama's election victory and what harm the station sought to remedy. Certainly, the lawsuit filed against Mr. Williams to collect outstanding printing fees redressed Select Graphics Corporation's monetary damages more effectively than the "Hall of Shame" exposure did. In addition, the lawsuit itself was, as Plaintiff suggests, a garden-variety lawsuit, indistinguishable from thousands of others but for the fact that it involved the publication of a book related to a highly-contested presidential election.
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> It is clear that Plaintiff's primary purpose in initiating the instant action was not to harass, embarrass or injure Select Graphics and Ms. Angelosante, who are not defendants in this lawsuit, or WJBK and Mr. Wolchek. Rather, it seems obvious that Plaintiff filed this lawsuit in an attempt to demonstrate that he is not a scam artist and to correct a misleading, mean-spirited media effort to discredit him. In addition, Plaintiff had a reasonable basis to believe there were facts to support his legal position, including that the check referred to in the broadcast was not returned because Mr. Williams lacked funds to cover it but because the bank erroneously deposited his funds in another account that did not belong to Mr. Williams.
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> Lastly, the standard, when determining whether a claim has merit, is that the Plaintiff's legal position must have been "devoid of *arguable* legal merit." MCL 600.2591(3)(a)(iii) (emphasis added). The fact that a claim is dismissed by summary disposition does not necessarily mean that it lacked arguable legal merit. Nor does every error in legal analysis constitute a frivolous position. *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NW2d 245 (2002). In this case, Plaintiff alleged facts in his complaint that arguably supported his claims, and this court cannot find that Plaintiff's legal position was devoid of arguable legal merit at the time this lawsuit was filed, as required. *In re Costs & Attorney Fees*, [250 Mich App at 94].
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> Defendants' motion for summary disposition is granted as to all Plaintiff's claims, and Defendants' request for sanctions is denied. This is a final order and closes this case.

It would be difficult, indeed, to improve upon Judge MacDonald's excellent legal reasoning and analysis. Quite simply, even if defendants' "Hall of Shame" report of July 9, 2009, contained certain minor inaccuracies, it was beyond genuine factual dispute that the "gist" or "sting" of the broadcast was substantially true and produced the same effect on the listener as would have been produced by an absolutely accurate account of the facts. *Duran*, 200 Mich App at 633. Nor did defendants improperly intrude on plaintiff's privacy during their investigation into the circumstances surrounding the publication of his book—a matter that was already open to the public eye. See *Porter*, 214 Mich App at 489.[2] At the same time, the circuit court did not

[2] It is true, as plaintiff points out, that a *false* accusation of the commission of a crime constitutes defamation per se and is actionable even in the absence of actual or special damages. MCL

clearly err by finding that plaintiff's defamation action was not frivolous, not intended to harass, and not devoid of arguable legal merit at the time it was filed. We affirm the circuit court in full.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Jane E. Markey

600.2911(1); *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 728; 613 NW2d 378 (2000). It is also true that writing or passing a "bad check" is a criminal offense in Michigan. See MCL 750.131a; MCL 750.249. However, the problem with plaintiff's theory of liability in this regard is that defendants' broadcast was *not materially false*. Indeed, as explained previously, although the broadcast may have contained minor inaccuracies, the overall gist of defendants' television report was true. Although a false accusation of criminal activity constitutes defamation per se, a defendant cannot be held liable for making a statement that is substantially true. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 333; 583 NW2d 725 (1998).