S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

LINDSAY CLARK ROSS, Plaintiff-Appellant,	UNPUBLISHED October 10, 2013
v	No. 308693 Iron Circuit Court
TONY ANDRESKI, INC., DAVID ANDRESKI, and SUSAN ANDRESKI WILLIAMS, Defendants-Appellees.	LC No. 10-004329-CH

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendants' motion for partial summary disposition as to plaintiff's claims of slander and intentional inflection of emotional distress. The court had previously granted defendant's motion for partial summary disposition as to plaintiff's claims of quiet title through easement by prescription, trespass, trover and conversion, conspiracy, denial of equal protection and deprivation of property without due process of law, denial of equal protection, and negligent infliction of emotional distress. We affirm.

I.

Plaintiff was living on and using land that defendants owned in part. Plaintiff alleged in his complaint that he had a prescriptive easement over a two-track dirt path that he used to access a cabin and storage shed. In 2009, defendant David Andreski installed a locked gate at the south entry of the road and put a large log at the north entry, which cut plaintiff off from the property. Plaintiff claims that he maintained and used the path consistently since 1993 up until he was denied access.

Shortly after plaintiff filed his complaint, a fire destroyed his cabin. Plaintiff alleged that a firefighter told him that defendant David Andreski was already at the scene when firefighters arrived and that he had told firefighters that plaintiff was crazy, had booby-traps in his cabin, and had been arrested as the Unabomber. Thereafter, plaintiff amended his complaint to include all of the claims referenced above. Defendants then moved for partial summary disposition pursuant to MCR 2.116(C)(8) and (10), and the trial court dismissed all but the claims of slander and intentional infliction of emotional distress. Thereafter, defendants moved for partial summary disposition as to plaintiff's remaining two claims. Plaintiff was present by telephone at

the hearing held on defendants' motion, but the trial court did not let him actively participate in the proceedings. He was allowed to listen. The trial court then entered an order dismissing plaintiff's slander claim pursuant to MCR 2.116(C)(10) and plaintiff's intentional infliction of emotional distress claim pursuant to MCR 2.116(C)(8) and (10).

After entry of the order dismissing all of plaintiff's claims and closing the file, plaintiff attempted to move to disqualify the trial judge. The trial court did not take any action on plaintiff's claim.

II.

We review de novo a decision on a motion for summary disposition. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint." *Liparoto Const, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). The court must view all the admissions, affidavits, depositions, pleadings, and other documentary evidence available at the time of the motion in a light most favorable to the nonmoving party and determine if genuine issues of material fact exist. *Reed*, 475 Mich at 537. "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). If no genuine issues of material fact remain, and the moving party is entitled to judgment as a matter of law, summary disposition is appropriate. *Id*.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint based on the pleadings alone. *Dalley v Dykema Gossett*, 287 Mich App 296, 304; 788 NW2d 679 (2010). Accepting all well-pleaded factual allegations as true and viewed in a light most favorable to the nonmoving party, the court determines whether the pleadings state a claim on which relief can be granted. *Id*. at 304-305. The court should only grant a motion if no factual development could possibly justify granting the nonmoving party with a right to recovery. *Id*. at 305.

III.

Plaintiff first argues that the trial court incorrectly dismissed his claim of a prescriptive easement. A prescriptive easement is created when an individual uses a servient estate for a period of 15 years in an open, notorious, adverse or hostile, and continuous manner. *Killips v Mannisto*, 244 Mich App 256, 258-259; 624 NW2d 224 (2001). Mere permissive use is not enough to create a prescriptive easement. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). Plaintiff has the burden of establishing that the necessary elements were continuous for the statutory period of 15 years. *Id*. When the property involved is considered wild or unenclosed, there is a higher burden to show hostility. *Du Mez v Dykstra*, 257 Mich 449, 451; 241 NW 182 (1932).

Here, the relevant documentary evidence indicates that the land in issue was wild and unenclosed up until September 2009. Plaintiff indicates that he began using the dirt road daily to access the property in August 1993. At the time, there were neither structures along the road nor fences or gates in the area. Plaintiff states that he removed obstructions and "berms of earth" from the road, and provided other maintenance to make it drivable. In September 2009,

defendant David Andreski had two gates installed on two ends of the dirt track. Until then, the land was open to public use through defendants' own policy as it was not barricaded or posted.

During the period when the land was wild and unenclosed, plaintiff was required to give notice to defendants of a claim of right to the road. *Id.* at 451. Plaintiff acknowledged that he never stated a claim to defendants regarding his use of the property before 2009. Plaintiff's occasional maintenance of the road was insufficient to notice a claim of right; therefore, plaintiff failed to satisfy the time requirements for a prescriptive easement. *Killips*, 244 Mich App at 258-259. The trial court correctly concluded that no genuine issues of material fact remained and rightfully dismissed plaintiff's claims involving a prescriptive easement.

IV.

Plaintiff next argues that the trial court erred in dismissing his claim of slander. This count was predicated on comments David Andreski allegedly made to firefighters responding to the fire that destroyed plaintiff's cabin.

"A communication is defamatory if it tends to lower an individual's reputation in the community or deters third persons from associating or dealing with that individual." *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998). To prove defamation (plaintiff's claim of slander), plaintiff must show:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). . . . [*Id.*]

Statements that are direct accusations or inferences of criminal conduct are actionable if they are false factual assertions. *Hodgins v Time Herald Co*, 169 Mich App 245, 253-254; 425 NW2d 522 (1988). A court may determine as a matter of law whether a statement is actually capable of defamatory meaning. *Ireland*, 230 Mich App at 619.

The parties have differences regarding what actually defendant David Andreski said to the firefighters. Plaintiff claims that one of the firefighters informed him that defendant David Andreski told them that plaintiff was crazy, that plaintiff had booby-traps in his house, and that plaintiff was arrested as the Unabomber. Defendant David Andreski stated that he became aware of the Unabomber investigation through plaintiff's filed pleadings. He indicated that what he stated was the following:

> The Affiant told to the firefighters present with words to the effect that the claimant to the burning structures, being Lindsay Clark Ross, had been associated with the Unabomber investigation, that persons within the Unabomber profile were considered crazy by others, that the Unabomber had created booby traps to hurt others and that firefighters need to be cautious in their activities.

Plaintiff's sole support for his claim was that one of the firefighters had told him that defendant made the statements as he, plaintiff, had represented them. But in an affidavit the

firefighter supported defendant David Andreski's representations regarding the statements, which were consistent with information plaintiff set forth in his original complaint.

Plaintiff asserts that the material he included in his complaint was under a litigation privilege. However, he provides no support for this conclusion. It is not this Court's duty to rationalize and support plaintiff's claims on appeal. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Plaintiff also argues that the trial court incorrectly concluded that defendant David Andreski had no intent to slander; however, intent is not an element of slander. *Ireland*, 230 Mich App 614. While the trial court did mention something about the lack of intent to slander, its comment went to plaintiff's being unable to prove that defendant made false and defamatory statements.

Viewing the evidence in a light most favorable to plaintiff as the nonmoving party, we agree with the trial court that no genuine issues of material fact remained as to whether defendant David Andreski made defamatory statements about plaintiff to firefighters.

V.

Plaintiff next argues that the trial court erred in dismissing plaintiff's claims for intentional infliction of emotional distress and negligent infliction of emotional distress. "To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004). The conduct must be so extreme and outrageous so as to go beyond any normal realms of decency and be completely intolerable in a civilized community. *Id.*

The "bystander" tort of negligent infliction of emotional distress requires that:

> (1) the injury threatened or inflicted on the third person is a serious one, of a nature to cause severe mental disturbance to the plaintiff; (2) the shock results in actual physical harm; (3) the plaintiff is a member of the third person's immediate family, and (4) the plaintiff is present at the time of the accident or suffers shock "fairly contemporaneous" with the accident. [*Taylor v Kurapati*, 236 Mich App 315, 360; 600 NW2d 670 (1999).]

First, we reject plaintiff's assertion that defendant David Andreski caused severe emotional distress when he burned plaintiff's house and books: Plaintiff admitted in his deposition that he had no evidence that defendant had any part in the burning of his home.

Plaintiff also claims that by saying "Hi, Lindsay" in the courtroom one day, defendant David Andreski caused him severe emotional distress. At his deposition, plaintiff stated that he was sitting in the courtroom when defendant David Andreski walked behind plaintiff and shouted from less than 10 feet away, "Hi, Lindsay." He characterized the statement as a yell but not a scream. Defendant then walked straight past plaintiff without any more conversation and met with his attorney. Defendant David Andreski asserted in his affidavit that he said "Hi, Lindsay" in a greeting voice with the sole intent of greeting plaintiff.

Plaintiff introduced no evidence that the statement was recklessly made or made with an intent to cause severe distress. Furthermore, in no way does the greeting rise to the level of conduct that goes beyond any realm of decency or that would be considered so atrocious and intolerable. Even if defendant "yelled" at plaintiff, the overt meaning of his expression, voiced in a crowded courtroom, was a simple greeting; it does not amount to a statement that would make an onlooker "shout, 'outrageous, unbelievable!" *Haverbush v Powelson*, 217 Mich App 228, 236; 551 NW2d 206 (1996). Indeed, there is no evidence that any of the other individuals in the courtroom reacted to the expression of greeting. Plaintiff also failed to provide the court with any evidence proving that he suffered severe emotional distress based on defendant's statement.

Moreover, plaintiff never alleged an injury to a third party. Without a claim that a third party was injured, plaintiff failed to state a claim, and no genuine issues of material fact remained regarding his claim for negligent infliction of emotional distress. *Duran v Detroit News, Inc*, 200 Mich App 622, 629; 504 NW2d 715 (1993).[1]

VI.

Plaintiff next argues that his rights were violated when the trial court did not allow him to participate by telephone at a hearing on defendants' motion for partial summary disposition. Plaintiff did not preserve the issue for appeal, so we review it for plain error affecting substantial rights. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

To use communication equipment for a motion hearing, pretrial conference, scheduling conference, or status conference, a party must submit a request in writing to the court seven days prior to the hearing. MCR 2.402(B). Plaintiff did not submit a written request seven days prior to the hearing for partial summary disposition— in fact, he did not submit a written request at all. Plaintiff argues that the court rule requires notice to a party before it directs telephonic communication *not* be used for a hearing. There is no basis or reasoning for this reading of the court rule. In fact, the only reference to notice is that the court "must give notice to the parties before directing on its own initiative that communication equipment be used." *Id*. Therefore, the trial court did not abuse it discretion, and thus did not plainly error, when it determined that plaintiff did not have a right to participate in the hearing through the telephone.[2]

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[1] Plaintiff cites *Daley v LaCroix*, 384 Mich 4; 179 NW2d 390 (1970). In that case, the Court held that a plaintiff's definite and objective physical injury that results from emotional distress stemming from negligent conduct that carried a risk of causing bodily was actionable even in the absence of direct physical injury stemming from the action. *Id*. at 12-13. In other words, if a plaintiff "by good chance escapes the threatened harm but is so frightened or shocked as to . . . be made ill," the defendant is not protected from being found liable. 2 Restatement Torts, 2d, § 436, comment b, p 458. This scenario does not apply in the case at hand.

[2] Plaintiff also argues that he was not able to participate in the hearing on his objections to the proposed order because the trial judge told his secretary not to answer plaintiff's phone calls.

VII.

Next, plaintiff argues that the trial court incorrectly denied plaintiff's motion to disqualify defendants' trial counsel after plaintiff submitted evidence that he had contacted defendants' attorney with confidential information about the case. After a hearing, the trial court entered an order denying plaintiff's motion for the reasons stated on the record. Plaintiff has not provided the transcript of this hearing on appeal. Without this transcript, we are unable to address the merits of the issue. *Myers v Jarnac*, 189 Mich App 436, 443-444; 474 NW2d 302 (1991).

VIII.

Finally, plaintiff argues that the trial judge should be disqualified because he was biased. Plaintiff's motion to disqualify came after the trial court entered the final order. We have already concluded that this argument is outside the scope of this appeal. *Ross v Tony Andreski, Inc*, unpublished order of the Court of Appeals, entered August 9, 2012 (Docket No. 308693).

We affirm. As the prevailing parties defendants may tax costs pursuant to MCR.7.219

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

Plaintiff did not participate in the hearing, but there is no evidence to support plaintiff's assertion regarding the court's actions.