STATE OF MICHIGAN

COURT OF APPEALS

CECIL G. FIELDER,

Plaintiff-Appellant,

v

GREATER MEDIA, INC., MIKE CLARK and DREW LANE,

Defendants,

and

DETROIT NEWS, INC., FRED GIRARD and AL AROSTEGUI,

Defendants-Appellees.

UNPUBLISHED
July 25, 2006

No. 267495
Wayne Circuit Court
LC No. 04-436195-CZ

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Plaintiff appeals from the trial court's grant of summary disposition in favor of defendants, dismissing plaintiff's claims of libel/slander/defamation, invasion of privacy/false light, and tortious interference with business relations.[1] We affirm.

Plaintiff is a former major league baseball player who spent part of his career with the Detroit Tigers. Defendant DN, a Detroit newspaper, published, on October 17 and 21, 2004, two newspaper articles which were written by defendant Girard about plaintiff Fielder. Reporter Girard quoted as a source defendant Arostegui, a Florida realtor who had business dealings with plaintiff. Plaintiff filed a complaint and a first amended complaint identifying at least ten

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[1] Greater Media, Inc., Mike Clark and Drew Lane were named defendants in plaintiff's complaint. On November 9, 2005, the trial court entered an order of voluntary dismissal without prejudice as to these defendants, and on December 21, 2005 amended that order to voluntary dismissal with prejudice. Those defendants are not involved in this appeal. Throughout this opinion, the term defendants refers to DN, Girard and Arostegui.

statements combined from the two articles that plaintiff alleged were false or made with reckless disregard for their truthfulness and therefore constituted libel/slander/defamation. Plaintiff further alleged invasion of privacy and tortious interference with business relations, relying on the same allegedly false statements. Defendants DN and Girard filed a joint motion for summary disposition under MCR 2.116(C)(8) or MCR 2.116(C)(10). Defendant Arostegui filed a separate motion for summary disposition, incorporating the motion filed by the other defendants. The trial court granted the motion for summary disposition based on MCR 2.116(C)(8), and denied plaintiff's request to again amend his complaint. Plaintiff filed a motion for reconsideration, which the court denied. Plaintiff then filed in this Court an application for interlocutory appeal and a motion for peremptory reversal, both of which this Court denied. After the remaining defendants, Greater Media, Clark, and Lane, were dismissed by order of voluntary dismissal with prejudice, plaintiff filed this appeal.

Summary disposition is appropriate under MCR 2.116(C)(8) if the party opposing the motion has failed to state a claim on which relief can be granted. MCR 2.116(C)(8); *Henry v Dow Chemical Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, considering only the pleadings. *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 51; 495 NW2d 392 (1992). All factual allegations in support of the claim and any reasonable inferences or conclusions that may be drawn from the facts are accepted as true and construed in the light most favorable to the nonmoving party. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003). A motion under MCR 2.116(C)(8) is properly granted "only where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Royal Palace Homes, supra* at 51.

Plaintiff first argues that the trial court erred in finding that plaintiff failed to plead actual malice, and next argues that the trial court erred in finding that plaintiff can never establish that defendants published the statements at issue with actual malice. What the trial court actually said was that plaintiff is a public figure and therefore "plaintiff must show by clear and convincing evidence that the defendants published their remarks with actual malice, that is further defined as reckless disregard for the truth. I rule, as a matter of law, plaintiff cannot so prove."

We agree with plaintiff that the allegations of libel were pled with the specificity required by *Royal Palace Homes, supra* at 53, in that plaintiff alleged "the very words of the libel." In his first amended complaint, plaintiff precisely identified the allegedly libelous statements, and alleged that the statements were "false and or were made with reckless disregard for the truthfulness of the statement(s)." However, we agree with the trial court that plaintiff cannot, as a matter of law, prove actual malice by defendants in the publication of the challenged statements.

"The question whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law." *Garvelink v The Detroit News, Inc*, 206 Mich App 604, 609; 522 NW2d 883 (1994). And First Amendment concerns are implicated in that determination: ". . .appellate courts must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression and to examine the statements and circumstances under which they were made to determine whether the statements are subject to First Amendment protection." *Ireland v Edwards*, 230 Mich App 607, 613; 584

NW2d 632 (1998) (citation omitted). To protect against unnecessary interference with free expression, "summary disposition is an essential tool in the protection of First Amendment rights." *Id.* at 613.

> To establish a valid libel claim, plaintiff must first establish these four elements:
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> 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 [defamation per se] or the existence of special harm caused by publication [defamation per quod]. [*Rouch v Enquirer & News of Battle Creek Michigan (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992) ("*Rouch II*"), Citing *Locricchio v Evening News Ass'n*, 438 Mich 84, 115-116; 476 NW2d 112 (1991).]

Additionally, "[t]he First Amendment requires courts to determine whether the plaintiff is a public or private figure, whether the defendant is part of the media, and whether the allegedly defamatory statement involved a matter of public interest." *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 32; 627 NW2d 5 (2001). We find that the trial court correctly found plaintiff here is a public figure. See *Gertz v Robert Welch, Inc*, 418 US 323, 342; 94 S Ct 2997; 41 L Ed 2d 789 (1974) ("Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures.")

Because plaintiff is a public figure, he must prove that the challenged statements were made with actual malice. *Garvelink, supra* at 608. And he must show actual malice by clear and convincing evidence. MCL 600.2911(6); *Ireland, supra* at 615. A statement is made with actual malice if "it was made with knowledge that it was false or with reckless disregard of whether it was false or not." *Garvelink, supra* at 608. As this Court noted in *Tomkiewicz v Detroit News, Inc*, 246 Mich App 662; 635 NW2d 36 (2001):

> Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. 'Reckless disregard' is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published. [Citations omitted.]

We further note that not all defamatory statements are actionable. *Ireland, supra* at 614. The First Amendment protects statements that "cannot be reasonably interpreted as stating actual facts about the plaintiff." *Ireland, supra* at 614; *Garvelink, supra* at 609. Statements of "opinion" are protected. *Ireland, supra* at 616. "[S]ubjective assertion[s]" are not actionable, while statements about "objectively verifiable event[s]" may be. *Kevorkian v American Medical Assoc*, 237 Mich App 1, 6; 602 NW 2d 233 (1999). Truth is also a defense, as "[l]iability may not be imposed on a media defendant for facts about public affairs it publishes accurately and without material omissions." *Royal Palace Homes, supra* at 52. Whether a statement is "actually capable of defamatory meaning," is a question of law for the court, and if "no such meaning is possible, summary disposition is appropriate." *Kevorkian, supra* at 9. Viewing the

statements in the context of the articles and accepting each statement as true, this Court must determine whether defamatory interpretation is reasonable or whether the statements "constitute no more that 'rhetorical hyperbole' or 'vigorous epithet.'" *Id*. at 7.

Taken in context, we find that four of the alleged defamatory statements are not provable as false because they are expressions of opinion: "Gambling caused Cecil Fielder's empire to collapse"; "this isn't a story of a hero who went bad but a hero who got sick"; "It's like a cancer of some sort that ate away at his wealth"; and "She (Stacey Fielder) is hard up financially." "In First Amendment defamation cases involving a media defendant, an expression of opinion is constitutionally protected." *Royal Palace Homes, supra* at 57 n 1. In the context of the October 17, 2004, article, these statements were subjective assertions regarding plaintiff, and are constitutionally protected expressions of opinion.

The title of the October 17, 2004, article, "Gambling Shatters Ex-Tiger's Dream Life," and the statements "unstoppable gambling compulsion," and "Fielder is in hiding," are also protected "rhetorical hyperbole" when read in the context of the article. This Court defined the term "rhetorical hyperbole" as statements that are "necessarily subjective and could also be reasonably understood as not stating actual facts." *Kevorkian, supra* at 13. We find that these statements, read in context, would not be understood by the ordinary reader as statements of actual facts about plaintiff. *Ireland, supra* at 618. These statements are not actionable.

The statements, "He is not in contact with his family," and "She and Cecylnn, now 12, receive no money from Fielder," are also rhetorical hyperbole. In *Ireland, supra* at 618 n 9, this Court considered various statements regarding a parent-child relationship including, *inter alia*, "[t]hat mother [the plaintiff] was never with her child"; and "Ireland [the plaintiff] abdicated all responsibility for the care and raising of this child to everybody." This Court held that the statements were not actionable because the expressions, taken literally, were "patently false" and "any reasonable person . . . would have clearly understood what was intended." *Id*. at 619. In the present case, the same is true. In context, the statements cannot reasonably be read as statements of actual fact about plaintiff. We conclude that these statements are not actionable.

Similarly, plaintiff's claim for false light invasion of privacy fails. A plaintiff alleging false light invasion of privacy based on defamatory statements must show that the statements are provable as false, understandable as stating actual facts about the plaintiff, and, in the case of a public figure plaintiff, that the statements were made with actual malice by clear and convincing evidence. *Ireland, supra* at 624. Here, plaintiff's false light invasion of privacy claim is based solely on the statements he alleges are defamatory. Based on our conclusion that the allegedly defamatory statements were not actionable, we conclude that plaintiff's false light invasion of privacy claim against defendants must also fail.

Defendant next argues that the trial court erred in granting defendants' motions for summary disposition when it concluded that plaintiff failed to properly plead his tortious interference with business relations claim. We disagree.

The elements of tortious interference with a business relationship are: (1) the existence of a valid business relation or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship has

been disrupted. *Lakeshore Comm Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). "Tortious interference with business relations may be caused by defamatory statements." *Id*. A public figure plaintiff must still allege sufficient facts to show that the alleged statements were made with actual malice. *Id*.

A review of plaintiff's first amended complaint reveals that plaintiff failed to specifically allege which, if any, business relation or expectancy existed when both articles were published or whether plaintiff lost the alleged business relation or expectancy as a result of each article. *Lakeshore Comm Hosp, supra* at 401. It is well established that the "gravamen of an action is determined by reading the claim as a whole." *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993). Plaintiff's claim for tortious interference with business relations merely restates his claim for defamation and false light invasion of privacy. Because plaintiff's claims for libel and false light invasion of privacy fail, we conclude that plaintiff's claim for tortious interference with business relations must also fail.

Defendant next argues that the trial court abused its discretion in denying plaintiff's motion to amend his first amended complaint. We disagree.

The trial court's ruling on a motion to amend pleadings in response to a motion for summary disposition is reviewed for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998).

MCR 2.116(I)(5) provides that if the trial court grants a motion under MCR 2.116(C)(8), it "shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that the amendment would not be justified." After the time for amendment as of right has expired under MCR 2.118(A)(1), a party may amend a pleading only by leave of the court or upon consent of the adverse party. MCR 2.118(A)(2). A court may deny a motion to amend if granting it would be futile. *Wyemers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). An amendment is futile if it merely restates allegations already made or adds new allegations that fail to state a claim. *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001).

In the present case, it is apparent from the lower court record that it would be futile to allow plaintiff to amend his pleadings. Plaintiff's complaint and first amended complaint specifically pled the allegedly defamatory statements, and plaintiff's allegations against defendants in the complaint and the first amended complaint are generally the same. Plaintiff's proposed second amended complaint, submitted to the trial court when plaintiff moved to amend his pleading, identifies the same ten statements contained in plaintiff's prior two pleadings, essentially only restating allegations already made. Based on our conclusion that the statements are constitutionally protected, it would be futile to allow plaintiff to amend his pleadings. We find that the trial court did not abuse its discretion in denying plaintiff's motion to amend his pleadings.

Plaintiff finally argues that the trial court erred in denying his motion for reconsideration. We disagree. This Court reviews a trial court's ruling on a motion for reconsideration for an

abuse of discretion. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 709; 609 NW2d 607 (2000).

To show that the trial court abused its discretion in denying plaintiff's motion for reconsideration, plaintiff must show that the trial court made a palpable error that misled the parties, or that the summary disposition motion would have been denied if the error were corrected. *American Transmission, supra* at 709. Plaintiff, in essence, argues that the trial court erred in denying his motion for reconsideration because he should have been successful on the underlying motion for summary disposition. Plaintiff has not identified a palpable error. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). This Court will not search the record for factual support for a plaintiff's claim. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). The trial court properly dismissed plaintiff's claims because plaintiff's allegations of libel are not actionable. We find that the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper