STATE OF MICHIGAN

COURT OF APPEALS

LORI KILCHERMANN,

Plaintiff-Appellee/Cross-Appellant,

v

KENNETH A. THOMPSON,
DARLENE J. THOMPSON,
MARY SEIDELMAN,
PHIL SEIDELMAN,
PAUL BOWERING, and
LORETTA ANN BOWERING

Defendant-Appellants/Cross-Appellees.

UNPUBLISHED
April 21, 2015

No. 320432
Ionia Circuit Court
LC No. 12-K-29228-NZ

Before: METER, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

In the main appeal, defendants appeal the portion of the trial court's January 27, 2014 order that denied defendant's motion for sanctions. In the cross-appeal, plaintiff appeals the portion of the same order that granted summary disposition to defendants and dismissed plaintiff's claims. We affirm the trial court's order in its entirety.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In 2012, plaintiff was the general manager of a newspaper, the Ionia Sentinel-Standard ("Sentinel"), and was the "Michigan Regional Editor" for the owner of the newspaper, GateHouse Media, Inc. ("GateHouse"). In February 2012, plaintiff authorized the publication of an article entitled "Four Arrested in Farmhouse Meth Bust" ("the article"). As originally published, the article contained information about, as indicated by the title, the arrest of four suspects on methamphetamine-related charges at a farmhouse. The article also contained the following statements:

> Location was host to 2010 Republican rally
>
> **RONALD TWP.—**When now-Gov. Rick Snyder and a handful of fellow Republican hopefuls were stumping for office in 2010, they attended a Republican Party fundraiser at a farmhouse on Woods Road in Ionia County. On

> Tuesday, Central Michigan Enforcement Team officers shut down a different type of party at the same location.

According to plaintiff, the Sentinel's website also included a photograph taken at the 2010 Republican Party fundraiser that in part depicted one or more of defendants, as well as a link to a Sentinel article regarding the fundraiser.

According to plaintiff, she received a call from defendant Mary Seidelman, after the article was published, wherein Seidelman insulted her for publishing the article, and Seidelman also called plaintiff's receptionist and threatened her. Plaintiff met with defendants Kenneth and Darlene Thompson and Mary Seidelman regarding the article, and following that meeting plaintiff had the photograph of the fundraiser removed from the webpage where the article was published. Plaintiff contends that during this meeting Kenneth Thompson and Mary Seidelman accused her of practicing "yellow journalism."

On February 25, 2012, an email was sent to Michael Reed, the Chief Executive Officer of GateHouse; David Arkin, the Vice President of Content & Audience of GateHouse; and Paul Heidbreder, the Michigan Regional Manager of GateHouse. The email was signed by Kenneth Thompson and stated that it was sent "With the support of, [sic] MARY AND PHIL SEIDELMAN, Ionia County, MI, PAUL AND ANN BOWERING – Ionia County, Mi. [sic] And [sic] many others with the community, and the thousands we shall share our opinion with regarding the editor of the Ionia Sentinel Standard." The email stated in part that plaintiff intended to pursue a career "reliant upon the journalistic style known as 'Yellow Journalism'" and further stated that:

> All Ms. Kilchermann has succeeded in doing in this County, is turn people away with her ignorance to the local community's sensibilities and her arrogance in using the paper in an attempt to promote her yellow journalistic designs. . . . This now former subscriber of the Ionia Sentinel Standard will be sure to let others know that if they desire to study "Yellow Journalism" that they may consider approaching Lori Kilchermann for an internship.

The email made several other references to "yellow journalism."

On November 19, 2012, plaintiff filed a complaint against defendants, with the exception of Darlene Thompson ("Darlene"), for defamation, intentional infliction of emotional distress, and tortious interference with a contract or business relationship. Plaintiff filed an amended complaint on February 25, 2012, adding Darlene as a defendant. Plaintiff's claims were premised in part on the sending of the email and, in addition, plaintiff alleged that defendants Kenneth and Darlene Thompson had made electronic postings to a Facebook page entitled "Ionia County Republicans" in 2012 that made reference to the article and plaintiff.[1] Plaintiff further alleged that these postings accused plaintiff of practicing "yellow journalism" and "gotcha journalism." Finally, plaintiff alleged her belief that defendants had informed numerous

[1] Copies of the actual postings do not appear in the lower court record.

individuals that plaintiff and the Sentinel practiced "yellow journalism" and encouraged them to unsubscribe from the Sentinel.

In May and June of 2013, defendants filed several motions with the trial court. The cumulative effect of these motions was to seek summary disposition and dismissal of all of plaintiff's claims under MCR 2.116 (C)(8) and (10).[2] Defendants also moved the trial court to impose sanctions on plaintiff for filing frivolous claims.

Defendants Paul and Loretta Ann Bowering were dismissed from the case pursuant to a settlement agreement and stipulated order dated August 30, 2013. The trial court held a hearing on defendants' motions on October 11, 2013. The trial court found that plaintiff was a limited purpose public figure for purposes of her claims. The trial court thus concluded that plaintiff had failed to establish the first element of defamation[3]:

> But I find that really the dispositive aspect of this case is as it relates to the very first element of defamation. The 4 components of a cause of action for defamation or libel in this particular case are first, a false and defamatory statement concerning the plaintiff . . . . In applying the law to this case I'm unable to get beyond the very first element of this cause of action . . . . So the action here is again, as it relates to this statement made by the defendants that Ms. Kilchermann engaged in yellow journalism. In defining yellow journalism Black's Law Dictionary indicates that it's the types of journalism that distort or exploit the news by sensationalism in order to sell copies of the newspaper.
>
> So the question is whether or not that reference to yellow journalism is a distortion or exploits the news and in reference to the yellow journalism I think it's important to take into context what the defendants were referring to and specifically, they're talking about this article referencing methamphetamine lab situation [sic] that was linked to a place where a political fundraiser had been held. As it relates to that, the law is clear that the determination, as I understand it, of whether or not something is provable as false is a legal determination, according to the law.
>
> So recognizing that the determination of whether not this was sensationalism is really something that is a statement of opinion. It's a subjective assertion. What may be sensationalized to one person would be very different to another, particularly in this context as it relates to the political fundraiser.

---

[2] One of defendant's motions also sought dismissal of plaintiff's defamation claim against Darlene Thompson on statute of limitations grounds, MCR 2.116(C)(7), because she was added to the action more than one year after the article was published.

[3] The first element of a claim for defamation is "a false and defamatory statement concerning the plaintiff." *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998). A plaintiff must establish all four elements to maintain a valid defamation claim. *Id*.

> So in my determination I find that this is not an actionable statement in light of the fact that it is protected by the First Amendment and our right to free speech . . . .

The trial court then found that plaintiff's other claims also failed because they were based on the same statement. The trial court declined to grant defendant's motions for sanctions based on a frivolous lawsuit, stating: "I think this is a legitimate question and issue and I would not be inclined to award costs in this matter."

The trial court issued an order granting summary disposition to defendants and denying their motion for sanctions for the reasons stated on the record. This appeal and cross-appeal followed.

II. DEFENDANTS' APPEAL

In the main appeal, defendants argue that the trial court erred in denying their motion for sanctions based on the filing of a frivolous claim. We disagree. We review a trial court's findings regarding whether an action is frivolous for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*.

MCR 2.114(D) provides that the signature of an attorney or party on a document, constitutes a certification by the signer that:

> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

MCR 2.114(E) permits the court to fashion an appropriate sanction for filing a document in violation of MCR 2.114. In addition to sanctions under MCR 2.114(E), MCR 2.114(F) provides that a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). Pursuant to MCR 2.625(A)(2), if the court finds that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591. That statute states that "if a court finds that a civil action . . . was frivolous, the court that conducts the civil action shall award 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(1).

Whether a claim is frivolous within the meaning of MCR 2.114(F) and MCL 600.2591 will depend upon the facts of the case. *Kitchen*, 465 Mich at 663. MCL 600.2591(3) defines "frivolous" to mean that at least one of the following is met: (1) the primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party, (2) the

party had no reasonable basis to believe that the facts underling the party's legal position were in fact true, or (3) the party's legal position was devoid of arguable legal merit. MCL 600.2591(3). However, the mere fact that a party did not ultimately prevail does not render the legal position frivolous. *Id*. at 662.

Here, defendants argue that plaintiff's purpose in filing this action was to harass defendants by imposing a financial burden on them, and further that plaintiff's position lacked legal merit and plaintiff knew that the facts underlying her position were not true. Defendants devote a great deal of their brief to arguing that plaintiff's amendment of her complaint to add Darlene as a party demonstrates that harassment was her motivation. During the motion hearing, counsel for plaintiff indicated that Darlene was added to the complaint later because, although she did not sign the original email to plaintiff's employer or the original Facebook posting, she later made similar allegedly defamatory postings to the same Facebook group. There is no evidence in the record to support the conclusion that Darlene's was added merely for the purpose of increasing costs against defendants (nor indeed any evidence that the cost of litigation was in fact substantially increased by her addition). Additionally, although defendants argue that Darlene's addition was clearly contrary to the statute of limitations for defamation, plaintiff's counsel presented argument at the motion hearing that the statute of limitations regarding Darlene's statements had not yet run. Although plaintiff's claim against Darlene, as well as the rest of defendants, was unsuccessful, we do not find that the trial court clearly erred in failing to determine that plaintiff's purpose in filing her claim was the harassment of defendants. *Kitchen*, 465 Mich at 662.

Further, although defendants allege that plaintiff lacked a factual basis for her claim, they do not actually dispute any of the facts underlying the litigation; they admit, for example, that the email was written and the Facebook postings were made. Instead, they appear to argue that it was a "fact" that plaintiff was a limited-purpose public figure and that defendants' statements were subjective statements of opinion. Such arguments are more properly considered in connection with defendants' argument that plaintiff's claim lacked legal merit. Further, the fact that the trial court determined that plaintiff was a limited-purpose public figure, and that the statements made by defendant were subjective, does not indicate that plaintiff was aware that her claim lacked factual support at the time it was made. See *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002).

Finally, defendants argue that plaintiff's claim lacked legal merit, because of their First Amendment protections, plaintiff's status as a limited-purpose public figure, and the subjective nature of defendant's statements. As discussed below, we find that the trial court did not err in dismissing plaintiff's claims. However, in making her claim, plaintiff advanced a colorable argument that the accusation that she engaged in "yellow journalism" was not a statement of opinion, but a factual assertion that was "provably false" and therefore not protected as a statement of opinion. See *Locricchio v Evening News Ass'n*, 438 Mich 84, 121-122; 476 NW2d 112 (1991). Plaintiff further advanced a colorable argument that she was not a limited-purpose public figure. Finally, plaintiff provided various definitions of the phrase "yellow journalism" in support of the contention that it was a factual statement, rather than a statement of opinion. While plaintiff's arguments ultimately were unsuccessful, we do not, under the clear error standard, find that the trial court erred in failing to conclude that plaintiff's claim was so devoid of legal merit as to warrant sanctions. *Kitchen*, 465 Mich at 661.

We therefore affirm the trial court's denial of defendants' motion for sanctions.

III. CROSS-APPEAL

In the cross-appeal, plaintiff argues that the trial court erred in granting summary disposition to defendants on each of her claims. We disagree.

A. GROUNDS FOR SUMMARY DISPOSITION

At the outset, we note that the trial court's order does not indicate the grounds for summary disposition upon which it based its ruling. While the motion transcript indicates that the trial court did not grant summary disposition to Darlene pursuant to MCR 2.116(C)(7) (statute of limitations has run), the trial court did not indicate whether it based its ruling on MCR 2.116(C)(8) (failure to state a claim for which relief can be granted) or MCR 2.116(C)(10) (no genuine issue of material fact).

We conclude from the record that the trial court based its grant of summary disposition on MCR 2.116(C)(8) (failure to state a claim for which relief can be granted). The trial court stated that "the case that's been most helpful to this Court in assessing or applying the law" was *Ireland v Edwards*, 230 Mich App 607, 619; 584 NW2d 632 (1998). In *Ireland*, this Court stated that "a court may decide as a matter of law whether a statement is actually capable of defamatory meaning." *Id*., citing *Sawabini v Desenberg*, 143 Mich App 373, 379; 372 NW2d 559 (1985). *Sawabini* stated that the trial court appropriately granted summary disposition to the defendant regarding the plaintiff's defamation claim under MCR 2.116(C)(8) when it determined that the defendant's statement was not capable of defamatory meaning. *Sawabini*, 143 Mich App at 375, 379-380. Further, the same limitations that render a statement not capable of defamatory meaning also limit the actionability of other claims regarding that statement, such as intentional infliction of emotional distress and tortious interference with contracts or business relationships. See *Ireland*, 230 Mich App at 625; *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 401-403; 538 NW2d 24 (1995). We therefore conclude that the dismissal of these claims was similarly based upon MCR 2.116(C)(8).

Plaintiff also alleged the defendant Mary Seidelman called and communicated a threat to plaintiff's receptionist that she would be "sending a male to Plaintiff's office to 'rip her throat out.'" The trial court stated in regard to this allegation:

> Now there was reference as you, Ms. Gallagher have argued, regarding a threat to [plaintiff's] person. But as Mr. Gilber has indicated apparently that was through a receptionist and I went back to review the complaint and I don't see where that was specifically referenced in the amended complaint as being the cause of action. Clearly all of those counts, as I review the first amended complaint, were premised upon the yellow journalism.

This statement indicates that the trial court found, with relation to the alleged threat, that plaintiff did not state a claim for which relief could be granted. MCR 2.116(C)(8). Contrary to the trial court's assertion, plaintiff did make reference to the alleged conduct in her amended complaint, and incorporated that conduct by reference in her claim for intentional infliction of emotional distress (IIED). Thus, although perhaps somewhat inartfully pleaded, plaintiff did base her claim for IIED at least in part on the alleged threat. Nonetheless, as discussed below, we conclude that

the trial court appropriately dismissed the IIED claim with relation to the alleged threat under MCR 2.116(C)(8).

MCR 2.116(C)(8) tests the legal sufficient of a complaint. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). The court must accept all factual allegations in support of the claim as true, as well as any reasonable inferences that can be drawn from the facts; further all factual allegations, inferences and conclusions must be construed in the light most favorable to the nonmovant. *Gorman v American Honda Motor Co*, 302 Mich App 113, 131; 839 NW2d 223 (2013). However, mere statements of legal conclusions are insufficient to state a cause of action. *Lansing Sch Ed Assoc*, *MEA/NEA v Lansing Sch Dist Bd of Ed*, 293 Mich App 506, 519; 810 NW2d 95 (2011). A motion under MCR 2.116(C)(8) should be granted when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012).

We review de novo the trial court's grant or denial of summary disposition based upon a failure to state a claim. See *Bailey*, 494 Mich at 603.

B. DEFAMATION AND OTHER CLAIMS INVOLVING THE LETTER AND FACEBOOK POSTINGS

Plaintiff first argues that the trial court erred in dismissing her claim for defamation regarding defendants' allegations of "yellow journalism." We disagree.

> 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. However, not all defamatory statements are actionable. If a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment. Thus, at least some expressions of opinion are protected.
>
> Where a defendant's statements are not protected by the First Amendment, a plaintiff can establish a defamation claim by showing: (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). [*Ireland*, 230 Mich App at 614 (citations omitted).]

Plaintiff argues that the trial court erred in determining that she was a limited-purpose public figure. If the party alleging defamation is a limited-purpose public figure, they must demonstrate by clear and convincing evidence that the alleged defamatory statements were made with actual malice. See *New Franklin Enterprises v Sabo*, 192 Mich App 219, 222; 584 NW2d 632 (1998). However, although the trial court did opine that plaintiff was a limited-purpose public figure, such a finding was unnecessary to its ultimate conclusion that defendant's statements could not reasonably be interpreted as capable of defamatory meaning. Because we agree with that conclusion, we do not address the issue of whether plaintiff was a limited-purpose public figure.

Plaintiff also argues that the trial court erred in dismissing her defamation count because the statements that she engaged in "yellow journalism" and "gotcha journalism" were provably false. Statements of fact that can be proven false may indeed be found capable of defamatory meaning, unlike most statements of opinion. See *Locricchio*, 438 Mich at 121-122. However, plaintiff's claim, simply put, is based on the contention that the use of the phrase "yellow journalism" and references to "gotcha journalism" indicate that defendants are saying the article contained false statements of fact, essentially implying or stating that plaintiff told untruths. Such a contention is belied by the content of the letter and the alleged content of the Facebook postings themselves, which accuse plaintiff of possessing a "biased opinion" and making a "poor editorial choice" as well as "editorializing," and "sensationaliz[ing]" the news. One of the alleged Facebook postings does contain the unattributed statement "Gotcha Journalism is considered highly unethical, a deliberately biased reporting, presenting as facts fabrications and distortions," however this statement appears to be a part of a general definition of "gotcha journalism." Defendants did not indicate with specificity in their statements any facts that they claimed plaintiff fabricated; in fact they admit that the essential facts (i.e. the fundraiser and the meth bust) occurred.

Statements of opinion are protected by the First Amendment despite consisting of "rhetorical hyperbole" or "vigorous epithet." *Kevorkian v Am Med Ass'n*, 237 Mich App 1, 7; 602 NW2d 233 (1999) (citation omitted). Here, the trial court correctly determined that defendants' statements were subjective statements of opinion, expressing their ire at a newspaper editor whom they felt presented their group in a biased and sensationalized light. Such statements are not actionable under the law of defamation, and the trial court correctly dismissed plaintiff's claim. MCR 2.116(C)(8); *Ireland*, 230 Mich App at 614.

Similarly, as stated above, limitations on actionability, including the fact that a statement must be provable as false, are First Amendment limitations. *Ireland*, 230 Mich App at 624. Such limitations are "not exclusive to defamation claims" but apply to all claims based on the same statements; to hold otherwise would be to "allow a plaintiff to circumvent the First Amendment limitations [by labelling his or her claim as one other than one of defamation] and would effectively eliminate the 'breathing space' required for freedom of expression." *Id*. at 624 n 15 (citation omitted). We therefore conclude that the trial court did not err in dismissing all of plaintiff's claims based on the alleged defamatory statements pursuant to MCR 2.116(C)(8).[4]

C. THREAT TO PLAINTIFF'S PERSON

Plaintiff also argues that the trial court erred in dismissing her claim for IIED because, notwithstanding the alleged defamatory statements, she was also subject to a verbal threat from one of the defendants, albeit through her receptionist. We disagree.

[4] Although a trial court should freely grant leave to amend a pleading that is defective under MCR 2.116(C)(8), such a grant of amendment is not needed if amendment would be futile. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004). Given the protected nature of defendants' statements, any such amendment indeed would have been futile.

Although we do find that the trial court erred in stating that plaintiff's complaint did not contain the allegation that she had received a threat, we find that it did not err in dismissing her claim for IIED.

> 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. Only when a plaintiff can demonstrate that the defendant's conduct is 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 will liability attach. [*Dalley v Dykema Gossett*, 287 Mich App 296, 321; 788 NW2d 679 (2010).]

Further, "mere insults, indignities, threats, annoyances, petty oppressions or other trivialities" do not suffice to give rise to a valid claim for IIED. *Id*. (citation omitted). "The test is whether the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' " *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999) (quotation marks and citations omitted). In examining a claim for IIED under MCR 2.116(C)(8), the reviewing court must determine whether, taking plaintiff's factual allegations as true, defendant's conduct could as a matter of law be reasonably regarded extreme and outrageous rather than a mere threat or insult. *Doe v Mills*, 212 Mich App 73, 92; 536 NW2d 824 (1995).

Here, apart from the described statements that are protected by the First Amendment, we are left with the allegation that one defendant communicated a verbal threat to plaintiff through her receptionist. Although such threats may be uncouth, we do not find that one such isolated threat rises to the level of conduct so outrageous and beyond all possible bounds of decency as to render defendant Mary Seidelman liable for IIED. Further, according to plaintiff's own pleadings, this threat did not dissuade plaintiff from meeting with defendants Kenneth and Darlene Thompson and Mary Seidelman (who allegedly had made the threat) a mere three days later. Finally, plaintiff's complaint does not allege specific damages that arose as a result of this threat; rather, all of plaintiff's alleged damages are listed as "damage to Plaintiff's reputation in the community and economic loss." We therefore conclude that the trial court did not err in dismissing plaintiff's claim for IIED related to the alleged threat to her person, albeit for different reasons that those articulated by the trial court. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

Affirmed in both the main appeal and the cross appeal. Neither party having prevailed in full, no costs may be taxed. MCR 7.219(A).

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Mark T. Boonstra