

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KERRY BENTIVOLIO,

Plaintiff-Appellee,

v

ANDREW RACZKOWSKI, also known as ROCKY  
RACZKOWSKI, also known as ANDRE  
RACZKOWSKI,

Defendant-Appellant.

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UNPUBLISHED  
September 17, 2020

No. 348878  
Oakland Circuit Court  
LC No. 2018-165705-CZ

Before: LETICA, P.J., and FORT HOOD and GLEICHER, JJ.

PER CURIAM.

The parties are political rivals. In 2018, they vied for nomination as the Republican candidate for election to the House of Representatives in Michigan’s Eleventh District. Neither prevailed. That race was not their only clash, however. Plaintiff Kerry Bentivolio maintains that in 2017 and 2018, defendant Andrew Raczkowski told several people that Bentivolio had lied about his military record, exaggerating the number and quality of the service medals he had been awarded. Bentivolio brought this defamation action seeking vindication and damages.

Raczkowski sought summary disposition on multiple grounds. The circuit court ruled that Bentivolio had established an actionable defamation claim. We reverse and remand for entry of summary disposition in favor of Raczkowski.

**I. FACTS AND PROCEEDINGS**

Bentivolio was elected to Congress in 2012 and served from 2013 to 2015. During Bentivolio’s campaign, Raczkowski “had heard, from time to time, that Bentivolio had been claiming, in connection with his 2012 campaign, that as a result of his service in Vietnam he had been awarded three Purple Heart Medals, a Silver Star Medal, and two Bronze Star Medals.”

Describing himself “[a]s a decorated combat veteran,” Raczkowski surmised that if Bentivolio’s claims were true, he “did indeed have a remarkable military service history.”<sup>1</sup>

Several months before the 2012 election, Bentivolio sought Raczkowski’s endorsement, and the two scheduled a dinner meeting. In advance of the meeting, Raczkowski sought to verify Bentivolio’s military service record. He contacted the Combat Infantry Badge Authority at Fort Benning and was told that there was no record of Bentivolio having received a Combat Infantry Badge. Because Bentivolio did not have that badge, Raczkowski was skeptical that Bentivolio had actually earned the other medals. Raczkowski concluded that he “needed to ‘vet’ Bentivolio” “face-to-face” to seek “proof” that “his claimed history of having been awarded all of the . . . medals was true and accurate.”

Raczkowski attended the dinner meeting with a friend, Bill Belcher. During the dinner, Bentivolio showed Raczkowski two Bronze Star Devices. Raczkowski characterizes a Bronze Star Device as a medal awarded to all soldiers who were present in a combat zone for six months. Raczkowski asked Bentivolio to verify that he had received a Bronze Star medal, which is bestowed based on meritorious achievement. According to Raczkowski, Bentivolio claimed that the official military records reflecting his receipt of the merit-based medals had “disappeared” or had been “lost,” and alternatively that a superior officer had withheld the medals. Raczkowski averred that during the dinner he asked to see Bentivolio’s Department of Defense Form 214, which would include a list of medals received, but Bentivolio refused. Belcher’s affidavit largely mirrors Raczkowski’s.

Raczkowski maintains that after the dinner he contacted the United States Army to determine whether Bentivolio had been awarded a Bronze Star, a Silver Star, or a Purple Heart, but was told that the Army had “absolutely no record” that Bentivolio had earned these awards.<sup>2</sup> Raczkowski refused to endorse Bentivolio.

Bentivolio was not reelected in 2014. He unsuccessfully attempted to run as an independent candidate in the 2016 election, and sought nomination a third time in 2018. According to Bentivolio, during the 2018 campaign Raczkowski informed three people—Debra Haas, Kenneth Crow, and Patricia Thomas—that Bentivolio was an unworthy candidate because he had lied about his military record. Haas averred that Raczkowski had expressed that Bentivolio “‘didn’t really earn his medals,’ and that they were ‘fictitious’ and ‘fake.’” Crow claimed to have heard Raczkowski make the same or similar statements.

Bentivolio brought this action for defamation asserting that Raczkowski had slandered him by making false statements about Bentivolio’s military record. According to Bentivolio,

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<sup>1</sup> We have drawn the facts from Raczkowski’s submissions to the circuit court in support of his motions for summary disposition, and other evidence of record. Bentivolio did not respond to those motions.

<sup>2</sup> We highlight that because Bentivolio failed to respond to Raczkowski’s post-discovery motions for summary disposition, Raczkowski’s version of the events at the dinner and his efforts to verify Bentivolio’s military service record are unrefuted in this record.

Raczkowski “engaged in a malicious defamation campaign,” telling “multiple third parties” that Bentivolio’s claimed military record was “fraudulent” and that “he did not earn his military medals and awards.” The circuit court granted summary disposition to Raczkowski with respect to any statements communicated to unidentified third parties. Bentivolio has not challenged that ruling on appeal; accordingly, only Raczkowski’s statements to Haas, Crow, and Thomas remain at issue.

Raczkowski first moved for summary disposition under MCR 2.116(C)(8) in lieu of filing an answer to plaintiff’s complaint. The circuit court denied his motion. After discovery concluded, Raczkowski filed four additional summary disposition motions under MCR 2.116(C)(8) and (10). Bentivolio did not respond to the motions. The circuit court conducted its own examination of the affidavits and discovery materials attached to Raczkowski’s motion and concluded that genuine issues of material fact precluded summary disposition. This Court granted Raczkowski’s interlocutory application for leave to appeal. *Bentivolio v Raczkowski*, unpublished order of the Court of Appeals, entered July 3, 2019 (Docket No. 348878).

## II. ACTUAL MALICE

Raczkowski argues that he was entitled to summary disposition under MCR 2.116(C)(10) because Bentivolio failed to demonstrate that Raczkowski acted with actual malice when he conveyed his belief that Bentivolio had untruthfully represented his military service record. Proof of malice requires clear and convincing evidence that a defamatory statement was made with knowledge of or reckless disregard to its falsity. *Ireland v Edwards*, 230 Mich App 607, 622-623; 584 NW2d 632 (1998). Bentivolio has failed to establish actual malice.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). In deciding a motion under subrule (C)(10), we consider the evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant trial. *Id.* “The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.” *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 685; 109 S Ct 2678; 105 L Ed 2d 562 (1989).

To establish a prima facie claim of defamation, a plaintiff must present evidence of the following elements:

(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication 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 publication.<sup>3</sup> [*Lakin v Rund*, 318 Mich App 127, 133; 896 NW2d 76 (2016) (quotation marks and citation omitted).]

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<sup>3</sup> “[E]xpressions of opinion are protected” under the First Amendment and cannot be the basis of an action for defamation. *Edwards v Detroit News, Inc*, 322 Mich App 1, 13; 910 NW2d 394

The third element, fault, is dispositive in this case.

Bentivolio acknowledges that he is a public figure. As such, he must prove that Raczkowski uttered the defamatory statements with actual malice, which means that he knew that his statements were false but made them anyway, or recklessly disregarded their likely falsity. *New York Times Co v Sullivan*, 376 US 254, 279-280; 84 S Ct 710; 11 L Ed 2d 686 (1964). “Mere negligence does not suffice.” *Masson v New Yorker Magazine, Inc*, 501 US 496, 510; 111 S Ct 2419; 115 L Ed 2d 447 (1991). Absent evidence that Raczkowski “in fact entertained serious doubts as to the truth of his publication . . . or acted with a high degree of awareness of . . . probable falsity,” Bentivolio cannot prevail. *Id.* (quotation marks and citations omitted, second alteration in original).

The actual malice standard is a high bar. It is made higher still by the requirement that actual malice be proven by clear and convincing evidence that the defendant knew the defamatory statement was false or was recklessly indifferent to its truth or falsity. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 114; 793 NW2d 533 (2010). Michigan codified these principles in MCL 600.2911(6), which provides:

An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.

“The clear-and-convincing-evidence standard is the most demanding standard applied in civil cases.” *In re Conservatorship of Shirley Bittner*, 312 Mich App 227, 237; 879 NW2d 269 (2015) (quotation marks and citation omitted). “Clear and convincing proof produces in the mind of the trier of fact a firm belief or conviction as to the truth” of the precise facts in issue. *Id.* (quotation marks, citation, and brackets omitted). “Evidence may be uncontroverted and yet not be clear and convincing. Conversely, evidence may be clear and convincing despite the fact that it has been contradicted.” *Smith*, 487 Mich at 115. In the actual malice context, the plaintiff’s evidence must clearly and convincingly demonstrate that the defendant made the alleged publication “with a high degree of awareness of the publication’s probable falsity, or that the defendant entertained serious doubts as to the truth of the publication made.” *Id.* at 116 (quotation marks and citation omitted).

Bentivolio’s complaint alleges two intertwined slanders: that Raczkowski falsely claimed that Bentivolio had misrepresented his military service record, and that Bentivolio’s actual representations regarding his service record were false. Bentivolio insists that he never misrepresented his service record by claiming that he had been awarded a Purple Heart or a Silver Star, and that Raczkowski’s claims that Bentivolio had lied about his medals was untrue and

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(2017) (quotation marks and citation omitted). Although Raczkowski argued below that his accusations against Bentivolio were protected statements of opinion, he does not raise this argument on appeal.

defamatory. We test both species of statements by applying the actual malice standard. Both fall short.

We first consider whether Bentivolio has created an actionable defamation claim arising from Raczkowski's alleged statement to the effect that Bentivolio had lied about his military service record. The record evidence supports that Raczkowski claimed to "have heard" during the 2012 campaign that Bentivolio received a Purple Heart, a Silver Star, and two Bronze Stars. Aside from Raczkowski's recounting of the conversation during the parties' dinner meeting, the record does not contain any evidence that Raczkowski directly quoted Bentivolio. Raczkowski's statement that he "had heard" about claims made by Bentivolio is not defamatory, as it cannot reasonably be interpreted as stating actual facts about Bentivolio and was not objectively verifiable. See *Milkovich v Lorain Journal Co*, 497 US 1, 20-21; 110 S Ct 2695; 111 L Ed 2d 1 (1990).

According to Haas and Crow, Raczkowski also declared that Bentivolio had not earned the medals that Bentivolio represented that he had earned, and that his alleged medals were "fictitious" and "fake." The record does not clearly and convincingly reflect that in making these statements, Raczkowski acted with actual malice.

The evidence establishes that Raczkowski performed an investigation regarding Bentivolio's medals before he made the challenged statements to Haas, Crow, and Thomas. His averment that he contacted two different government sources is unrefuted in this record. Raczkowski more than fulfilled any duty of investigation he may have had. The Supreme Court explained in *Smith* that Raczkowski's efforts more than confirmed his initial skepticism regarding Bentivolio's military record; indeed, not all statements need to be backed-up by independent research:

[I]t is well settled that the failure to investigate the accuracy of a communication before publishing it, even when a reasonably prudent person may have done so, is not sufficient to establish that the defendant acted with reckless disregard for the truth. However, a purposeful avoidance of the truth is dissimilar from the mere failure to investigate, and a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of a publication is sufficient to find reckless disregard. [*Smith*, 487 Mich at 117 (quotation marks and citations omitted).]

Bentivolio's actual malice argument centers on his DD 214 form documenting that he in fact received two Bronze Star Devices and the Combat Infantry Badge. Bentivolio complains that Raczkowski neglected to contact the National Personnel Records Center in St. Louis, Missouri, to obtain information on the Combat Infantry Badge. He also criticizes Raczkowski for confusing the Bronze Star Device with the Bronze Star Medal.

Raczkowski may have misrepresented Bentivolio's military record. But Bentivolio has put forth no evidence that Raczkowski *knew* that his statements about Bentivolio's medals were false, or that he made them recklessly. Raczkowski made two telephone calls to military agencies in an effort to verify Bentivolio's military history before making any statements about it. He set up a meeting with Bentivolio to explore the facts. And according to Raczkowski, Bentivolio suggested

during the dinner meeting that he had, in fact, earned a Purple Heart, Silver Star, and Bronze Stars, but due to his commander's intervention or someone's negligence the medals were never formally awarded. This evidence solidly supports that Raczkowski did not make "a deliberate decision" to avoid acquiring knowledge of the truth and did not harbor concerns that his statements about Bentivolio's record were false. See *id.*

We highlight two final points. First, the actual malice standard is subjective. A plaintiff must come forward with clear and convincing evidence that the defendant had a "high degree of awareness of . . . probable falsity." *Garrison v Louisiana*, 379 US 64, 74; 85 S Ct 209; 13 L Ed 2d 125 (1964). Such evidence of Raczkowski's state of mind is absent here, particularly in light of Raczkowski's efforts to glean the facts surrounding the medals. Further, "[p]ublic discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule." *Ocala Star-Banner Co v Damron*, 401 US 295, 300; 91 S Ct 628; 28 L Ed 2d 57 (1971). Bentivolio knew or should have known that the world of politics is rough and tumble and that along with the truth, good manners often fall by the wayside.

We reverse and remand for entry of summary disposition in favor of Raczkowski. We do not retain jurisdiction.

/s/ Anica Letica  
/s/ Karen M. Fort Hood  
/s/ Elizabeth L. Gleicher