STATE OF MICHIGAN

COURT OF APPEALS

KENNETH C. BRACCO and BEVERLY BRACCO,

Plaintiffs-Appellees/
Cross-Appellants,

v

ROBERT VERCRUYSSE and BUTZEL LONG, P.C.,

Defendants-Appellants/
Cross-Appellees.

UNPUBLISHED
May 30, 1997

No. 185303
Houghton Circuit Court
LC No. 93-008512-NZ

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

In this defamation action, the trial court denied both parties' motions for summary disposition. MCR 2.116(C)(8) and (10). Defendants appeal by leave granted and plaintiffs cross appeal. We reverse the trial court's decision as to defendants' motion.

Defendant Vercruysse is an attorney with defendant Butzel Long, P.C., and was defense counsel for Michigan Technological University in a wrongful discharge lawsuit brought by plaintiffs following the termination of plaintiff Kenneth C. Bracco's employment there. Mr. Bracco was fired from his job as a public safety officer at the university on grounds of "theft," because he took some packages of yogurt covered raisins from a snack bar at the university after the till was closed. Plaintiffs maintained that the termination was unjustified because the university had a policy of giving free food to security and other university personnel and to outside police officers. Judge Quinnell rendered his findings of fact and conclusions of law on the claims against the university in a lengthy opinion issued February 10, 1993

Judge Quinnell found that Mr. Bracco had a just cause employment contract at the university, but that Mr. Bracco's admitted actions, as the university perceived them, amounted to just cause for discharge under the university's policy regarding discharge for theft. However, Judge Quinnell found

that Mr. Bracco did not commit theft because he honestly believed he was entitled to take the food under the circumstances:

> 11. In order that there be no misunderstanding of what is to follow in this opinion, and based on facts and evidence known now, I conclude beyond any question that defendant did not commit theft; he had a subjectively honest belief that he had a right to eat the food under the circumstances. See CJI2d 7.5.
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> 12. However, I also conclude that, based on the facts known to them at the time of the termination, the officials of MTU responsible for it were acting in good faith, were acting reasonably (subject to the Due Process discussion to follow), and that the perceived theft amounted to just cause for discharge under standards set by MTU.

Judge Quinnell also found that Mr. Bracco was deprived of procedural due process, noting that Bracco was not given an adequate opportunity to present mitigating facts in his defense, such as proof that other university employees had taken free food in the past. In this regard, Judge Quinnell found it more likely than not that an opportunity to present this information would have affected the university's ultimate decisions:

> 49. It seems more probable than not that any reasonable decision maker here would have reached a different decision if further facts had been made known prior to any decision being made. At the time of the decision, the decision maker knew that Bracco had been informed of the accusation, the statements against him, and that he had admitted the conduct alleged. With even minimal further time and counsel, the decision maker would have found that every other employee of the Public Safety Department had eaten free food at the Memorial Union as a matter of common practice, although the timing and nature of the food eaten might be somewhat differently described by the various officers; this hypothetical reasonable decision maker would have known that MTU had invited officers from other police departments to do so for many years, and they had done so; the decision maker would have found that although some officers proclaimed that they ate only when invited to do so by the janitors, other employees including a former student manager and at least one of the janitors themselves thought that the public safety officers had the same right to eat at the union after the till was closed as did the janitors themselves, and the janitors themselves had enjoyed that privilege for many years; that perhaps there was some lack of understanding of the "free food" policy after hours, that as a matter of sound personnel management the decision maker should formulate a policy regarding the practice, and that any discipline given to plaintiff Bracco could not differ significantly from the discipline given to every other public safety officer.

Shortly after Judge Quinnell's February 10, 1993, opinion was released, plaintiffs' attorney, Hunter Watson, issued a press release stating that Judge Quinnell's decision included a "complete exoneration" of Mr. Bracco from "erroneous allegations of theft associated with his firing," and that the court's decision "makes it clear that this finding of Mr. Bracco's innocence is beyond any question." A

radio reporter received the press release and called defendant Vercruysse for a response. Apparently, the reporter tape-recorded Vercruysse's remarks over the telephone and then incorporated those statements into her news story which was broadcast by the station on at least two occasions on February 17, 1993. The broadcast, in its entirety, was as follows:

> Michigan Technological University's legal counsel said yesterday that MTU considers a decision in a recent case a win for the University. The case involves an employee who MTU fired in August, 1987 for taking some candy from the snack bar. MTU attorney, Bob Vercruysse:
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> "It clearly holds the University has a right to terminate employees who commit what the University deems is acts of theft. The Judge hasn't issued a final decision as to what remedy he is going to issue, if any at all, for what he found to be a deficiency in procedural due process. Now, procedural due process is something that there's a lot of dispute in the law in terms of exactly what you've got to do with respect to and that's an area for us to consider when we see the Judge's final ruling in the case."
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> The defense attorney for former MTU employee, Ken Bracco, said earlier this week that Judge Quinnell found Bracco had not been given due process for the offense, that the University had fired Bracco within less than four hours after notifying him of the charges. Defense counsel, Hunter Watson, also said the Judge's ruling proved Mr. Bracco's innocence beyond any question. Vercruysse said he disputes that:
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> "It was not common policy to have people take yogurt-covered raisins off of a rack and stuff 'em in their pocket and walk out and that's what the Judge found that Mr. Bracco did. That's pretty clearly something that you and I wouldn't do if we walked into a snack bar or an area where they sell things. It's just not an appropriate thing to do."
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> MTU attorney Vercruysse said the Judge has asked for both sides to file briefs before the Judge decides what, if any, awards are given to Ken Bracco for what Vercruysse says was a technical violation of Bracco's due process rights.

Although the radio station made another broadcast approximately two months later clarifying Judge Quinnell's decision by directly quoting ¶ 11 of his February 10, 1993, opinion, plaintiffs filed this defamation lawsuit against defendants alleging that Vercruysse had falsely accused Mr. Bracco of theft (plaintiffs also sued Michigan Technological University, but the university has since been dismissed from the case by stipulation).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kennedy v Auto Club*, 215 Mich App 264, 266; 544 NW2d 750 (1996). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. All factual allegations supporting the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. The motion should be granted only when the claim is so

clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395-396; 516 NW2d 498 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. When deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). Summary disposition pursuant to MCR 2.116(C)(10) is proper when, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Allstate Ins Co v Elassal*, 203 Mich App 548, 552; 512 NW2d 856 (1994).

The standard of review is further governed by case law holding that, in a case involving alleged libel of a public figure, the reviewing court must make an independent examination of the record to assure that the judgment does not constitute an intrusion on the field of protected free expression. *New York Times v Sullivan*, 376 US 254, 285; 84 S Ct 710; 11 L Ed 2d 686 (1964); *Garvelink v Detroit News*, 206 Mich App 604; 522 NW2d 883 (1994).[1]

The parties' arguments can best be analyzed in the following sequence: 1) whether Bracco was a public figure and whether the alleged conduct was related to his duties; 2) whether the statement was a statement of material fact and whether it was capable of defamatory interpretation; and 3) whether the statement was made with actual malice.

Whether Bracco was a public figure for purposes of libel law:

Defendants assert that "[c]ourts have uniformly declared law enforcement officials to be 'public officials' under the libel law," citing *St Amant v Thompson*, 390 US 727; 88 S Ct 1323; 20 L Ed 2d 262 (1968). However, at least one court examined the actual duties of a deputy sheriff and found as a matter of law that he was not a public figure. *McCusker v Valley News*, 428 A2d 493 (NH 1981). It is not clear that Bracco was a "law enforcement officer" or that he would be a public figure as a matter of law. We therefore undertake an analysis of whether Bracco was a private or public figure. *Buffalino v Detroit Magazine*, 433 Mich 766, 772; 449 NW2d 410 (1989).

At the time he was terminated, Bracco's position was classified as a "Facilities Security Officer." In that position, he was responsible for the keys of MTU. Like other security personnel, Bracco carried a "grand master" key. He was also responsible for issuance and receipt of all keys to all university buildings. When he worked in the key room, Bracco wore civilian clothes. However, Bracco wore a uniform on a regular basis as the employee who worked the "bump shift," that is the one who filled in for others when they vacationed or were otherwise absent from work. He would generally work one day each week in uniform. During the summer it was not unusual to spend a week in uniform. He drove a "regular police car" and delivered cash bags from university offices to local banks. When on patrol, Bracco checked to be sure buildings were locked, surveyed parking lots, and responded to an "occasional domestic problem." He carried handcuffs, had the authority to make arrests and had done so. In addition, he was deputized by the county sheriff and the city police. He carried "three credentials": Houghton County Sheriff, Houghton City Police and Michigan Tech.

Whether an individual is a public official is a question of law. *Rosenblatt v Baer*, 383 US 75, 88; 86 S Ct 669, 677; 15 L Ed 2d 597, 607 (1966). In *Peterfish v Frantz*, 168 Mich App 43; 424 NW2d 25 (1988), a panel of this Court summarized the appropriate analysis of the public figure's status:

> In *Rosenblatt v Baer*, 383 US 75; 86 S Ct 669; 15 L Ed [2d] 597 (1966), the United States Supreme Court, in defining for the first time the term "public official," stated:
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> "It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." 383 US at 85; 86 S Ct at 676.
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> By way of elaboration on the Court's definition, it continued:
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> "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in New York Times are present and the New York Times malice standards apply." 383 US at 86; 86 S Ct at 676.
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> Finally, the Court pointed out, by way of footnote:
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> "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." 383 US at 87 n 13; 86 S Ct at 676 n 13.

A public employee is not ipso facto a public figure. See, e.g., *Moss v Stockard*, 580 A2d 1011 (DC App 1990) (college women's basketball coach), and *True v Ladner*, 513 A2d 257 (Me 1986) (public school teacher). Receipt of public funds alone is not sufficient to make a private person a public figure. *Hutchinson v Proxmire*, 443 US 111, 136; 99 S Ct 2675, 2688; 61 L Ed 2d 411 (1979).

In *Peterfish*, *supra*, this Court determined that the contract compliance officer of the City of Battle Creek was a public official. In its analysis, the Court considered the facts of that plaintiff's employment:

> She is paid through use of public funds and her position is not one filled by election. Indeed, she was placed in the position by the finance director of the city, the personnel director of the city, and the former purchasing agent/risk manager of the city respectively. She serves at the discretion of the city's mayor, vice-mayor, manager and commissioners. As indicated, her duties include the monitoring of various construction projects let by the city for compliance with affirmative action requirements, with minority

> hiring standards, with local hiring requirements and with prevailing wage standards. Plaintiff monitors "anything that has to do with the money that an employee is paid on any project." She also monitors projects funded by local, state and federal moneys. She has, however, no authority to monitor projects not let by the city, nor has she any authority to monitor projects funded through private sources or economic development bonds. She only acts upon receiving orders from her superiors.
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> Further, plaintiff administers the city's program for certification of women- and minority-owned businesses. Finally, she conducts equal opportunity employment reviews for financial assistance on all businesses seeking tax abatements. [168 Mich App 51-52.]

The panel concluded that the plaintiff was a public official within the meaning of *Rosenblatt*. *Peterfish, supra,* 168 Mich App 52. The panel relied on the following factors: 1) Although she did not have independent authority to initiate monitoring of construction projects, she was charged with that responsibility;

2) As a result, she was required to have a broad knowledge of law and administrative rule;

3) She was charged with collecting information;

4) Her decisions affected wages paid to local workers;

5) Her decisions had a direct impact on whether local businesses received tax abatements and minority-owned classification; she also affected employment of workers.

As a result, the plaintiff's position was of "such apparent importance that the public has an independent interest in her qualifications and in her performance of her duties beyond the general public interest in the qualifications of all government employees." *Id.* In comparison, Kenneth Bracco:

1) Could not initiate the choice of campus locks and keys, but was charged with the responsibility of maintaining the entire system;

2) Had the power to arrest, and was thus charged with knowledge of state and federal law;

3) Could conduct criminal investigations and could therefore under power of law gather information on private citizens;

4) Made decisions on a routine basis affecting the security of substantial property assets of the state as well as the rights of faculty, staff and students.

We conclude that Bracco was a public figure. As a security guard, Bracco wore a uniform, was empowered to make arrests, and was responsible for securing an entire public college campus. He was paid from public funds. He carried deputy's cards from the city and the county, and he was on

duty as a campus security officer at the time of the alleged events. This is not to say that every government-employed security officer can be so classified, but Bracco's position in the relatively self-contained community of the college campus elevated his status within that community. In *Waterson v Cleveland State Univ*, 639 NE2d 1236 (Ohio App, 1994), the court found that the deputy chief of a university police department was a public figure for purposes of his defamation suit. The *Waterson* court observed that the public in general has a significant interest in the performance of law enforcement officers, and

> Similarly, the students and faculty of CSU have a significant interest in the qualifications, performance and conduct of officers of the CSU police department, as they rely on these officers for their campus security and are more likely to have day-to-day contact with them than with the officers of the greater Cleveland community. [*Id.*, p 1238.]

Although Michigan Technological University may not be of the size of Cleveland State University, the students and faculty of MTU would look on a uniformed guard as authoritative and rely upon him for protection. Plaintiffs' assertion that Bracco was a mere locksmith does not withstand analysis.

Similarly, plaintiffs' assertion that the alleged theft was unrelated to Bracco's police function is untenable. As indicated, Judge Quinnell found that while on his meal break during work and while wearing his uniform, Bracco visited the snack bar and pocketed the raisins. An act of alleged theft by a uniformed security guard while on duty cannot be considered unrelated to his police-like duties. Further, while the alleged incidents giving rise to his dismissal did not occur at a time Bracco acted as a county or city deputy, the acts impinged upon the character of a security officer who had the authority to act as such when so directed.

Whether the statement was one of opinion or material fact and whether it was capable of a defamatory interpretation:

Regardless of whether Bracco was a public or private figure, a statement must be reasonably interpreted as stating an actual fact about an individual, or the statement is an opinion protected by the First Amendment. This Court is required to undertake an independent review of the pleadings and the statement to guard against a forbidden intrusion on the realm of protected speech. *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 402; 538 NW2d 24 (1995); *Garvelink*, *supra*, 206 Mich App 609. A statement of fact must be shown to be false to be actionable. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 338; 497 NW2d 585 (1993).

The statement by Vercruysse was separated into two parts with intervening narrative by the news reporter.[2] The first portion of the statement appears to be a true statement of fact regarding the decision of the judge:

> "It clearly holds the University has a right to terminate employees who commit what the University deems is acts of theft. The Judge hasn't issued a final decision as to

> what remedy he is going to issue, if any at all, for what he found to be a deficiency in procedural due process. Now, procedural due process is something that there's a lot of dispute in the law in terms of exactly what you've got to do with respect to and that's an area for us to consider when we see the Judge's final ruling in the case."

That statement is true and consistent with Judge Quinnell's findings of fact and conclusions of law. In paragraph 12, the judge wrote:

> 12. However, I also conclude that, based on the facts known to them at the time of the termination, the officials of MTU responsible for it were acting in good faith, were acting reasonably (subject to the Due Process discussion to follow), and that the perceived theft amounted to just cause for discharge under standards set by MTU.

Given the context of the underlying litigation, a suit for wrongful discharge, the judge had decided that Bracco was a just-cause rather than an at-will employee. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980). However, MTU prevailed in the Court of Claims because, as Judge Quinnell found, MTU had just cause to terminate Bracco and acted reasonably and in good faith. Vercruysse's statement is true: the judge found that MTU could discharge an employee for an act deemed to be theft. Vercruysse's explanation of due process concerns does not affect plaintiff Bracco in this context.

The second portion of Vercruysse's statement appears to be mixed opinion and fact:

> "It was not common policy to have people take yogurt-covered raisins off of a rack and stuff 'em in their pocket and walk out and that's what the Judge found that Mr. Bracco did. That's pretty clearly something that you and I wouldn't do if we walked into a snack bar or an area where they sell things. It's just not an appropriate thing to do."

Judge Quinnell found that Bracco admitted the alleged conduct: he had helped himself to packaged snacks on display at the school's snack bar. Whether there was a "free-food" policy at MTU was a disputed fact at trial, but the trial judge found that other guards who ate free food at the snack bar did so only after being invited by a custodian. Vercruysse's statement again agrees with the trial judge's findings of fact. The statement that "[I]t was not common policy to have people take yogurt-covered raisins off of a rack and stuff 'em in their pocket and walk out" is consistent with the judge's findings that the policy was unclear and that other security personnel ate free food only after invited to do so. The statement of fact is not false.

Finally, the statement as to appropriateness of the conduct appears to be an expression of evaluative opinion: "That's pretty clearly something that you and I wouldn't do if we walked into a snack bar or an area where they sell things. It's just not an appropriate thing to do." If a statement can reasonably be interpreted as stating "actual facts" about a public figure plaintiff, the statement is protected under the First Amendment. *Lakeshore Community Hosp, Inc, supra*, 212 Mich App 402 ; *Garvelink, supra*, 206 Mich App 609.

It should be noted that it was the reporter, and not Vercruysse, who said, "Defense counsel, Hunter Watson, also said the Judge's ruling proved Mr. Bracco's innocence beyond any question. *Vercruysse said he disputes that*." (Emphasis added.) That reportorial interpretation is a somewhat inflammatory characterization of the statement. Vercruysse disagreed with Watson regarding the import of Judge Quinnell's opinion. Vercruysse's statement was not an inaccurate representation when viewed in context.

On cross appeal, plaintiffs argue that the conduct described by Vercruysse in his statement can only be interpreted as accusing Bracco of shoplifting. The reader should recall that the judge found as fact that Bracco admitted the conduct. A publication of admitted conduct in this case is not defamatory.

Malice:

> "The First and Fourteenth Amendments of the United States Constitution prohibit public figures from recovering damages caused by a defendant's statement unless they prove that the statement was a defamatory falsehood and that it was made with actual malice, that is, that it was made with knowledge that it was false or with reckless disregard of whether it was false or not." [*Lakeshore Community Hosp, Inc, supra,* 212 Mich App 402, citing *New York Times Co v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964), and *Curtis Publishing Co v Butts,* 388 US 130, 87 S Ct 1975, 18 L.Ed.2d 1094 (1967).]

In the instant case, the factual portions of the statement accurately reflect the trial judge's findings of fact and conclusions of law. The statement was not false and was therefore not made with malice.

Affirmed in part, reversed in part and remanded for entry of summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ David H. Sawyer

[1] Defendants aver that summary disposition is a preferred disposition of a public interest libel case, and that doubts, if any, are to be resolved in defendants' favor. *Lins v Evening News Ass'n*, 129 Mich App 419; 342 NW2d 573 (1983). *Lins* applied that standard only in a case where the plaintiff was a public figure and the defendant was a publication or other public medium. *Lins, supra*, 129 Mich App 425-426. *Lins* is inapplicable to the instant case.

[2] It is important to separate Vercruysse's statements from those of the radio reporter. Vercruysse is not responsible for the reporter's words.