STATE OF MICHIGAN

COURT OF APPEALS

ROBERT MCLACHLAN,

Plaintiff-Appellant,

v

DAVID KNEFF, STEPHEN DRESCH and JOSEPH CALLEWAERT,

Defendants-Appellees.

UNPUBLISHED
August 29, 1997

No. 193448
Crawford Circuit
LC No. 95-003626-CZ

Before: Michael J. Kelly, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Plaintiff, who was a Crawford County Commissioner, sued defendants for defamation, alleging that defendants had falsely stated that plaintiff had engaged in illegal behavior during the sale of a county landfill to a private company. He now appeals as of right from the circuit court's order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(8). We affirm.

I

We review a grant or denial of summary disposition de novo to determine whether the moving party is entitled to judgment as a matter of law.[1] *Garvelink v Detroit News*, 206 Mich App 604, 607; 522 NW2d 883 (1994). A motion under MCR 2.116(C)(8) (failure to state a claim upon which relief may be granted) tests the legal sufficiency of a claim by the pleadings alone. *Michigan Ins Repair Co, Inc v Manufacturers Nat'l Bank of Detroit*, 194 Mich App 668, 673; 487 NW2d 517 (1992). 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. *Id.* 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. *Feister v Bosack*, 198 Mich App 19, 22; 497 NW2d 522 (1993).

To establish a claim for defamation, a plaintiff is required to demonstrate the following elements:

> (a) a false and defamatory statement concerning plaintiff; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher;

> and (d) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm (defamation *per quod*). [*Rouch v Enquirer & News of Battle Creek*, 427 Mich 157, 173-174; 398 NW2d 245 (1986).]

The parties stipulated that plaintiff is a public official. In defamation cases, a public official must prove not only that the publication was a defamatory falsehood but that the statement was made with actual malice, that is, that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. *Garvelink*, *supra* at 608. Public officials must demonstrate by clear and convincing evidence that the defendant made the defamatory statement with actual malice. *Locricchio v Evening News Ass'n*, 438 Mich 84, 110; 476 NW2d 112 (1991). Moreover, appellate courts are required to conduct an independent review of the record when actual malice is at issue "to ensure that no 'forbidden intrusion on the field of free expression' has occurred." *Id.*, citing *New York Times Co v Sullivan*, 376 US 254, 285; 84 S Ct 710; 11 L Ed 2d 686 (1964).

II

Plaintiff first argues that the circuit court erred in finding that the statement made by defendant Dresch lacked the requisite specificity for actionable libel, that the statement was opinion and/or rhetorical hyperbole, and that plaintiff failed to plead actual malice. In his complaint, plaintiff averred that defendant Dresch wrote an article for the *Traverse City Record Eagle*, which contained the following statement: "Have your reporter colleagues heard of the Crawford Co. equalization director's charge that Commissioner McLachlan offered him a bribe in exchange for a reduction in the City Mgt. Landfill assessment? Indictment is expected shortly according to my sources. I have some details (names for confirmation, etc)." Plaintiff averred that this statement was false and that defendant Dresch made it with knowledge that the statement was false or with a reckless disregard for the truth or falsity of the statement.

In arguing to this Court, plaintiff takes the statement out of context by asserting that defendant Dresch wrote that plaintiff had offered the equalization director a bribe. Dresch actually wrote that the equalization director had alleged that plaintiff had offered him a bribe. Plaintiff does not dispute that the equalization director said this but only that he did not actually offer a bribe. Therefore, plaintiff has not established the requisite element of defamation that the statement in question is false, and he has not stated a claim of defamation regarding defendant Dresch's article. The circuit court properly granted summary disposition to this defendant. See *Rouch*, *supra* at 173. Because plaintiff as a matter of law has failed to state a claim of defamation, we do not need to address his remaining issues concerning defendant Dresch.

III

Plaintiff next argues that the circuit court erred in finding that defendant Callewaert's communication was not libelous, that the communication was opinion or rhetorical hyperbole, and that plaintiff had failed to plead actual malice. In his complaint, plaintiff averred that defendant Callewaert stated in a letter that there was a pattern of "bribes and fixes here," implying that there was a pattern of

criminal activity in Crawford County. Plaintiff also averred that this letter included the following statement concerning the sale of the landfill: "Please remember that Crawford County officials, including the Prosecutor, were instrumental in this closed door sale. Minutes and records were fabricated, altered and embellished." Plaintiff alleged that because he was the only official named in the letter, it must be inferred that defendant Callewaert meant to accuse plaintiff of criminal activity. Plaintiff's complaint indicated that the statements were false and that defendant Callewaert acted with knowledge of their falsity or with a reckless disregard for the truth or falsity of his statements.

Plaintiff contends that the circuit court erred in finding that defendant Callewaert's statements were not of and concerning plaintiff and that, therefore, plaintiff failed to state a claim for defamation. However, a close reading of the allegedly defamatory material demonstrates that the letter never implies that plaintiff himself was involved in the "pattern of bribes and fixes." Thus, it was not defamatory because it was not of or concerning plaintiff. *Postill v Booth Newspapers, Inc*, 118 Mich App 608, 618; 325 NW2d 511 (1982). Because we find that plaintiff has failed to state a claim of defamation against Callewaert as a matter of law, we do not need to address plaintiff's remaining issues concerning this defendant.

IV

Finally, plaintiff argues that the circuit court erred in finding that the statement made by defendant Kneff was not libelous and that plaintiff failed to plead that Kneff acted with actual malice. In his complaint, plaintiff alleged that the *Bay City Times* reported that defendant Kneff said of plaintiff: "'He may have abstained from a vote or two,' Kneff countered, 'but that doesn't matter. He exerted undue influence on the Board's decision.'" According to plaintiff's complaint, defendant Kneff meant that plaintiff "was guilty of impropriety and/or criminal behavior in violation of Michigan Statutes governing the Plaintiff's conduct as a public official, [MCL 15.342; MSA 4.1700(72), MCL 15.405; MSA 4.1702(5), MCL 168.931; MSA 6.1931, and MCL 750.117; MSA 28.312]." Plaintiff's complaint further avers that defendant Kneff made this statement "with knowledge of its falsity or with reckless disregard as to whether it was false" and "with reckless indifference to the truth and with actual malice and with an intent to injure the Plaintiff's reputation and accordingly these communications were wholly false and constituted libel per se." In its decision, the circuit court noted:

> As to Defendant Kneff's alleged defamation, this Court concludes the statement as published is simply not libelous. The Defendant's statement that the plaintiff "exerted undue influence" is virtually the same as the *wrongful influence* of the *Glazer* case. Further, the said statement fails to meet the *Sullivan* standard of actual malice plead.

Plaintiff contends that the circuit court erred in concluding that *Glazer v Lamkin*, 201 Mich App 432; 506 NW2d 570 (1993) stands for the proposition that the term "undue influence" is not defamatory, and that Kneff's statement was therefore not defamatory. We agree. Our review of *Glazer* indicates that the panel in that opinion found that the lower court record did not indicate that the defendant had accused the plaintiff of exercising undue influence, not that such an accusation is not defamatory. The record in the present case supports plaintiff's assertion that defendant Kneff accused

plaintiff of exercising wrongful influence. "[T]he uttering or publishing of words imputing the commission of a criminal offense" may be actionable in themselves and subject the publisher to civil liability for defamation. MCL 600.2911(1); MSA 27A.2911(1). Thus, Kneff's statement was defamatory because it suggested that plaintiff may have committed a crime.

However, the circuit court also found that plaintiff failed to plead that Kneff made the statement with actual malice. For public officials, general allegations of malice are insufficient to sustain a claim of defamation. *Glazer*, *supra* at 438. General allegations of malice will not suffice to establish a genuine issue of material fact concerning actual malice. *Peterfish v Frantz*, 168 Mich App 43, 53; 424 NW2d 25 (1988). Instead, a plaintiff who is a public official or public figure must support his allegations with facts from which the existence of malice might be inferred. *Id.* Reckless disregard is not measured by whether a reasonably prudent person would have made the statement or would have investigated before publishing the statement, but by whether the publisher, in fact, entertained serious doubts concerning the truth of the statement. *Id.*

Plaintiff contends that because his complaint avers that defendant Kneff participated in a request for a grand jury investigation of plaintiff, and the grand jury determined that there was insufficient evidence to indict plaintiff, the complaint sufficiently pleads actual malice because Kneff must have either known that plaintiff did not wrongfully influence the board's decision or must have made the defamatory statement in reckless disregard of its truth or falsity. However, Kneff's knowledge or intent may not be inferred from a grand jury's decision. It is possible that defendant Kneff had more evidence than that presented to the grand jury. Plaintiff did not allege other facts to support the conclusion that defendant Kneff acted with actual malice. Rather, plaintiff expected the court to make this inference. The circuit court properly determined that the facts pleaded in plaintiff's complaint would not support the conclusion that Kneff acted with actual malice, and that plaintiff therefore failed to plead that Kneff acted with actual malice. See *Swenson-Davis v Martel*, 135 Mich App 632, 637-638; 354 NW2d 288 (1984); *Peterfish*, *supra* at 54. Thus, the grant of summary disposition to defendant Kneff was appropriate.

Affirmed.

/s/ Michael J. Kelly
/s/ Myron H. Wahls
/s/ Hilda R. Gage

[1] We note that plaintiff has included material not part of the lower court record in his appellate brief. In the absence of a motion to amend the record, MCR 7.216(A)(4), we will not evaluate any material not part of the actual lower court record. *In re Norris Estate*, 151 Mich App 502, 507; 391 NW2d 391 (1986).