

STATE OF MICHIGAN
COURT OF APPEALS

JAMES VOLLMAR,

Plaintiff-Appellant,

v

ELTON LAURA, KENNETH JACOBS,
JEFFREY COLEMAN, SUSAN PHILIPS,
SHARON SMALL, and PATRICIA ODETTE,

Defendants-Appellees.

UNPUBLISHED

April 18, 2006

No. 262658

Wayne Circuit Court

LC No. 03-331744-CZ

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

During plaintiff's tenure as a superintendent of the Gibraltar School District, he received facsimiles from the president of the school board. Plaintiff's secretary, defendant Susan Phillips, allegedly obtained copies of the facsimiles, which were subsequently circulated among the other defendants. Plaintiff filed this action alleging that he was defamed and portrayed in a false light after the content of those facsimiles was revealed. Plaintiff also alleged claims for eavesdropping, tortious interference with a business relationship, and intentional infliction of emotional distress. The trial court granted defendants' motions for summary disposition and dismissed each of plaintiff's claims. Plaintiff appeals as of right. We affirm.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

I

In Count I of his complaint, plaintiff alleged that defendants violated Michigan's eavesdropping statute, MCL 750.539c, by using the copies of the facsimile transmissions that allegedly were obtained by defendant Philips. Michigan's eavesdropping statute, MCL 750.539c, prohibits a person from willfully using any device to eavesdrop on the private conversations of others and provides:

Any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is

guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$2,000.00 or both.

MCL 750.539a(2) defines the term “eavesdrop” as follows:

“Eavesdrop” or “eavesdropping” means to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse. Neither this definition or any other provision of this act shall modify or affect any law or regulation concerning interception, divulgence or recording of messages transmitted by communications common carriers.

Relying principally on *United States v Meriwether*, 917 F2d 955 (CA 6, 1990), the trial court concluded that there was no violation of the eavesdropping statute because defendants did not use a device to record or intercept the facsimile transmissions from the school board president. In *Meriwether*, the court held that a police officer did not violate the Electronic Communications Privacy Act, 18 USC 2510 *et seq.*, when he obtained the defendant's telephone number by pressing a display button on a pager the police seized during the execution of a search warrant. The court held that the officer did not intercept the information by using an “electronic, mechanical or other device,” as proscribed by the definition of “intercept” found in 25 USC 2510(4). *Meriwether, supra* at 960.

Plaintiff argues that the trial court erroneously relied on *Meriwether* because 18 USC 2511(1)(a) generally prohibits the intentional interception of any wire, oral, or electronic communication. 18 USC 2510(4) defines “intercept” as “the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.” Although MCL 750.539c uses the term “eavesdrop,” which is not defined as the interception of communications, Michigan’s statute, like the federal statute, “protects private conversations against eavesdropping accomplished through the wilful use of ‘any device.’” *People v Stone*, 463 Mich 558, 564-565; 621 NW2d 702 (2001). Although the federal statute specifically prohibits the interception of communications, the distinction between the relevant terms used in each statute is immaterial for purposes of this case.

In this case, plaintiff does not allege, nor is it disputed, that defendants were not responsible for using the facsimile machine to record or access the messages sent to plaintiff. The messages were sent to plaintiff by the school board president. At most, plaintiff alleges that defendant Philips stole copies of the facsimiles after they were received and that the other defendants were aware that they were stolen. Accepted as true, these facts do not establish that defendants may be liable for the wilful use of any electronic device to eavesdrop or that any of the defendants knew or should have known that the copies of the facsimiles they received were obtained by the wilful use of a facsimile machine as an eavesdropping device. Accordingly, the trial court properly dismissed plaintiff’s eavesdropping claim.¹

¹ Plaintiff’s reliance on *People v Warner*, 401 Mich 186, 196; 258 NW2d 385 (1977) (opinion of (continued...))

II

Plaintiff also argues that the trial court erroneously dismissed his claims for defamation and invasion of privacy for portraying him in a false light. We disagree.

The trial court held that plaintiff failed to allege any defamatory statements with specificity. Furthermore, although plaintiff alleged that he was defamed by the facsimiles, he admitted at his deposition that none of the facsimiles defamed him personally. The court also held that plaintiff failed to identify specific statements disseminated by defendants that placed him in a false light.

To prove defamation, plaintiff was required to establish 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. *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992) (libel); *Ledl v Quik Pik Food Stores, Inc.*, 133 Mich App 583, 589; 349 NW2d 529 (1984) (defamation). [*Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).]

A superintendent of a school district is a public figure. *Kefgen v Davidson*, 241 Mich App 611, 623-624; 617 NW2d 351 (2000). “A public figure claiming defamation must prove by clear and convincing evidence that the publication was a defamatory falsehood and that it was made with actual malice through knowledge of its falsity or through reckless disregard for the truth.” *Id.* at 624; see also MCL 600.2911(6).

Accusing another of the commission of a crime is defamatory per se and the plaintiff need not prove special harm. *Kevorkian v American Medical Ass’n*, 237 Mich App 1, 8; 602 NW2d 233 (1999). “A court may determine, as a matter of law, whether a statement is actually capable of defamatory meaning.” *Id.* at 9. “Where no such meaning is possible, summary disposition is appropriate.” *Id.*

A claim for invasion of privacy based on being placed in a false light requires that the plaintiff receive publicity. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 385; 689 NW2d 145 (2004). As this Court explained in *Duran v Detroit News*, 200 Mich App 622, 631-632; 504 NW2d 715 (1993),

[i]n order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of

(...continued)

Williams, J.), does not result in appellate relief. In *Warner*, the police obtained information from the co-manager of a hotel who was operating the switchboard when she intentionally intercepted a telephone conversation regarding drugs. The decision is clearly factually distinguishable. In the present case, defendants did not use recording or electronic equipment to gain access to the information.

people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position.

Although plaintiff asserts that defendant Laura defamed him and portrayed him in a false light by accusing him of committing a felony at a televised board meeting, as the trial court properly observed, plaintiff did not allege such facts in his complaint. A plaintiff alleging a claim for defamation must allege and identify with specificity the statements he believes form the basis for the claim. General allegations that a defendant's statements were defamatory are not actionable. *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 53-54; 495 NW2d 392 (1992). Because plaintiff's complaint failed to include any specific allegations regarding defendants falsely accusing him of a crime or misconduct in office at a televised board meeting, the trial court properly granted defendants summary disposition of this claim.

Plaintiff also asserts that the other defendants may be liable for defamation and invasion of privacy, but has failed to specify what statements those parties made that were false or actionable. Accordingly, defendants' motions for summary disposition were properly granted. *Royal Palace Homes, supra*.

Furthermore, the trial court additionally dismissed plaintiff's defamation and invasion of privacy claims because plaintiff could not demonstrate actual malice. Plaintiff does not dispute that he was a limited-purpose public figure at the time the statements were allegedly made. Therefore, he was required to establish that the alleged statements were made with actual malice. *Ireland v Edwards*, 230 Mich App 607, 615; 584 NW2d 632 (1998). Plaintiff had the burden of proving actual malice by clear and convincing evidence. *Id.* "Actual malice exists where the publication was made with knowledge of the falsity of the statements or with reckless disregard of their truth or falsity." *Id.* Ill will, spite, and hatred, standing alone, do not prove actual malice. *Kefgen, supra* at 624. General allegations that statements were false and malicious are insufficient to establish a genuine issue of material fact over whether a person published a statement with actual malice. *Id.* A mere inference of malice is insufficient to prove defamation of a public figure. *Id.* at 631. Whether evidence is sufficient to find actual malice is a question of law. *Id.* at 624-625.

Plaintiff asserts that defendants used the facsimiles to wage a campaign against him because they wanted him removed from his position or did not want his contract renewed. Even if these allegations are accurate, they are insufficient to show actual malice as a matter of law. *Kefgen, supra* at 631. Defendants' alleged efforts to have plaintiff removed from his position do not demonstrate that they knew that the information they learned from the facsimiles was false or that they used that information with a reckless disregard for whether it was true or false. For these reasons, the trial court properly dismissed plaintiff's claims for defamation and invasion of privacy.

The trial court also denied plaintiff's request to amend his complaint, concluding that any amendment would be futile. We agree. When a trial court grants summary disposition under MCR 2.116(C)(8), it must ordinarily give the nonmoving party an opportunity to amend his or her pleading unless an amendment would not be justified or would be futile. *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001); MCR 2.116(I)(5). An amendment is

futile if it merely restates allegations already made or adds new allegations that fail to state a claim. *Yudashkin, supra*.

According to plaintiff, defendant Laura stated the following on television:

[S]chool employees recently gave me a document under the Whistleblower's Act.

Under this act an employee can turn over information to a supervisor without fear of retaliation. Because I now have this information in my possession, I feel compelled to share it with the rest of the board.

The document provides information that a board member did something **illegal and unethical. The superintendent is also implicated.** [Emphasis added.]

Accepting as true that defendant Laura made these statements, we agree that they do not support a claim for defamation. Laura did not specifically accuse plaintiff of unethical or illegal conduct, and certainly not of committing any felony, as plaintiff alleges. Rather, he only stated that he received a document that contained information that a board member did something illegal or unethical, and, without further explanation, that plaintiff was also implicated. This statement is too vague to be construed as accusing plaintiff of a crime for defamation per se. Also, plaintiff does not claim that Laura falsely represented the contents of the document he received.

Furthermore, plaintiff cannot establish defamation by implication. “A cause of action for defamation by implication exists in Michigan, but can succeed only if the plaintiff proves that the defamatory implications are materially false.” *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 702; 609 NW2d 607 (2000). Here, Laura was commenting on a document that he received and plaintiff does not claim that Laura falsely represented the nature of that document. See *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 329-330; 583 NW2d 725 (1998). Therefore, we agree with the trial court that any amendment to more specifically allege these statements attributed to defendant Laura would have been futile.

Because there is no merit to plaintiff’s claims for defamation or invasion of privacy, we need not address whether defendants are immune from liability or protected by an absolute or qualified privilege.

III

Plaintiff also argues that the trial court erroneously dismissed his claim for intentional infliction of emotional distress. We disagree.

In *Graham v Ford*, 237 Mich App 670, 674-675; 604 NW2d 713 (1999), this Court stated:

In order to invoke the tort of intentional infliction of emotional distress . . . , plaintiffs had to establish (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress.

Haverbush v Powelson, 217 Mich App 228; 551 NW2d 206 (1996). Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been 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. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Id.* It is not enough that the defendant has acted with an intent that is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by “malice,” or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602-603; 374 NW2d 905 (1985), quoting Restatement Torts, 2d, § 46, comment d, pp 72-73. In reviewing a claim of intentional infliction of emotional distress, we must determine whether the defendant’s conduct is sufficiently unreasonable as to be regarded as extreme and outrageous. *Doe, supra* at 92. 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!’” *Roberts, supra* at 603.

It is for the trial court to initially determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999).

Plaintiff asserts that he sufficiently alleged a claim for intentional infliction of emotional distress because he was accused of engaging in illegal conduct, and of being anti-Semitic and homophobic. Plaintiff did not allege in his complaint that he was accused of being anti-Semitic or homophobic by defendants, nor did he present any evidence below factually supporting this assertion. Additionally, as discussed previously, plaintiff has not demonstrated that statements made by defendant Laura at a televised board meeting were false. Because plaintiff failed to show that his reputation was improperly sullied by false statements, there is no merit to his claim that such statements were so outrageous and extreme to support a claim for intentional infliction of emotional distress. The trial court properly dismissed this claim.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Patrick M. Meter