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STATE OF MICHIGAN

IN THE SUPREME COURT

FOUNDATION FOR BEHAVIORAL RESOURCES, a Michigan non-profit corporation,

Plaintiff-Appellant,

v

W.E. UPJOHN UNEMPLOYMENT TRUSTEE CORPORATION d/b/a UPJOHN INSTITUTE d/b/a W.E. UPJOHN INSTITUTE FOR EMPLOYMENT RESEARCH, a Michigan non-profit corporation, and BEN DAMEROW,

Defendants-Appellees.
____/

Supreme Court
Case No. 161592

Court of Appeals
Case No. 345415

Kalamazoo Circuit Court
Case No. 16-000309-CZ

DEFENDANTS-APPELLEES' ANSWER TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Proof of Service

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COUNTER-STATEMENT IDENTIFYING JUDGMENT AND ORDER APPEALED FROM AND INDICATING RELIEF SOUGHT

Plaintiff's application seeks interlocutory leave to appeal the Court of Appeals' May 28, 2020 opinion in this case (see Ex G), which affirmed the circuit court's July 19, 2018 order granting in part defendants' motion for summary disposition on plaintiff's false-light invasion of privacy claim under MCR 2.116(S)(10) (see Ex C and Ex D).

Defendants ask this Court to deny plaintiff's application for interlocutory leave to appeal.

COUNTER-STATEMENT OF QUESTION PRESENTED

Did the trial court and the three judges of the Court of Appeals in this case properly conclude that--under well-established and longstanding Michigan law, which follows the relevant provision of the Restatement of Torts and also follows the majority rule applicable in virtually all jurisdictions throughout the nation--a private plaintiff in a false-light invasion of privacy action must establish the element of malice?

- Defendants-Appellees answer: Yes
- The trial court answered: Yes
- The Court of Appeals answered: Yes
- Plaintiff answers: No

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COUNTER-STATEMENT OF FACTS

Most of plaintiff-appellant's Statement of Material Proceedings and Relevant Facts is the same language that plaintiff-appellant included as its Statement of Facts in Plaintiff-Appellant's Brief on Appeal in the Court of Appeals. (Cf Plaintiff's Supreme Court Application, pp 2-10, filed July 9, 2020, with Plaintiff's Court of Appeals Brief, pp 2-10, filed April 25, 2019.)

Accordingly, in response, defendants-appellees rely on the following Counter-Statement of Facts from Defendants-Appellees' Brief on Appeal in the Court of Appeals. (See Defendants' Court of Appeals Brief, pp 4-10, filed June 25, 2019.)

> The allegations in Plaintiff's complaint arise from a 2015 contractual bidding process handled by Michigan Works! Southwest to obtain a contract to provide services for the Partnership, Accountability, Training and Hope ("PATH") program for Branch, Calhoun, Kalamazoo, and St. Joseph counties. (**Exhibit 31**, Request for Proposal 2015-4, Apx, pp 289-329).[1] During the time of the contractual bidding process, the Upjohn Institute (hereinafter referred to as the "Institute") was serving as the administrator of Michigan Works! Southwest and Ben Damerow was employed by the Institute. Plaintiff, along with two other entities, submitted responses to the Request for Proposal 2015-4.
>
> [1] References in this brief to Exhibit 1-30 are a part of the Appendix filed by Plaintiff-Appellant. Exhibits 31-35 were not referenced by Appellants and, thus, Appellees add these exhibits to the Appendix, as Volume III, beginning at page 288.
>
> Plaintiff's complaint alleges counts of defamation, false light invasion of privacy, and tortious interference with Foundation for Behavioral Resources' (hereinafter "FBR") business relationship and/or expectancy. (**Exhibit 3**, Complaint, Apx pp 10-29). In an attempt to support these claims, Plaintiff alleges that four statements were made during the bidding process that were defamatory. These statements included the one at issue in this appeal that "none of the proposals [submitted in response to the Request for Proposal 2015-04] received the minimum score of 75". Although Plaintiff's appeal presents a single legal issue, Defendants submit that for context purposes it is beneficial to set forth the pertinent facts surrounding the bidding process.
>
> Michigan Works! Southwest issued Request for Proposal 2015-4 to solicit bids for PATH services in Branch, Calhoun, Kalamazoo, and St. Joseph counties.

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Three entities, including Plaintiff, submitted responses to Request for Proposal 2015-4. Committee review meetings were held on June 25, 2015, and June 30, 2015. (**Exhibits 22** and **24**, Committee meeting minutes, Apx pp 228-234 and 241-245). Members of the committee received a packet of information that included a number or documents, including applicant responses, monitoring reports and recent financial information. Following these review meetings, the committee determined that none of the three entities would be recommended for the contract. Moreover, the review committee presented a unanimous consensus recommendation for the services to be provided in house by the Institute. (**Exhibit 24**, Apx pp 241-245).

Following the committee review meetings, a Michigan Works! Southwest Workforce Development Board meeting was held on July 15, 2015, wherein the Workforce Development Board accepted the review committee's recommendation and did not award the contract to any of the three applicant entities. (**Exhibit 25**, 7/15/15 WDB meeting minutes, Apx pp 247-252). The Meeting Minutes from this meeting provided as follows:

> Ben Damerow reported the Request for Proposal (RFP) Committee met at the end of June to review the three proposals received for providing Application Eligibility Period (AEP)/Partnership, Accountability, Training, Hope, (PATH) Program and services for Branch and Calhoun Counties. The agencies that submitted proposals included the current provider, Foundation for Behavioral Resources (FBR); Business Interface of Maryland; and Arbor Employment and Training, also known as ResCare. A total of seven individuals including Workforce Development Board members and administrative staff reviewed the proposals. He reported none of the proposals received scored the minimum score of 75 and the Board committee recommended that none of the agencies that submitted proposals should receive a contract offer. [**Exhibit 25**, Apx p 247].

At this July 15, 2015 Workforce Development Board meeting two options were presented to the Board for consideration. (**Exhibit 25,** Apx pp 247-248). The first option was to resubmit the request for proposals and the second option was to have the Institute provide the program operations. The Workforce Development Board Meeting Minutes provide that a Motion was made for the Institute to provide the PATH program operations beginning with the start of the new program year, October 1, 2015, and to bring the proposal back to the Board in six months for future consideration and that this Motion passed. (**Exhibit 25**, Apx p 248).

Following the Board's determination not to accept any of the responses to the RFP, Plaintiff filed a Step One Appeal alleging that there had been calculation errors in the review process, which incorrectly placed Plaintiff below the minimum scoring threshold. (**Exhibit 26**, Step One Appeal). Deputy Director Jeanne Konrad notified Plaintiff that its appeal was denied. In the denial letter,

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Deputy Director Konrad acknowledged that there have been "some calculation errors", but clarified that scoring at the minimum threshold does not guarantee an award because other factors are taken into consideration. (**Exhibit 32,** August 3, 2015 denial, Apx pp 254-262). The denial of Plaintiff's Step One Appeal further outlined Plaintiff's long history of "a pattern of poor communications and lack of follow-through" including untimely responses to requests for information and/or documentation and a lack of communication regarding several recent FBR financial staff members who left FBR employment. (**Exhibit 23**, Apx pp 236-239).

Deputy Director Konrad testified that the error in calculation was a mathematical inaccuracy, but that Plaintiff would not have gotten the contract if they were over the threshold on the initial review. (**Exhibit 16**, Deposition of Konrad pp 137-138, Apx pp 191-192).

Plaintiff then proceeded to file two additional appeals. The Step Two Appeal was denied on the basis that there was no reason to reverse the original decision. (**Exhibit 33**, Step Two Appeal and denial, Apx pp 331-334). The Step Three Appeal was denied for being untimely on December 14, 2015. (**Exhibit 34**, Step Three Appeal and denial, Apx pp 336-339).

Following the denial of the third appeal, Plaintiff filed this lawsuit alleging counts of defamation, false light invasion of privacy, and tortious interference with Plaintiff's business relationship and/or expectancy. (**Exhibit 3,** Apx pp 10-29). Plaintiff alleged that four statements made by Defendant Damerow were defamatory and placed Plaintiff in a false light:

- "None of the proposals [submitted in response to the Request for Proposal 2015-04] received the minimum score of 75";

- There were financial concerns with renewing the contract with the Foundation for Behavioral Resources;

- A recent independent financial audit raised questions about the financial procedures of FBR; and

- That "the State and USDOL has reviewed this service provider (FBR) several times."

With respect to Count II false light invasion of privacy, Plaintiff's complaint alleges that in making these statements Defendant Damerow knew of or acted in reckless disregard as to the falsity of his statements and the false light in which those statements would place Plaintiff. (**Exhibit 3**, paragraph 73, Apx pp 24). Mr. Peterson, however, admitted in his deposition that he had no evidence indicating that Damerow acted with malice or reckless disregard for the truth. (**Exhibit 36** , Peterson dep, pp 158-159, Apx pp 361-362).

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Defendants moved for summary disposition of Plaintiff's entire complaint. Defendants argued that under Michigan law in order to sustain a claim of false light invasion of privacy, Plaintiff needed to show that the "defendant must have known of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed."

Plaintiff's response to Defendants' motion for summary disposition made no argument that Defendants' statement of the law with respect to establishing a claim of false light invasion of privacy were incorrect. Indeed, Plaintiff's complaint alleged that malice was a requirement to establish a false light invasion of privacy claim.

On June 27, 2018, the trial court held oral argument on Defendants' motion and ultimately granted summary disposition in favor of Defendants on most of Plaintiff's claims. More specifically, the Court found as follows:

- Defendants' Motion for Summary Disposition as to the first of the four alleged defamatory claims, i.e., the minimum score of the proposals was *denied*;

- Defendants' Motion for Summary Disposition as to the second, third, and fourth of the four alleged defamatory claims, i.e., alleged statements relating to financial concerns, audit and Department of Labor matters was *granted*;

- Defendants' Motion for Summary Disposition as to the first of the four alleged false light invasion of privacy claims, i.e., the minimum score of the proposals was *granted*;

- Defendants' Motion for Summary Disposition as to the second, third and fourth of the four alleged false light invasion of privacy claims, i.e., statements relating to financial concerns, audit and Department of Labor was *granted*; and

- Defendants' Motion for Summary Disposition as to Plaintiff's tortious interference with business relationship and/or expectancy claims pursuant to MCR 2.116(C)(10) was *granted.*
  (Exhibit 1, Apx pp 3-4).

As such, the only claim remaining is Plaintiff's claim of defamation with respect to the statement regarding failure to reach the minimum score. In granting summary disposition on Plaintiff's false light invasion of privacy claim with respect to the minimum score of the proposal the Court found:

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> To assert the false light invasion of privacy claim the Plaintiff must show Defendant broadcast to the public in general and to a large -- or to a large number of people information that was unreasonable and highly objectionable by attributing to the Plaintiff characteristics, conduct or beliefs that are false and place the Plaintiff in a false position. See *Porter v City of Royal Oak*, 214 Mich App 478, 486 (1995).
>
> Additionally the Plaintiff must show that "the defendant must have known of or acted in reckless disregard as to the falsity of the published -- publicized matter and the false light in which the plaintiff would have been placed." See the *Detroit Free Press v Oakland County Sheriff*, 164 Mich App 656, 666.
>
> * * * * *
>
> What remains is whether the alleged defamatory statement regarding plaintiff's failure to meet the minimum scoring requirements qualifies as a false light of invasion -- false light invasion of privacy and this Court would hold that it does not.
>
> As stated above in order to exceed [sic: succeed] on a claim of false light of -- false light invasion of privacy the plaintiff must show that defendant acted in "reckless disregard of the truth." In the present case Plaintiff has offered no evidence that Defendant made the defamatory statement regarding the scoring with a reckless disregard. As such there is no dispute of material fact as to this element of that tort and without the element being established the Defendant is entitled to a judgment as a matter of law.
>
> (**Exhibit 4**, pp 37-38, Apx pp 67-68).

Plaintiff filed a motion for reconsideration arguing for the first time that it did not need to show malice to establish a claim of false light invasion of privacy. The trial court properly denied Plaintiff's motion. Plaintiff sought interlocutory review of the trial court's order granting summary disposition of Plaintiff's false light invasion of privacy claim regarding the statement pertaining to the minimum score, which was granted by th[e] Court [of Appeals].

ARGUMENT

NEITHER THE TRIAL COURT NOR THE THREE JUDGES OF THE COURT OF APPEALS IN THIS CASE ERRED IN FINDING THAT--UNDER WELL-ESTABLISHED AND LONGSTANDING MICHIGAN LAW, WHICH FOLLOWS THE RELEVANT PROVISION OF THE RESTATEMENT OF TORTS AND ALSO FOLLOWS THE MAJORITY RULE APPLICABLE IN VIRTUALLY ALL JURISDICTIONS THROUGHOUT THE NATION--A PRIVATE PLAINTIFF IN A FALSE-LIGHT INVASION OF PRIVACY ACTION MUST ESTABLISH THE ELEMENT OF MALICE

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Plaintiff's application asserts that "it may prevail in its false light action without having to prove malice." (Plaintiff's Application, p i.)

However, plaintiff is mistaken, because well-established and longstanding Michigan law, which follows the relevant provision of the Restatement of Torts, and also follows the majority rule applicable in virtually all jurisdictions throughout the nation, require that a private plaintiff in a false-light invasion of privacy action must establish the element of actual malice.[1]

1. ***This issue was raised by plaintiff for the first time in its motion for reconsideration of the trial court's order granting in relevant part defendants' motion for summary disposition, thereby not properly preserving the issue for appellate review***

The sole issue raised by plaintiff in its application was raised for the first time by plaintiff in its motion for reconsideration of the trial court's order granting in relevant part defendants' motion for summary disposition. (See Ex E: Plaintiff's Motion for Reconsideration, dated August 8, 2018.)

This issue was not raised in plaintiffs' brief in opposition to defendants' motion for summary disposition. (See Ex B: Plaintiff's Brief in Opposition to Defendants' Motion for Summary Disposition, dated April 2, 2018, pp 28-29.)

However, the issue of plaintiff's obligation under Michigan law to establish malice to support its claim of false-light invasion of privacy--such that the defendants must have known or acted in reckless disregard as to the falsity of an allegedly untrue statement made about plaintiff--was explicitly set forth in defendants' brief in support of their motion for summary disposition. (See Ex A: Brief in Support of Defendants' Motion for Summary disposition, dated February 23,

[1] "Actual malice" means "with knowledge that [the publication] was false or with reckless disregard of whether it was false or not." *NY Times Co v Sullivan*, 376 US 254, 279-280; 84 S Ct 710; 11 L Ed 2d 686 (1964); see also Restatement of the Law 2d, Torts, § 652E(b). In this brief, the words malice or actual malice will be used as a shorthand for knowledge that the publication was false or with reckless disregard of whether it was false or not.

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2018, p 31.) Thus, defendants' brief in support of motion for summary disposition stated as follows:

> [A] plaintiff must show 'the defendant **must have known of or acted in reckless disregard** as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.' *Detroit Free Press v Oakland County Sheriff*, 164 Mich App 656, 666; 418 NW2d 124 (1987) (emphasis added). [Ex A, p 31, emphasis in defendants' brief, citing *Detroit Free Press*, *supra*, which itself cites *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 630; 403 NW2d 830 (1986), and 3 Restatement Torts, 2d, § 652E.]

Nor did plaintiff challenge this well-established rule of law requiring the establishment of reckless disregard at the hearing that was conducted by the trial court on defendants' motion for summary disposition. (See Ex C: Transcript of Summary Disposition Hearing, dated June 27, 2018.)

In response to plaintiff's motion for reconsideration, the trial court issued an order denying the motion. (Ex F: Order Denying Plaintiff's Motion for Reconsideration, dated August 22, 2018.) "[A] trial court's decision to grant or deny a motion for reconsideration" is reviewed "for an abuse of discretion." *Farm Bureau Ins Co v TNT Equipment, Inc*, 328 Mich App 667, 672; 939 NW2d 738 (2019), lv den 940 NW2d 80 (3-27-2020). And it is well established that a trial court cannot abuse its discretion by denying a motion for reconsideration "resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order." *Woods v SLB Prop Mgmt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008), lv den 481 Mich 916 (2008); see also *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 521; 773 NW2d 758 (2009), lv den 485 Mich 1119 (2020); *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987); *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, __; __ NW2d __ (2019) (quotation marks and citation omitted) ("The issue was not raised until plaintiff filed his motion for reconsideration. Where an issue is first presented in a motion for reconsideration, it is not properly preserved. And, the trial court does not abuse its

discretion by rejecting arguments made in a motion for reconsideration that could have been made in response to the original motion.”).

Plaintiff could have, but chose not to, challenge the issue of Michigan’s well-established and longstanding rule that a private plaintiff in a false-light invasion of privacy action must establish the element of malice before the trial court ruled on defendant’s motion for summary disposition. Defendants already had explicitly asserted that rule and supported their reliance on that rule with Michigan caselaw in the brief in support of their dispositive motion.

This issue is not properly preserved for review; accordingly, defendants ask this Court to deny plaintiff’s application for interlocutory leave to review the issue.

2. *The trial court has already ruled that plaintiff can ask the jury to award tort damages to plaintiff under a negligence standard on its claim of defamation against defendants*

The trial court has already denied in part defendants’ motion for summary disposition so as to allow plaintiff to pursue a defamation claim against defendant seeking any and all damages to which it might be entitled under a negligence (i.e., non-malice) standard. (See Ex C, pp 31-32; Ex D: Order Granting in Part and Denying in Part Defendants’ Motion for Summary Disposition, p 2, ¶ 3.)

Plaintiff has already acknowledged that its false-light invasion of privacy claim (which the trial court dismissed) is based on the same statements that are the subject of defendants’ allegedly defamatory actions, and that its false-light claim and its defamation claim are in parallel and are actually alternative ways to obtain the same tort damages. Thus, plaintiff has acknowledged that “[p]laintiff’s false light invasion of privacy claim . . . is based upon the same statements which are the subject of . . . [plaintiff’s] defamation action,” and further that “[t]he

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false light count parallels and is an alternative to the defamation count. Each count is based upon the identical statements." (Plaintiff's Application, pp vii, 1.)

"Under Michigan law, a party may bring an action for both false light invasion of privacy and defamation, but may " 'have but one recovery for a single instance of publicity.' " *Morganroth v Whitall*, 161 Mich App 785, 411 N.W.2d 859, 863 (1987) (quoting Restatement (Second) of Torts § 652 cmt. (b) (1965)." *Armstrong v Shirvell*, 596 Fed Appx 433, 450 (CA 6, 2015), cert den 136 S Ct 403; 193 L Ed 2d 315 (2015). Under "Michigan's clear rule against double recovery for defamation and false light," tort damages for the same injury cannot be awarded under both theories. *Armstrong*, 596 Fed Appx at 450-451.

Plaintiff here will have the opportunity to ask the jury to award it damages for any injury it might have sustained as a result of defendants' allegedly tortious statements, but it is not entitled to ask the jury to award it double damages for those same injuries. Yet that in essence is what plaintiff seeks to accomplish here. Accordingly, defendants ask this Court to deny plaintiff's application for interlocutory leave to review the issue.

3. *As the Court of Appeals has acknowledged, a plaintiff's status as a private or non-public figure for purposes of a claim of false-light invasion of privacy is already recognized in Michigan law, because a plaintiff's status as a private or non-public figure entitles a plaintiff to seek tort damages from a defendant under a mere "preponderance of the evidence" standard, and not under the higher "clear and convincing evidence" standard*

Michigan law already provides significance to a plaintiff's status as a private figure (as opposed to a public figure or a limited public figure) for purposes of a claim of false-light invasion of privacy and the requirement of the plaintiff to show that the defendant's actions were committed with malice. As the Court of Appeals stated in its opinion in this case, "[t]he significance in the difference between a private plaintiff, as here, and a public figure (or a limited

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public figure) as in *Battaglieri v Mackinac Ctr For Pub Policy*, 261 Mich App 296, 304; 680 NW2d 915 (2004), seemingly affects only the burden of proof--preponderance of the evidence for a private plaintiff, see M Civ JI 114.06 & 8.01, and clear and convincing evidence for a public figure. *Battaglieri*, 261 Mich App at 304. See *Dadd* [*v Mount Hope Church*], 486 Mich 857 [; 780 NW2d 763 (2010)] ("The trial court properly instructed the jury on false light invasion of privacy, which included the instruction that 'plaintiff must prove by a preponderance of the evidence that the defendant must have known or acted in reckless disregard of the falsity of the information and the false light in which the plaintiff would be perceived.' ").[2]

---

[2] M Civ JI 114.05 (emphasis added) and M Civ JI 114.06 (emphasis added) provide as follows:

> **M Civ JI 114.05 Invasion of Privacy—Publicity Which Places Plaintiff in a False Light—Elements**
>
> Plaintiff claims that defendant is responsible for invasion of [his / her] privacy. The claim here is that defendant placed plaintiff in a false light in the public eye.
>
> The elements of this claim are the following:
>
> (a) a disclosure to the general public or to a large number of people,
>
> (b) of information that was highly objectionable to a reasonable person, which attributed to plaintiff characteristics, conduct, or beliefs that were false and placed plaintiff in a false light, and
>
> (c) *the defendant must have had knowledge of or acted in reckless disregard as to the falsity of the disclosed information and the false light in which the plaintiff would be placed*.
>
> *Note on Use* If the plaintiff is a public figure, actual malice must be proved by clear and convincing evidence. *Battaglieri v Mackinac Center*, 261 Mich App 296 (2004). See M Civ JI 8.01. In *Collins v Detroit Free Press, Inc.*, 245 Mich. App. 27, 32 (2001), the Michigan Court of Appeals held that "[t]he First Amendment requires courts to determine whether the plaintiff is a public or private figure…." *Collins* involved allegations of both defamation and false light.
>
> *Comment* *Dadd v Mount Hope Church*, 486 Mich 857 (2010); *Duran v Detroit News*, 200 Mich App 622 (1993); *Battaglieri v Mackinac Center*, 261 Mich App 296 (2004); *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 630 (1986).
>
> *History* Added July 2012.

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However, Michigan law does not support, but rather rejects, the proposition that a plaintiff's status as a private figure for purposes of a claim of false-light invasion of privacy further mandates (in addition to the lower preponderance-of-the-evidence burden of proof in showing the existence of the defendant's malice) that the plaintiff need not show any malice at all on the part of the defendant. (See Section 4, *infra*.) Accordingly, defendants ask this Court to deny plaintiff's application for interlocutory leave to review the issue.

4. *As recognized in Michigan law, and as recognized in the Restatement of Torts, and as recognized in the law of virtually all jurisdictions, a private plaintiff in a false-light invasion of privacy action must show that the defendant acted with actual malice*

According to plaintiff, "a private plaintiff in a false light invasion of privacy action does not have to prove malice" on the part of the defendant. (Plaintiff's Application, pp i-ii.)

M Civ JI 114.06 Invasion of Privacy—Publicity Which Places Plaintiff in a False Light—Burden of Proof

Plaintiff has the burden of proving:

(a) that defendant disclosed to the general public or a large number of people,

(b) information that was unreasonable and highly objectionable to a reasonable person, which attributed to plaintiff characteristics, conduct, or beliefs that were false and placed plaintiff in a false light, and

(c) *that defendant must have had knowledge of or acted in reckless disregard as to the falsity of the published information and the false light in which the plaintiff would be placed*.

Your verdict will be for the plaintiff if the plaintiff has proved all of those elements.

Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

Note on Use If the plaintiff is a public figure, actual malice must be proved by clear and convincing evidence. *Battaglieri v Mackinac Center*, 261 Mich App 296 (2004).

History Added July 2012. Amended January 2020.

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However, plaintiff is mistaken, because neither Michigan law, nor the Restatement of Torts, nor the majority of other jurisdictions recognizes any such rule. Instead, they all recognize the opposite--that all plaintiffs (both private-figure and public-figure) must show actual malice on the part of a defendant in order to recover damages for false-light invasion of privacy.

The unanimous, per curiam Court of Appeals opinion of Judges Tukel, Krause, and Murray in this case fully explains "the weight of the longstanding and consistent authority on this matter" such that the requirement of actual malice is an "element[] of a false-light claim [that] applies to *all plaintiffs*--both public and private figures." (Ex G, p 4: *Foundation for Behavioral Resources v WE Upjohn Unemployment Trustee Corp*, __ Mich App __; __ NW2d __ (5-28-2020); 2020 WL 2781718, emphasis in original.) The panel unanimously cites and relies on the following opinions: *Puetz v Spectrum Health Hosps*, 324 Mich App 51; 929 NW2d 439 (2018), lv den 504 Mich 880 (2019); *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618; 403 NW2d 830 (1986); *Hall v Pizza Hut*, 153 Mich App 609; 396 NW2d 809 (1986); *Sawabini v Desenberg*, 143 Mich App 373; 372 NW2d 559 (1985). See also *Case v Hunt*, unpublished per curiam opinion of the Court of Appeals, issued April 23, 2019 (Docket No. 341645); 2019 WL 1780643 at *6, quoting *Puetz*, *supra* (Ex H).

Specifically, the unanimous Court of Appeals opinion states in part as follows: "We decline to depart from the weight of the longstanding and consistent authority on this matter. Consistent with *Dadd*, *Sawabini*, *Hall*, and *Early Detection Center*, this formulation of the elements of a false-light claim applies to *all plaintiffs*--both public and private figures. See *id*. Thus, as established by the *Puetz* Court, malice is an element of false light invasion of privacy, regardless of whether the plaintiff is a public or a private figure." (Ex G, p 4, emphasis in original, footnote omitted.)

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Defendants will not rehash or repeat here the complete and compelling analysis of this issue already provided in the written opinion of Judges Tukel, Krause, and Murray. Defendants respectfully suggest that that opinion succinctly sets forth all that needs to be said. There is no reason here to disturb the conclusion reached by the Court of Appeals, which is soundly based on clear and persuasive Michigan precedent and on "the weight of the longstanding and consistent authority on the matter." (Ex G, p 4)

It is also based on the longstanding and consistent authority on the matter from the Restatement of Torts, and also from countless court opinions from throughout the nation.

For example, Restatement of the Law 2d, Torts, § 652E (emphasis added) plainly states as follows:

> § 652E Publicity Placing Person in False Light
>
> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to the other for invasion of privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) *the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.*

In addition, courts throughout the nation have long followed this longstanding and consistent rule requiring a private plaintiff in a false-light invasion of privacy action to prove malice on the part of the defendant, and they continue to follow this rule. For just a sampling of such opinions, see, e.g., *Ashby v Hustler Magazine, Inc*, 802 F2d 856 (CA 6, 1986) (actual malice standard, not negligence standard, applies to private plaintiff in false-light invasion of privacy action); *Hauf v Life Extension Foundation*, 547 F Supp 2d 771 (WD Mich, 2008) (basic requirement necessary to sustain a false-light invasion of privacy claim is actual malice); *Dodrill*

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v Arkansas Democratic Co, 265 Ark 628; 590 SW2d 840 (1979) (the actual malice standard has remained constant and is applicable to in suits for false light invasion of privacy when the plaintiff is a private individual); *McCall v Courier-Journal & Louisville Times Co*, 623 SW2d 882 (Ky, 1981), cert den 456 US 975; 102 S Ct 2239; 72 L Ed 2d 849 (1982) (any plaintiff wishing to recover for false-light invasion of privacy must prove that the defendant-publisher acted with actual malice); *Goodrich v Waterbury Republican-American, Inc*, 188 Conn 107; 448 A2d 1317 (1982) (no matter what the status of the plaintiff, public or private, the false matter must have been published by the defendant with actual malice); *Dean v Guard Pub Co*, 73 Or App 656; 699 P2d 1158 (1985) (plaintiff in false-light invasion of privacy action must show actual malice on the part of the defendant); *Colbert v World Pub Co*, 747 P2d 286 (Okla, 1987) (this jurisdiction and the majority of jurisdictions have followed the rule that a private figure must prove a defendant's actual malice in a false-light invasion of privacy case); *Lovgren v Citizens First Nat'l Bank*, 126 Ill 2d 411; 128 Ill Dec 542; 534 NE2d 987 (1989) (both public figure and private figure plaintiffs must prove actual malice by the defendant in false-light invasion of privacy cases); *Yancey v Hamilton*, 786 SW2d 854 (Ky, 1989) (actual malice standard applies in false-light invasion of privacy cases regardless of individual plaintiff's status as a private individual or a public figure); *Meyerkord v Zipatoni Co*, 276 SW3d 319 (Mo App, 2008) (actual malice standard applies to all false-light invasion of privacy claims); *Welling v Weinfeld,* 113 Ohio St 3d 464; 866 NE2d 1051 (2007) (the standard of fault for private plaintiff's false-light invasion of privacy claim is defendant's actual malice under Restatement rule).

And for just a couple of recently issued opinions, issued within the past few months, upholding this longstanding and consistent rule, see, e.g., *Harvey v Systems Effect*, *LLC*, __ NE3d __, __ n 4; (Ohio App, 4-24-2020); 2020 WL 1991441 at *7 (in false-light invasion of

privacy cases brought by both private figures and public figures, it must be shown that the defendant acted with actual malice, citing Restatement of the Law 2d, Torts, § 652E(b)); and *Geiger v Creative Impact Inc*, opinion of the United States District Court for the District of Arizona, issued June 30, 2020 (Case No. CV-18-01443-PHX-JAT); 2020 WL 3545560 at *4 n 4 (Ex I) (plaintiffs must still show actual malice as part of their prima facie case regardless of whether or not they are public figures).

This matter presents a rule that is virtually uniformly recognized and followed not only in longstanding Michigan caselaw, but in the Restatement of Torts, and in the longstanding and consistent caselaw from throughout the nation. Accordingly, defendants ask this Court to deny plaintiff's application for interlocutory leave to review the issue.

RELIEF REQUESTED

Defendants-appellees ask this Court to DENY plaintiff's application for interlocutory leave to appeal.

GARAN LUCOW MILLER, P.C.

August 14, 2020
1519250

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LIST OF EXHIBITS

A Defendants' motion for summary disposition and brief in support of motion, dated February 23, 2018

B Plaintiff's brief in opposition to defendants' motion for summary disposition, dated April 2, 2018

C Transcript of summary disposition hearing, dated June 27, 2018

D Order granting in part and denying in part defendants' motion for Summary disposition, dated July 19, 2018

E Plaintiff's motion for reconsideration, dated August 8, 2018

F Order denying plaintiff's motion for reconsideration, dated August 22, 2018

G *Foundation for Behavioral Resources v WE Upjohn Unemployment Trustee Corp*, __ Mich App __; __ NW2d __ (5-28-2020); 2020 WL 2781718

H *Case v Hunt*, unpublished per curiam opinion of the Court of Appeals, issued April 23, 2019 (Docket No. 341645); 2019 WL 1780643

I *Geiger v Creative Impact Inc*, opinion of the United States District Court for the District of Arizona, issued June 30, 2020 (Case No. CV-18-01443-PHX-JAT); 2020 WL 3545560

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STATE OF MICHIGAN

IN THE SUPREME COURT

FOUNDATION FOR BEHAVIORAL RESOURCES, a Michigan non-profit corporation,

Plaintiff-Appellant,

v

W.E. UPJOHN UNEMPLOYMENT TRUSTEE CORPORATION d/b/a UPJOHN INSTITUTE d/b/a W.E. UPJOHN INSTITUTE FOR EMPLOYMENT RESEARCH, a Michigan non-profit corporation, and BEN DAMEROW,

Defendants-Appellees.
____/

Supreme Court
Case No. 161592

Court of Appeals
Case No. 345415

Kalamazoo Circuit Court
Case No. 16-000309-CZ

PROOF OF SERVICE

Proof of Service: I certify that a copy of **DEFENDANTS-APPELLEES' ANSWER TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL,** and this **PROOF OF SERVICE** were served on the following as indicated below:

Date of Service: August 14, 2020

Signature: /s/ *Enis J. Blizman*

VIA ESERVICE Michael H. Perry (P22890) Fraser Trebilcock Davis & Dunlap, P.C. Attorneys for Plaintiff-Appellant 124 W. Allegan St., Suite 1000 Lansing, MI 48933 Telephone: (517) 482-5800 Email: mperry@fraserlawfirm.com	

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