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9TH JUDICIAL CIRCUIT  
COUNTY OF KALAMAZOO  
KALAMAZOO, MICHIGAN

STATE OF MICHIGAN

NINTH JUDICIAL CIRCUIT COURT (KALAMAZOO COUNTY)

SCOTTSDALE CAPITAL ADVISORS  
CORPORATION,

Plaintiff,

v

File No. 2018-0153-CZ

MORNINGLIGHTMOUNTAIN, LLC, et al.,

Defendants.

HEARING ON MOTION FOR SUMMARY DISPOSITION

BEFORE HONORABLE ALEXANDER C. LIPSEY, CIRCUIT JUDGE

KALAMAZOO, MICHIGAN - FRIDAY, DECEMBER 14, 2018

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WITNESSES:

NONE

EXHIBITS:

NONE

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Kalamazoo, Michigan

Friday, December 14, 2018 - 2:45 p.m.

THE JUDICIAL AIDE: The Court calls the case of  
Scottsdale Capital Advisors Corporation versus  
MorningLightMountain, LLC, Case Number 2018-0153-CZ. Please  
state your appearances for the record.

MR. PINSKY: H. Rhett Pinsky for the Plaintiff  
Scottsdale, your Honor.

MR. RICHOTTE: Good afternoon, your Honor. May it  
please the Court, Joe Richotte appearing on behalf of  
Defendants of whom Defendant Michael Goode is present.

THE COURT: Good afternoon. This is a time and  
place set for a Motion for Summary Disposition under  
2.116(C)(8). This is to a amended complaint based on an  
earlier ruling of this Court. I'll save some additional  
comments until later, I expect in the dialogue, but at this  
point, I guess Mr. Richotte, it's your motion.

MR. RICHOTTE: Thank you, your Honor.

Your Honor, obviously as the Court has indicated in  
its opening remarks, we're here on a (C)(8) motion as it  
relates to a second amended complaint.

There was some discussion the last time we were here  
regarding a special First Amendment standard that applies and  
the Court had indicated in its earlier ruling that the First  
Amendment standard is designed to apply in cases where there

1 are public figures or public officials that are defendants in  
2 the action. And we've had an opportunity, your Honor, in this  
3 motion to supply some additional authority that we would ask  
4 the Court to revisit that issue since that authority  
5 demonstrates that it does, in fact, apply as well in the  
6 private figure context.

7 Moving into the statements themselves that are at  
8 issue, your Honor, as you'll recall from last time, there were  
9 four statements. We're now down to two. The two statements -  
10 - of the two, rather, the first is "If you have followed penny  
11 stocks and pump-and-dumps for a few years, then you know  
12 Scottsdale Capital Advisors." Your Honor, we have three main  
13 points to make as regards that statement.

14 First, we believe that it is not actionable as  
15 opinion. To be actionable, a statement must be provably  
16 false. Nonfactual hyperbole is not provably false. This kind  
17 of everyone knows statement is classical, rhetorical hyperbole  
18 that is not actionable. Indeed, we -- excuse me, we cited the  
19 Court to the case of *Komarov* out of New York where in that  
20 particular instance, someone said everybody knows in the  
21 community that the plaintiff Mr. Komarov who was accused of  
22 being a mobster who assisted in moving people around for the  
23 mob, was as well-known in the community as John Gotti,  
24 obviously a well-known mobster.

25 In that case, the Court held that was not actionable

1 as rhetorical hyperbole because it's a fact that can't be  
2 proven objectively false. Here we have the same scenario.  
3 Scottsdale can't objectively prove that those who followed  
4 pump-and-dump schemes did not know of Scottsdale.

5 The second issue, your Honor, is that the statement  
6 is simply just not false on its face. The statement does not  
7 accuse, as Scottsdale continues to suggest, of it being  
8 involved in pump-and-dump schemes, of being a defendant in any  
9 pump-and-dump lawsuits, or of being convicted of such  
10 activity. These are the same allegations that the Court had  
11 found wanting before.

12 The new twist, if you will, on the amended pleading  
13 is essentially defamation by implication and the basis for  
14 that is the juxtaposition of the challenge statement against  
15 the headline FINRA fines Scottsdale 1.5 million. There are  
16 two problems with this approach. The first is that a person  
17 is not responsible for every implication a reader might draw  
18 from a report of true facts or because the statement might be  
19 taken out of context.

20 Scottsdale has to plead facts that Mr. Goode and  
21 MorningLightMountain intended the defamatory implication,  
22 intended the defamatory implication but it has not pleaded any  
23 facts to demonstrate that intent.

24 Second, the statement must read, or excuse me, must  
25 be read in the context of the entire article, not just the

1 parts that Scottsdale wants to focus on. Scottsdale has  
2 essentially admitted in its brief that the FINRA report  
3 provides important context, namely, that FINRA fined  
4 Scottsdale 1.5 million in part because it allowed itself to  
5 yet again be used as a tool for a pump-and-dump scheme.

6 It goes on essentially to say that the Court should  
7 ignore this context because the damage is done after the  
8 headline and the challenge statement are read, but that isn't  
9 the law.

10 The Michigan Supreme Court has held that the Court  
11 must construe the entire article and that includes the linked-  
12 out FINRA report that provides that, admittedly from  
13 Scottsdale's perspective, important context.

14 Moving to Statement Number Two, your Honor, the  
15 statement at issue, "They are one of the few brokers left that  
16 have continued to allow the deposit and sale of shares of  
17 illiquid penny stocks. Larger brokers and discount brokers  
18 stopped allowing that over five years ago." We have two main  
19 points.

20 First, that the statement itself is not false. The  
21 deposit and sale of shares are two different activities. The  
22 deposit of shares is how shares are introduced into the market  
23 for trading. The selling of shares is the actual trading of  
24 shares.

25 Statement number two is conjunctive. It says

1 Scottsdale is one of the few brokers that still allowed both  
2 activities, but the complaint only identifies brokers who sell  
3 penny stocks. They do not identify any brokers that allow the  
4 deposit of those shares. So it has not sufficiently alleged  
5 that the statement as written, "deposit and sale" is false.

6 The second main point, your Honor, is that the  
7 statement is not defamatory. Scottsdale urges the Court to  
8 hold the statement as inherently defamatory by implying that  
9 its business practices were not in line with others in its  
10 field but that's not the test. To say something is inherently  
11 defamatory is to say that it is defamatory per se.

12 For something to be defamatory per se, it must  
13 either hold a person up to contempt, ridicule, scorn, as to  
14 impute crime, unchastity or some sort of a loathsome disease.  
15 It's a very specific category of things that can qualify for  
16 that inherently defamatory label.

17 In *Bufalino* the Michigan Supreme Court held that  
18 saying someone is in a particular line of business is not  
19 defamatory if it's a perfectly legitimate business. Now,  
20 while Scottsdale has had some difficulty being used as a tool  
21 in pump-and-dump activity, its brokerage status, the business  
22 that it engages in is legal. It is a federally-regulated  
23 business. Saying as much, even while noting that most other  
24 brokers choose not to enter into that portion of the market,  
25 is not defamation under *Bufalino*.

1           Your Honor, we spent a few minutes speaking about  
2 the two statements individually but there is an overarching  
3 thread and element of fault that also must be addressed here.  
4 Scottsdale alleges that it's a prime figure. Now, of course,  
5 we don't make a concession here at a (C)(8) stage. You have  
6 to assume that that's true based on the pleadings. We, of  
7 course, reserve the right to challenge that if this case were  
8 to go forward. But if we're assuming that it is a private  
9 figure, then it must prove that the defendants acted  
10 negligently.

11           That means at the pleading stage, it must allege  
12 what a reasonably-prudent journalist or publisher would have  
13 done differently under the circumstances and that must be  
14 assessed in the light of the most reasonable audience here,  
15 the sophisticated readers who are familiar with that penny  
16 stock market we've been talking about. Scottsdale says it  
17 meets this requirement but it has not for at least two  
18 reasons.

19           First, it says defendants have refused to retract,  
20 correct or apologize for the challenged statements. Well, of  
21 course, as a matter of law, apologies aren't required. The  
22 issue is really retraction or correction but that's a damages  
23 question. Fault is assessed at the time of publication, not  
24 days or weeks or even months later. The failure to retract  
25 the statement could be evidence of fault only if leaving the



1 article online after receiving the retraction demand amounted  
2 to a republication.

3 All right. If it were a republication, then the  
4 very next day after receiving the retraction demand, you could  
5 point to that and say they didn't take it down, therefore it's  
6 evidence of negligence. But Michigan follows the single  
7 publication rule. The Michigan Court of Appeals has already  
8 ruled, albeit in an unpublished opinion, that leaving  
9 allegedly defamatory material on a website is not a new  
10 publication each day it remains online. Thus, the fact that  
11 the article remained online after Scottsdale issued its  
12 retraction demand is irrelevant as a matter of law on the  
13 issue of fault.

14 Next, Scottsdale relies on the Court's previous  
15 ruling that adequately pleading falsity automatically  
16 establishes fault under the doctrine of res ipsa loquitor.

17 Your Honor, I'd like to ask the Court to use this as  
18 an opportunity to revisit that ruling. We have explained in  
19 our brief why we don't believe that res ipsa applies, at least  
20 in defamation cases. It's used when the Court doesn't know  
21 and can't find out what actually happened but the injury could  
22 not ordinarily occur without the defendant acting negligently.  
23 All right, the act in and of itself speaks for itself.

24 The doctrine can't apply in defamation cases because  
25 a false statement is never automatically the result of actual

1 malice or negligence. The act of publishing the allegedly  
2 false statement can't speak for itself because the test is  
3 what a reasonable reporter and publisher would have done  
4 differently than the defendants in the same situation. It's  
5 that objectively reasonable person test as applied in the news  
6 reporting context.

7 So if a reasonable reporter or publisher would have  
8 done the same thing in this situation, then the defendants did  
9 act as the reasonable person and there would be no fault even  
10 if the challenge statements were false.

11 Your Honor, so we believe that these are reasons  
12 that the Court should dismiss both statements. I realize last  
13 time we were here, it affirmed Statement Number Two as being  
14 adequately pleaded but we think with this additional  
15 information, the Court would agree with us that both  
16 statements are inadequately pleaded.

17 Even if that's not the case, your Honor, on the  
18 sanctions issue that's been raised regarding --

19 THE COURT: Having to refile this.

20 MR. RICHOTTE: -- raising the same issues, as we  
21 pointed out in our brief, this is really just a matter of  
22 issue preservation. It's certainly not intended in any  
23 harassing way toward plaintiff so we don't think sanctions  
24 would really be appropriate in this case.

25 And of course, your Honor, if the Court does agree

1 with us, we would ask that given the number of opportunities  
2 to plead at this time, that no amendment be permitted.

3 And with that, your Honor, unless you have any  
4 questions, I'll cede the floor to Mr. Pinsky.

5 THE COURT: No questions at this point. I'll let  
6 Mr. Pinsky have his say.

7 MR. PINSKY: If it please the Court, your Honor, the  
8 defendant has raised the question of heightened scrutiny in  
9 defamation cases and quite frankly, I'm not sure what that  
10 means. I don't know is that a substantive standard or a  
11 procedural standard?

12 In any case for a judgment on the pleadings, you  
13 have to allege a statement of claim and it seems to me that we  
14 have done that, regardless of whether we say it's heightened  
15 or it's not heightened. It's the same thing. In other words,  
16 it looks like it's a concept in search of a meaning so I have  
17 no idea really what that means.

18 Now let's take Statement Number One. Defendant says  
19 that that's merely hyperbole but I think as was pointed out in  
20 the plaintiff's brief, you could make a determination as to  
21 who knew about pump-and-dump stocks and Scottsdale and who  
22 didn't. That's different than the John Gotti statement.

23 Secondly, it is true that that statement in and of  
24 itself is not false and I think the Court recognized that in  
25 the first hearing when it dismissed that claim. However, what

1 the plaintiff has done now is plead the headline, if you will,  
2 regarding this matter where it says Scottsdale was fined by  
3 FINRA for being associated with pump-and -- deposits of pump-  
4 and-dump or deposits of penny stocks.

5 I think it becomes really a question of fact whether  
6 that is false and defamatory because the juxtaposition of the  
7 two suggest that Scottsdale was fined for being associated  
8 with a pump-and-dump scheme and that, that actually is false.  
9 Now how a jury will read that or I don't know but that seems  
10 to me to be a question of fact and by pleading that headline,  
11 we have cured the fact that the initial complaint did not  
12 comply with the appropriate standards.

13 Secondly, the Statement Number Two. The Court has  
14 already decided that twice. We're in the same place with  
15 respect to Statement Number Two that we were on the -- in the  
16 initial Motion for Summary Judgment. Nothing there has really  
17 changed except defendant has raised this question of  
18 heightened scrutiny, which as I have indicated I don't really  
19 understand. I think -- I don't know what kind of meaning it  
20 has.

21 But let's assume that it means that certain facts  
22 have to be pleaded. There's a kind of a circular argument  
23 here with respect to defendant's claim and that is well, you  
24 haven't alleged negligence and therefore you can't make your  
25 claim or your claim should be dismissed.

1           On the other hand, how do we know what the reporter  
2 or whoever wrote the article did or didn't do? There's no way  
3 for us to know. All of the facts are in the control of the  
4 defendant and therefore there has to be discovery in order to  
5 find out what the defendant did or didn't do.

6           Now if the Court says you haven't pleaded it  
7 sufficiently, how in the world are we gonna get to the facts  
8 to know whether or not there was negligence or intention? So  
9 it seems to me that to dismiss this claim based on defendant's  
10 argument is premature. We should be entitled to discovery.

11           Now if all the defendant is saying is well, you  
12 didn't use the word "negligence," I mean that's easily  
13 corrected. But quite frankly, we don't know what the reporter  
14 did in this matter or didn't do. We think because we believe  
15 that the statement is false that he didn't do his due  
16 diligence so to speak and we think that that is the basis of  
17 the Court's ruling about res ipsa loquitor.

18           But until we can take depositions and documents and  
19 whatever, there is no way for -- there is no way for us to  
20 state negligent facts other than to say, look, this happens,  
21 it's false and you should have known better or you intended  
22 this.

23           So based on those reasons, we think that number one,  
24 the Statement Number One should not be dismissed because we  
25 have now sufficiently pleaded it and number two, it's simply a

1 rehash of the old arguments but if the Court wants to take  
2 into account our new argument, we think that the argument is  
3 really circular and we're entitled to discovery on that.

4 So if the Court has any questions, I'd be pleased to  
5 answer them.

6 THE COURT: Well, no. I mean in some ways, it's the  
7 third time around; certainly it's second time around in terms  
8 of looking at these statements. So any questions I think I  
9 probably had have been answered already. But yeah, no  
10 questions at this point.

11 MR. RICHOTTE: If I may, your Honor, just one thing.

12 THE COURT: Mmm-hmm.

13 MR. RICHOTTE: Our brief mentioned sanctions. I  
14 don't think the relief really requested sanctions. I think  
15 that was simply a way of saying we think that this is not a  
16 good motion but we don't really intend to ask for sanctions.

17 THE COURT: Thank you.

18 MR. RICHOTTE: Thank you, your Honor. Joe Richotte  
19 again for defendants. I do thank Mr. Pinsky for that last  
20 remark regarding the sanctions.

21 Your Honor, just a few points in response. Mr.  
22 Pinsky says that he doesn't know what the heightened standard  
23 means, that it's kind of in search of itself, if you will.  
24 But as we've outlined in our moving papers, your Honor, it is  
25 essentially and this is my own shorthand, it's the importation

1 of a fact-pleading requirement, almost like the federal Iqbal  
2 standard.

3 You have to plead your facts. It's not the  
4 traditional tort case where you come in and you say, you know,  
5 you dropped something on my foot. You injured me. You must  
6 be negligent, right? You have to be able to articulate the  
7 facts that support each one of the claims and that includes  
8 those -- or excuse me, each of those elements and that  
9 includes elements like fault which is akin to the breach of  
10 the duty of care. Right?

11 With respect to Statement Number One, I think the  
12 only issue that I'll spend time here responding to that isn't  
13 adequately perhaps briefed is on the implication of it being a  
14 question of fact that a jury should decide. Right? Can this  
15 be the implication?

16 This is why we have heightened standard at work.  
17 There is no factual allegation regarding the intent of the  
18 defendants for that implication. Right? In order for the  
19 Court to say that this is adequately pleaded to get over that  
20 First Amendment pleading standard that we advocate, you have  
21 to plead facts that would demonstrate that the implication  
22 alleged is the implication intended.

23 What facts do they have that Mr. Goode in drafting  
24 this article when he wrote this statement and the headline  
25 that goes with it, Statement Number One, intended for readers

1 to conclude what plaintiff is asking you to conclude, right,  
2 that they are actively engaged in pump-and-dump schemes? When  
3 you read the entire article which includes the links out to  
4 the source documents, right, that would be no different than  
5 if I had an article with an exhibit attached to it that was  
6 posted online or filed with the Court. That report, it's a  
7 slog, but it goes through in detail four other lawsuits that  
8 either FINRA has brought or the SEC has brought, someone has  
9 brought where either Scottsdale itself or people who work for  
10 Scottsdale either acted or failed to act in a way that allowed  
11 pump-and-dumps to move forward.

12 So if you follow this space, if you're somebody who  
13 follows penny stocks and you follow the news about penny  
14 stocks, then it won't come as a surprise to you that a company  
15 that has been named in four other lawsuits that the Securities  
16 and Exchange Commission has filed, that FINRA has filed are in  
17 some way connected in the conscious with pump-and-dumps.

18 So that's the heightened standard. Right? If  
19 you're going to require somebody to plead facts, what is it  
20 that they have to suggest that he intended that? They don't  
21 have that information.

22 With respect to Statement Number Two, Mr. Pinsky  
23 said well, what did the defendant do or he didn't do, right?  
24 The only way we can get after that is through discovery. If  
25 this were an ordinary tort case, I might agree with him. But



1 we're talking about the fault element. Right? It's not what  
2 would the defendants have done or what did they do; it's what  
3 would a reasonable person in their situation have done  
4 differently?

5 If Mr. Goode was a reporter for the *New York Times*,  
6 what would his publisher have done differently? Right? If he  
7 were, you know, the proverbial *Deep Throat*, right, and he was  
8 publishing stories, what would they have wanted him to do  
9 differently? That's something they can plead. They can plead  
10 what the test is. Right? Think of it back in the context of  
11 a regular tort case. What is the duty of care that he's  
12 alleged to have breached? But in the First Amendment context,  
13 they have to plead the facts establishing what the duty of  
14 care is. What would a reporter, what would a publisher have  
15 done differently? And of course, in the context of their  
16 audience, what would a reasonable audience have understood?

17 When in this context, a reasonable audience are the  
18 people who go to MorningLightMountain's website for  
19 information about stock trade. So it isn't just man on the  
20 street reasonable audience. It's people who actually know  
21 this space. They live it, they breathe it, they trade these  
22 stocks. So what would a reasonable publisher, a reasonable  
23 journalist have done differently to ensure that their audience  
24 didn't draw this implication.

25 Of course, they have to plead why that he intended

1 the implication. Right? We've already talked about that.

2 But assume you can get past that, what would they have done  
3 differently? That's the heightened standard of review that  
4 applies in these First Amendment cases at the pleading stage.

5 And at the very end, your Honor, when we talk about  
6 fault, I heard nothing today about *Bufalino*. This is a case  
7 that couldn't be more clear. Saying somebody works in a  
8 specific industry, specific job is not defamatory. And what  
9 they're saying is because we implied that they're the only  
10 people or one of the few remaining people who work in this  
11 space, that we've defamed them somehow, at least with respect  
12 to Statement Number Two. But that's not true because simply  
13 identifying somebody as occupying a job isn't defamatory.

14 For example, Judge, I do a lot of criminal defense  
15 work. Not a lot of people like criminal defense attorneys.  
16 Right? We help the bad guys get out of jail. Think of  
17 collections lawyers. Right? Think of the lawyers who that  
18 people just don't think of. Personal injury lawyers. Right?  
19 The ambulance chasers. But if I were to identify somebody as  
20 working in that profession and maybe it's not the most  
21 glamorous part of what we do, but it's a necessary part of  
22 what we do. It protects people's rights, it protects people's  
23 interests. It may not be popular but it doesn't mean that  
24 I've defamed them somehow, particularly if the underlying fact  
25 is true.

1                   And that's what we have here. We have facts that  
2                   are true. We have implications that aren't intended and  
3                   they're trying to say that anything we can come up with is  
4                   sufficient for pleading and that's simply not what the First  
5                   Amendment allows in this case, your Honor.

6                   Thank you.

7                   THE COURT: This is a --. I don't know. That light  
8                   has a mind of its own.

9                   This is another attempt to get ourselves, get our  
10                  heads around a defamation action being filed by Scottsdale  
11                  Capital Advisors Corp. against MorningLightMountain, LLC,  
12                  Michael Goode and John Does 1 through 10 is the caption.

13                 Scottsdale is an investment banking company that  
14                 participates in a number of things but in the most I guess  
15                 salient piece at this point, or at least apropos, they have  
16                 engaged in so-called penny stock trading. In 2017, so almost  
17                 two years ago, MorningLightMountain in its website, looks like  
18                 *Good Trades.com*, published an article that Scottsdale alleges  
19                 is defamatory. It claims the article actually contained  
20                 several false comments and originally there were I think four  
21                 defamatory statements that occurred over a period of time.

22                 Through an earlier Motion for Summary Disposition,  
23                 this Court indicated that two of those were not defamatory and  
24                 that the defendants were entitled to, in essence, summary  
25                 disposition as to those items. The Court did allow plaintiff

1 opportunity to further amend their complaint with regard to  
2 two of the alleged statements to clarify possible defamatory  
3 action as relates to those.

4 Those quotes actually have been cited by both  
5 parties already during these proceedings, one being, quote, if  
6 you have followed penny stocks and pump-and-dumps for a few  
7 years, then you know Scottsdale Capital Advisors. The second  
8 one being, they, Scottsdale, are one of the few brokers left  
9 that are -- that have continued to allow the deposit and sale  
10 of shares of illiquid penny stocks. Larger brokers and  
11 discount brokers stopped allowing that over five years ago,  
12 close quote.

13 After the first round of the Motion for Summary  
14 Disposition, plaintiffs amended their complaint to  
15 specifically allege those two statements as defamatory, in  
16 essence jettisoning the other claimed defamatory statements  
17 which, of course, found could not establish a cause of action  
18 as they were pled and as the facts of the case appeared to the  
19 Court at that particular time, although it was a (C)(8)  
20 motion, I believe.

21 In any event, the second complaint, the second  
22 amended complaint is now being tested again by the defendants  
23 under 2.116(C)(8) basically arguing that as pled there is no  
24 way that a cause of action can be supported based on the  
25 pleading as it presently stands.

1           In this matter today, the defendants have raised a  
2 number of issues with regard to how the Court analyzes the  
3 question of fault and whether, in fact, on its face the  
4 complaints, the two counts in the complaint satisfy the  
5 elements necessary to establish defamation.

6           There's the initial arguments that were raised with  
7 regard to whether there is -- this is a public or a private  
8 entity and therefore subject to under the First Amendment  
9 analysis subject to heightened scrutiny for defamation. And  
10 then there is as counsel for the defendant notes a more  
11 overarching question of establishing the necessary element of  
12 negligence with regard to the defamation matter.

13           Basically this Court in reviewing the submission and  
14 arguments that have been raised in this round would note that  
15 while res ipsa loquitor is an attractive analysis for purposes  
16 of trying to get at whether a particular matter is breached,  
17 an element necessary to establish defamation, this Court is  
18 not comfortable with the fact that at least as I can discern,  
19 there is not a body of case law that would allow the Court to  
20 use that in this particular context.

21           Basically looking at this from the standpoint of  
22 journalistic activity, if the elements with regards to  
23 negligence can be established simply because the statement was  
24 false or in some ways defamatory, this Court would in essence  
25 be providing in essence a strict standard with regard to

1 publication of articles, in essence requiring that the  
2 journalist, the writer, in essence take responsibility for  
3 what I would characterize as innocence misreporting or in the  
4 larger context simply bad reporting related to events and  
5 individuals.

6 I think that there is a need to establish some  
7 intentionality on the part of the writer to really satisfy  
8 that prong of a defamation action, particularly when we are  
9 talking about one of the, I think, bedrock of our system,  
10 namely the First Amendment to the Constitution. And as  
11 defense counsel notes, if we simply look at these two  
12 statements from the standpoint of establishing a  
13 intentionality on the part of the author that goes above  
14 simply writing a poor article or not engaging in sufficient  
15 research to get a totally accurate picture with regard to the  
16 plaintiff. If we look at it from that lens, then I have to  
17 agree that something more is required in the pleading to  
18 support a notion of defamatory action on the part of the  
19 defendant journalist.

20 That ultimately means that while plaintiff notes  
21 that they may not necessarily have a clear picture as to the  
22 motivation of the journalist in writing the article, I believe  
23 it is incumbent on them to at least connect the dots in that  
24 respect lest all journalists be subject to possible defamation  
25 acts anytime they misprint, misread or simply write any

1 article that can be interpreted by the subject of the article  
2 as being defamatory.

3 It is not, I believe, the status of the law that  
4 says simply because something is unflattering that that could  
5 and should subject the writer to libel or slander claims by  
6 the subject of the article. Something more is required. And  
7 something more I believe is required in the pleadings to at  
8 least allege that that is something to be proven. If it can  
9 be proven, obviously through discovery you can prove it. If  
10 it's not provable, then quite frankly, the plaintiff is not  
11 entitled to have in essence the defendant saddled with the  
12 quote, unquote, falsity simply because it's later proven that  
13 somehow the statement was not totally accurate.

14 It is a fairly high mountain to climb as far as the  
15 plaintiff is concerned but I believe that as most litigation  
16 that comes before this Court requires that the parties  
17 establish facts as a basis for their conclusions and their  
18 positions. I think that that is the appropriate burden, if  
19 you will, to place on the plaintiff in this matter.

20 So regardless of the truth or falsity of the  
21 statements, if in fact the plaintiff believes that there is a  
22 cause of action related to the writings of this particular  
23 journalist, it is incumbent upon them in the complaint to  
24 specify why they think that this action was either reckless or  
25 negligent or some facts that would establish the causation

1 with regard to this particular journalist and this particular  
2 article and these particular statements.

3 So in one sense, this Court is revisiting the  
4 earlier ruling allowing res ipsa to be a part of the elements  
5 that are to establish defamation. I am reversing that opinion  
6 and indicating that it is a requirement plaintiff establish  
7 the necessary elements of negligence in their pleadings in  
8 order to proceed with those claims.

9 For that reason, the Court is going to grant the  
10 motion for summary disposition as relates to these two claims.  
11 The Court is not, given the fact of the Court's prior ruling  
12 and my ruling today, the Court is not going to deny the  
13 plaintiff an opportunity to fashion a complaint that does  
14 comport with this Court's rulings relating to establishing at  
15 least some factual basis for negligence that can be explored  
16 in the litigation process and in that respect I will provide  
17 21 days for plaintiff to fashion an amended complaint if they  
18 so desire.

19 I guess Mr. Richotte, you can prepare the order.

20 MR. RICHOTTE: All right. Thank you, your Honor.

21 THE COURT: Thank you.

22 (At 3:27 p.m., proceedings concluded)  
23  
24  
25



1 STATE OF MICHIGAN )  
2 )  
3 COUNTY OF KALAMAZOO )

4 I certify that this transcript, consisting of 25 pages, is a  
5 complete, true, and correct transcript of the proceedings and  
6 testimony taken in this case on Friday, December 14, 2018.

7 *Nancy J. Mitchell*

8  
9 December 20, 2018

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