IN THE COURT OF APPEALS
STATE OF MICHIGAN

SCOTTSDALE CAPITAL ADVISORS CORPORATION,

Plaintiff-Appellee,

v.

MORNINGLIGHTMOUNTAIN, LLC, MICHAEL GOODE, and DOES 1-10,

Defendants-Appellants.

Docket no. 348702
Kalamazoo County Circuit Court
Case No.: 2018—0153-CZ
Hon. Alexander C. Lipsey

APPELLEE'S ANSWER TO APPELLANTS' APPLICATION TO PURSUE AN INTERLOCUTORY APPEAL

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Pursuant to MCR 7.205(C), Plaintiff-Appellee Scottsdale Capital Advisors Corp. ("Scottsdale"), submits its Answer to Defendants-Appellants MorningLightMountain, LLC and Michael Goode's (collectively, "Defendants") Application for Leave to Appeal (the "Application").

JURISDICTION

The jurisdictional summary provided by Defendants in their Application is complete and correct.

COUNTER-STATEMENT OF QUESTION INVOLVED

1. Did the trial court commit reversible error by denying Defendants' motion for summary disposition?

COUNTER-STATEMENT OF FACTS[1]

This action arises from Defendants' publication on www.goodetrades.com of an article that Scottsdale believes is false, defamatory, and highly misleading (the "Article").[2] The Article, titled "FINRA fines Scottsdale Capital Advisors $1.5 million," opened with the sentence "If you have followed penny stocks and pump and dumps for a few years then you know Scottsdale Capital Advisors."[3] Scottsdale alleges that this juxtaposition leads the reader to immediately conclude that Scottsdale was fined by FINRA for pump and dump activity, when, in fact, it was not.[4]

Scottsdale filed its initial complaint in this action on April 16, 2018.[5] It filed its First Amended Complaint ("FAC") on April 20, 2018 in order to fix a minor error in the initial complaint.[6]

[1] Concurrent herewith, Scottsdale has filed a Motion to Strike the numerous non-conforming portions of Defendants' Application, including the Defendants' Statement of Facts.
[2] Third Amended Complaint ("TAC") at ¶ 2 (Appx. 799a).
[3] Attachment to Answer to TAC (Appx. 823a).
[4] TAC at ¶ 22 (Appx. 803a).
[5] Register of Actions at 1 (Appx. 16a).
[6] *Id*.

On June 7, 2018, Defendants filed a Motion for Summary Disposition of the FAC,[7] which was denied by the trial court on October 4, 2018.[8]

On October 25, 2018, Defendants filed a Motion for Reconsideration, which was denied on the same day.[9]

On November 8, 2018, Scottsdale filed its Second Amended Complaint ("SAC"), which again alleged that the statement "If you have followed penny stocks and pump and dumps for a few years then you know Scottsdale Capital Advisors" (the "Statement") was defamatory when read in context of the Article.[10]

On November 14, 2018, Defendants filed a Motion for Summary Disposition of the SAC, which was heard by the trial court on December 14, 2018.[11] At the hearing, the trial court held that Scottsdale had sufficiently alleged that the Statement was defamatory, but granted Defendants' motion because Scottsdale had not pleaded "the necessary elements of negligence in their pleadings."[12] The Court granted Scottsdale leave to "fashion a complaint that does comport with this Court's rulings relating to establishing at least some factual basis for negligence that can be explored in the litigation process."[13]

On January 16, 2019, Scottsdale filed its operative Third Amended Complaint ("TAC"), in which it alleged additional facts to establish that Defendants negligently published the Statement, including:

> 22. At a minimum, Defendants were negligent in creating the implication in False Statement #1 that FINRA fined SCA $1.5 million for participating in illegal pump and dump schemes. In the Article, Defendants cite to a Stockwatch article and a 111-page FINRA decision as support for False Statement #1, but a plain

[7] Motion for Summary Disposition of FAC (Appx. 273a).
[8] Order Denying Motion for Summary Disposition of FAC (Appx. 6a).
[9] Motion for Reconsideration (Appx. 509a); Order Denying Motion for Reconsideration (Appx. 3a).
[10] See generally SAC & SAC at ¶ 13(a) (Appx. 575a-577a).
[11] Motion for Summary Disposition of SAC (Appx. 757a).
[12] Transcript of Hearing at 20:13-20; 24:3-8 (Appellee's Appendix 24b).
[13] *Id*. at 24:9-18 (Appellee's Appendix 24b).

> reading of both of these documents indicates that FINRA fined SCA for selling securities without registration and without an exemption, as required by FINRA Rule 2010, and not for participating in illegal pump and dump schemes. A reasonable journalist reads the documents he cites and would not report, or imply that, a fine for procedural noncompliance is the equivalent of a fine for intentional pump and dump activity.
>
> 23. Defendants intended, or acted with reckless disregard for the truth, to cause the reasonable reader to read False Statement #1 and conclude that FINRA fined SCA $1.5 million for participating in illegal pump and dump schemes by juxtaposing certain facts together and by purposefully omitting that the FINRA fine was for SCA "violat[ing] FINRA Rule 2010 by selling securities without registration and without an exemption."
>
> 24. Defendants were also negligent in making False Statement #1. Defendants, as journalists in the penny stock industry, knew or should have known that SCA has not been charged by any regulatory agency with involvement in a "pump and dump" scheme, has never been fined for its involvement in a "pump and dump", and has never been either identified or known as being involved in the illegal pump and dump of penny stocks. Defendants had no reason to conclude that followers of penny stock pump and dumps would have any knowledge of SCA, yet published a statement specifically to that affect.
>
> 25. Defendants intended, or acted with careless disregard for the truth, to cause the reasonable reader to read False Statement #1 and conclude that SCA is such a major player in penny stock pump and dumps that it is commonly associated with such activity.[14]

On January 29, 2019, Defendants filed a Motion for Summary Disposition of the TAC which (1) alleged Scottsdale failed to plead the requisite fault standard, (2) realleged that Scottsdale failed to state a claim for defamation, and (3) alleged for the first time that Scottsdale's defamation claim is barred as a matter of law based on the substantial truth defense and public interest privilege.[15]

On March 26, 2019, the trial court denied Defendants' Motion for Summary Disposition of the TAC.[16]

Defendants' Application followed.

[14] TAC at ¶¶ 22-25 (Appx. 802-803a).
[15] Motion for Summary Disposition of TAC (Appx. 990a).
[16] Order Denying Motion for Summary Disposition of TAC (Appx. 1a).

ARGUMENT

A. The Trial Court Correctly Held That Scottsdale's Complaint Is Not Subject To A Heightened Pleading Standard

MCR 2.111(B)(1) provides that a complaint must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." "The purpose of any requirement of specificity in pleadings is to provide a defendant with sufficient notice to prepare a defense to the charges." *Belobradich v. Sarnsethsiri*, 131 Mich. App. 241, 247, 346 N.W.2d 83, 86 (1983).

Defendants argue that courts must apply a heightened pleading standard to defamation actions "because of the constitutional implications for free speech." (Application, p.7). Defendants are wrong, and no Michigan court has made such a holding. In order to reach their incorrect conclusion, Defendants stitched together a string of tangentially related cases and citations in the hopes of misleading the Court. Defendants' arguments unravel upon inspection.

Defendants cite *Bose Corp. v. Consumers*, 466 U.S. 485 (1984) for the proportion that "[i]n defamation actions, courts have a special heightened duty to review the sufficiency of the allegations before them because of the constitutional implications for free speech." (Application, p.7). ***Bose Corp.* says nothing about the pleadings in a defamation case.** Moreover, Defendants already acknowledged that *Bose Corp.* "does not set [] a higher pleading standard." (Defendants' Reply in Support of Motion for Summary Disposition of FAC) (Appx. 504a). Similarly, the very next case cited by Defendants, *Gonyea v. Motor Parts Fed. Credit Union,* 192 Mich. App. 74 (1991), says nothing about the First Amendment.

Defendants continue in this vein, incorrectly claiming that a concurring opinion by Justice Riley in *Rouch v. Enquirer News,* 440 Mich. 238 (1992) established a higher pleading standard for defamation cases. (Application, p.8). Defendants are wrong. Justice Riley simply applied the notice requirements of MCR 2.111(B)(1) to a defamation claim. *See Rouch*, 440 Mich. at 221; *see also Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.*, 197 Mich. App.

48, 53, 495 N.W.2d 392, 394 (1992) ("Justice Riley relied, in part, on MCR 2.111(B)(1), which 'requires plaintiffs to state in their pleadings '[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.'"). The notice pleading requirement for a defamation action is no different than the specificity requirements in pleading a claim for medical malpractice. *See Porter v. Henry Ford Hosp.*, 181 Mich. App. 706, 709, 450 N.W.2d 37, 39 (1989) ("the degree of specificity required in setting forth a medical malpractice action flows from the circumstances and nature of the case, rather than from any objective heavier burden of pleading").

Justice Riley merely stated that defamation claims should be pleaded with a level of specificity consistent with MCR 2.111(B)(1)—which is exactly what the trial court held in this matter. (Order Denying Motion for Summary Disposition of FAC, p.5) (Appx. 10a) ("[T]his Court should not implement a higher standard as the Defendant suggests, but instead maintain a normal course of action regarding MCR 2.116(C)(8) that reviews only pleadings for legal sufficiency in light of the alleged wrongdoing.").

Defendants' claim of a heightened pleading standard is therefore without merit.

B. <u>The Trial Court Examined The Full Article</u>

Defendants' next line of argument is equally incorrect. Defendants claim that the trial court declined to consider the FINRA Decision in deciding to deny Defendants' motion. Defendants are incorrect. **The trial court considered the FINRA Decision**, and held that the allegations therein were not dispositive for ruling on Defendants' motion. (Transcript of Hearing on Motion for Summary Disposition of the TAC) (Appx. 49a) ("[the FINRA Decision] is rather elaborate and had a whole lot of matters that don't necessarily touch on this particular issue [of falsehood], all of those are considerations that the Court might well determine in a (C)(10) motion as dispositive of this proceeding, **but I am not considering this as dispositive in a (C)(8) proceeding**"). In other words, the trial court considered the FINRA Decision and held it was not dispositive for determining Defendants' motion.

Even if the trial court did not consider the FINRA Decision (which it did), Defendants are incorrect that a hyperlink in the Article automatically brought the entire FINRA Decision within the four corners of the publication. Defendants fail to cite a single court case in Michigan or elsewhere that has made such a sweeping proposition.

Defendants' reliance on *Adelson v. Harris*, 973 F. Supp. 2d 467 (2013) is not just misplaced; it is deceptive and misleading. Contrary to Defendants' argument, the court in *Adelson* did **not** hold that "links embedded in online articles are the functional equivalent of attachments." (Application, pp.9-10). Rather, a hyperlink in an online article is merely the equivalent of a footnote **for purposes of attribution**. *Adelson*, 973 F. Supp. 2d at 484 ("The hyperlink is the twenty-first century equivalent of the footnote **for purposes of attribution** in defamation law, because it has become a well-recognized means for an author or the Internet to attribute a source.") (Emphasis added). Other decisions are in accord. *See e.g., Doctor's Data, Inc. v. Barrett*, 170 F. Supp. 3d 1087, 1137 (N.D. Ill. 2016) ("A hyperlink, however, does not duplicate the content of a prior publication; rather, it identifies the location of an existing publication and, if selected, instructs a search engine to retrieve that publication."); *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012) (finding that although a hyperlink facilitated access to a webpage, it did not amount to a restatement of the allegedly defamatory material on that webpage).

Because the trial court considered the FINRA Decision, this cannot be a basis for overturning the lower court's ruling.

C. The Article Is Provably False

The Article leads the reader to understand that Scottsdale is actively involved in pump and dump schemes and was recently fined by FINRA for such involvement. This is provably false, because Scottsdale has never been fined for its involvement in a pump and dump scheme.

While a media defendant is not "liable for the reader's possible inferences, speculations, or conclusions, where the defendant has not made or directly implied any provably false factual assertion," a media defendant is liable if it has "by selective omission of crucial relevant facts,

misleadingly conveyed any false factual implication." *Locricchio v. Evening News Ass'n*, 438 Mich. 84, 144, 476 N.W.2d 112, 139 (1991) (Cavanaugh, C.J., concurring).

The primary case that Defendants rely upon, *Komarov v. Advance Magazine Publ'rs, Inc*., 691 N.Y.S.2d 298 (NY Sup. Ct. 1999), is easily distinguished. In *Komarov*, the court held that an author's comment during an interview about the plaintiff being as "well known" in his community as John Gotti, "especially read in the context of the article [at issue], where the author was clearly trying to elicit a response from [a close associate of the plaintiff about his relationship with the plaintiff]," was "clearly understood as conjecture." *Id.* at 302. The facts of *Komarov* are in stark contrast to those here, in which Defendants falsely implied that Scottsdale was fined for its involvement in pump and dumps. Defendants did not conjecture anything; they merely published falsehoods.

Defendants' attempt to characterize the implication that Defendants were fined for involvement in pump and dumps as mere "hyperbole" makes no sense. Defendants falsely accused Scottsdale of being fined $1.5 million for its purported involvement in criminal pump and dump schemes, when, in fact, Scottsdale was fined for mere regulatory violations. Defendants are peddling falsehoods, not hyperbole.

Defendants caustically try to dismiss Scottsdale's ability to proffer expert testimony based upon polling as a "gameshow" and "mindreading." (Application, p.11). In fact, expert polling is a tried and true method for determining public awareness and knowledge. *See e.g., Southland Sod Farms v. Stover Seed Co*., 108 F.3d 1134, 1143, n.8 (9th Cir. 1997) ("as long as they are conducted according to accepted principles, survey evidence should ordinarily be found sufficiently reliable under *Daubert*"); *Schering Corp. v. Pfizer Inc*., 189 F.3d 218, 227 (2d Cir. 1999) ("The great majority of surveys admitted in this Circuit, including those used in Lanham Act cases to establish actual confusion or secondary meaning, fall into this category: they poll individuals about their presently-existing states of mind to establish facts about the group's mental impressions."); *Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 432, 437 (D. Md. 2005), *aff'd*, 162 F. App'x 231 (4th Cir. 2006) ("The Court holds that expert testimony is

required with respect to the state of common knowledge of smoking hazards during the smoking career of a plaintiff and that that testimony must be rendered by competent experts.").

The Article is provably false and Scottsdale can and will prove its falsity at trial. Consequently, the Court should deny the Application.

D. <u>The Statement Is Not Substantially True</u>

Defendants devote the majority of their Application to arguing that the Statement is substantially true. A substantial truth defense requires that the gist or sting of the statement be true. *Collins v. Detroit Free Press*, 245 Mich. App. 27, 33 (2001). Here, the gist of the Statement—that Scottsdale was fined $1.5 million for its involvement in a pump and dump scheme—is demonstrably false.

1. Defendants Mischaracterize The Article

Defendants argue that Scottsdale conflates committing fraud with being a tool of fraud. (Application, p.12). Defendants are grasping at straws, as the Article falsely implies that Scottsdale was fined $1.5 million for its involvement in a pump and dump scheme, when, in fact, it was fined for a purported violations of Section 5 of the Securities Act relating to the sale of unregistered securities.

Defendants proffer their own slanted (and quite frankly, disingenuous) reading of the FINRA Decision to argue that the Article is substantially true. (Application, pp. 13-14). Although Defendants accused the trial court of not reading the Statement in the context of the entire Article, it is the Defendants who have curated selective quotes from the FINRA Decision in order to cast false aspersions on Scottsdale. On a motion for summary disposition, this is entirely improper, as "[a]ll factual allegations in support of the claim are accepted as true [and] any reasonable inferences or conclusions which can be drawn from the facts [must be] construed in the light most favorable to the nonmoving party." *Ben-Tech Indus. Automation v. Oakland Univ.*, No. 247471, 2005 WL 50131, at *2 (Mich. Ct. App. Jan. 11, 2005). This Court should not dismiss Scottsdale's lawsuit based upon Defendants' selective and misleading recitation of facts.

Hawkins v. Mercy Health Servs., Inc., 230 Mich. App. 315, 335, 583 N.W.2d 725, 734 (1998), is instructive. In *Hawkins*, the court held that a news release stating that a nurse had been terminated for her involvement in administering an overdose was not substantially true because the nurse had actually been terminated for denying that she participated in a conversation criticizing a doctor's standard of care. "Looking at the evidence in a light most favorable to [the nurse] it was erroneous to conclude as a matter of law that the implication created by the [news] release would have the same effect on the mind of the audience as would a statement accurately identifying the reasons underlying the discharge." *Id.*

Hawkins is similar to the fact pattern here, as Defendants stated that Scottsdale was punished for actions that were worse than what actually occurred. Defendants falsely wrote and published that Scottsdale was fined for affirmative intentional actions (pump and dump schemes) when it was actually fined for administrative negligence (believing it qualified for an exemption to the requirement to be registered to sell securities). When the allegations in the TAC are viewed in a light most favorable to Scottsdale, it would be erroneous to conclude as a matter of law that the implications created by the Statement would have the same effect on the mind as a statement that accurately identified the reasons for FINRA's fine.

2. Defendants Attempt To Rewrite The Article

Defendants try to manufacture a new narrative by claiming that "the central thrust of the Article" was "a company—with a history of being used as a tool to execute pump-and dump schemes because of its repeated failure to take its gatekeeping function seriously—was fined $1.5 million for yet again not doing its job to adequately safeguard the investing public." Application, p.15). Defendants are trying to rewrite the Article, as it says nothing about "gatekeeping" or "safeguarding the investment public." Instead, the Article contains a lengthy quote from the FINRA Decision that makes no mention of pump and dumps whatsoever (much less anything about Scottsdale having a history of being used as a tool to execute pump and dump schemes). (*See* Attachment to Answer to TAC) (Appx. 823a). To be clear: the Article does not mention Scottsdale's purported gatekeeping function, nor its purported failure to take

that function seriously, nor Scottsdale being fined because it did not adequately safeguard the investing public. The central thrust of the Article cannot be allegations that are not mentioned in the Article.

3. Defendants Falsely Accused Scottsdale Of Criminal Activity

In its Opposition to Defendants' Motion for Summary Disposition of the TAC, Scottsdale stated, "Defendants' inference of criminal conduct is not protected hyperbole." (Appx. 1028a). Scottsdale stands by that statement. Defendants, however, have plucked the forgoing statement from the pleadings and use it to explore a tangent about whether FINRA is a civil or criminal authority, and whether Defendants are liable for false inferences made by their readers. Defendants are, yet again, playing fast and loose with the facts and the law.

As an initial matter, the quote about Defendants' "inference of criminal conduct" was expressly made with regard to hyperbole. (Opposition to Motion for Summary Disposition of the TAC) (Appx. 1028a). Defendants disingenuously use this out-of-context statement to launch a series of *ad hoc* attacks regarding the $1.5 million FINRA fine.

Second, contrary to Defendants' argument, Scottsdale does not allege that FINRA fined it for criminal activity. Indeed, the very basis for this lawsuit is Defendants' false inference that Scottsdale was part of an illegal pump and dump scheme. Pump and dump schemes are routinely the subject of criminal indictments. *See e.g., People v. Thompson,* 51 Misc. 3d 693, 28 N.Y.S.3d 237 (N.Y. Sup. Ct. 2016); *United States v. Parris*, 573 F. Supp. 2d 744, 746 (E.D.N.Y. 2008).

Third, FINRA is **not** seeking to hold Defendants liable for "every defamatory implication a reader might draw" from the Article. (Application, p.16). Rather, Scottsdale seeks to hold Defendants liable for the inferences of criminal conduct and wrongdoing, which are **reasonably inferred** from the Statement. *See Hodgins v. Times Herald Co*., 169 Mich. App. 245, 253–54 (1988) ("Direct accusations or inferences of criminal conduct or wrongdoing are not protected as opinion. There is no First Amendment protection for a charge which could reasonably be understood as imputing specific criminal conduct or other wrongful acts.").

The Statement reasonably inferred that Scottsdale was involved in criminal conduct, which is false. The Statement is, therefore, defamatory, and the Application should be denied.

4. Defendants Falsely Implied That Scottsdale Was Fined For Its Involvement In A Pump And Dump Scheme

The implication that Scottsdale was fined $1.5 million for its involvement in a pump and dump scheme is not substantially true. Defendants try to justify their false Statement by claiming there is a distinction between committing fraud and being a tool of fraudsters, and that a person who followed pump and dump schemes would know the difference. (Application, p.17). According to Defendants, "the reasonable audience would understand Scottsdale was *legally culpable* for frauds perpetrated on the market." (*Id*.) (Emphasis in original). By this argument, Defendants are doing the exact same thing they previously accused Scottsdale of doing: being mindreaders of what the "reasonable audience would understand." Moreover, and of greater importance, Defendants' accusation is false. Scottsdale was legally culpable for a Section 5 violation—not for any fraud perpetrated on any market. (*See* FINRA Decision attached to Answer to FAC) (Appx. 969a) ("The Firm [Scottsdale] violated FINRA Rule 2010 because, in connection with the transactions at issue, it did not have a reasonable basis for an exemption. Selling securities without registration and without an exemption violated Section 5.").

The gist and sting of the Statement is that Scottsdale is a renegade firm that was fined $1.5 million for its participation in a criminal pump and dump scheme. This is false, defamatory, and actionable. Consequently, the Application should be denied.

E. <u>The Statement Is Not Protected By The Fair Comment Privilege</u>

Defendants argue that their defamation of Scottsdale is protected by the fair comment privilege, which allows for honest expression of opinion based upon true facts. *Detiz v. Wometco West Mich. TV*, 160 Mich. App. 367 (1987). Defendants' argument fails as a matter of law.

The Statement and its false implications are not matters of opinion, but false statements of fact. The FINRA Decision (on which Defendants allege to report) clearly stated that FINRA

fined Scottsdale for an administrative failure: Scottsdale did not have the proper registration and it did not fall into an exemption. (FINRA Decision attached to Motion for Summary Disposition of the TAC) (Appx. 969a) To "opine" that Scottsdale was fined for pump and dump activity is not an opinion based on true facts. It creates a new fact.

Moreover, Defendants misrepresent legal authority. The case of *Dadd v. Mount Hope Church*, 486 Mich. 857, 780 N.W.2d 763 (2010) did **not** concern the fair comment privilege at all, and the alleged quote from *Dadd* in Defendants' brief that "a plaintiff must prove untruth and actual malice" (Application, p.18) is incomplete, inaccurate, and confuses the issues. The actual complete quote from *Dadd* comes from *Van Vliet v. Vander Naald*, 290 Mich. 365, 371, 287 N.W. 564 (1939): "Where it appears that the occasion is subject to a qualified privilege, the burden is upon the plaintiff to prove the untruth of the statements and actual malice." *Dadd*, 486 Mich. 857, 857 n.1. In other words, **the issue of malice only arises if a privilege applies**. Here, the privilege does not apply, and no showing of malice is required.

Defendants' argument that Scottsdale must plead malice in order to overcome the fair comment privilege is, therefore, backwards. Because the privilege does not apply, malice need not be shown or pleaded. Defendants' argument that Scottsdale must plead malice because they intend to assert the fair comment privilege would upend decades of defamation jurisprudence by requiring every plaintiff—including private figures—to plead malice in order to overcome the fair comment privilege. Defendants' attempt to impose a new standard for pleading defamation is baseless and should be rejected.

F. <u>The TAC Sufficiently Pleads Fault</u>

"The negligence standard under Michigan law is understood to measure whether a defendant's actions were those of a 'reasonably careful journalist' or 'reasonably careful publisher.'" *Compuware Corp. v. Moody's Inv'rs Servs., Inc.*, 371 F. Supp. 2d 898, 902 (E.D. Mich. 2005) (*citing Michigan Microtech, Inc. v. Federated Publ'ns, Inc.,* 187 Mich. App. 178, 466 N.W.2d 717, 722 (1991)).

Here, the TAC clearly states that Defendants acted negligently because "a reasonable

journalist reads the documents he cites and would not report, or imply that, a fine for procedural noncompliance is the equivalent of a fine for intentional pump and dump activity." (TAC ¶ 22) (Appx. 803a). Although the Article linked to the FINRA Decision, a plain reading of that document indicates that FINRA fined SCA for selling securities without registration and without an exemption, as required by FINRA Rule 2010—**not** for participating in illegal pump and dump schemes. (Attachment to Answer to FAC) (Appx. 162a-272a). Defendants, therefore, were negligent because they failed to give "a full and accurate account of the relevant facts" regarding the decision upon which they claimed to reporting. *In re Thompson*, 162 B.R. 748, 770 (Bankr. E.D. Mich. 1993).

Defendants wrongly surmise, "Scottsdale would presumably have the Court draw the inference that Goode did not read the FINRA Decision." (Application, p.19). Not quite. Based upon the false representations in the Article, Defendants either did not read the FINRA Decision, or read it and recklessly chose to misrepresent the allegations therein. Either way, they did not act with reasonable care.

Finally, Defendants argue that their readers are well versed in the microcap market and would conclude that Scottsdale was the means by which a pump and dump was accomplished, not that Scottsdale engaged in illegal activity. (Application, p.20). Notwithstanding that Defendants are again hypothesizing what their readers would think, Defendants' conclusion is contrary to the implication created by Defendants that Scottsdale was fined $1.5 million for its involvement in a pump and dump scheme, which is false.

The TAC expressly pleads fault, and cannot be the basis for overturning the trial court's order.

G. Leave To Amend Should Be Granted If Necessary

Leave to amend a pleading "shall be freely given when justice so requires." MCR 2.118(A)(2). "Michigan's court rule regarding the amendment of pleadings provides for a liberal handling of requests to amend." *Clapham v. Yanga*, 102 Mich. App. 47, 52 (1980).

Should the Court determine that the TAC is somehow lacking, Scottsdale respectfully requests an opportunity to amend.

CONCLUSION

As demonstrated herein, the trial court did not err by denying Defendants' Motion for Summary Disposition. The Application should, therefore, be denied.

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Dated: May 16, 2019

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