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 MOTION TO STRIKE NON-CONFORMING PORTIONS OF APPELLANTS' APPLICATION TO PURSUE AN INTERLOCUTORY APPEAL

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Pursuant to MCR 7.211(E)(2)(c) and MCR 7.212(I), Plaintiff-Appellee Scottsdale Capital Advisors Corporation ("Scottsdale") moves this Court for an order striking the nonconforming portions of Defendants-Appellants MorningLightMountain LLC and Michael Goode's ("Defendants") Application to Pursue an Interlocutory Appeal ("Application") or requiring Defendants to immediately file a supplemental application correcting their deficiencies.

I. INTRODUCTION

Defendants' Application contains pages of allegations that do not conform to the relevant Michigan Court Rules for appellate briefs. The Court should strike these nonconforming portions of the Application.

First, **MCR 2.302(H)(3)** provides, "On appeal, only discovery materials that were filed or made exhibits are part of the record on appeal." In violation of this Rule, the Application cites to and references information that is not contained in the record.

Second, **MCR 7.212 (C)(6)** provides, "All material facts, both favorable and unfavorable, must be fairly stated without argument or bias. The statement must contain, with specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." In violation of this Rule, the Application fails to include unfavorable facts, and it states other facts with extreme bias. In addition, the Application alleges numerous facts and argument without citing to the transcript, the pleadings, or other document or paper filed with the trial court.

Third, **MCR 7.210(A)(1)** provides, "In an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced." In violation of this Rule, the Application cites to and references information that is not contained in the record. In

addition, the Application alleges numerous facts and argument without citing to the transcript, the pleadings, or other document or paper filed with the trial court.

When a party, such as Defendants, violates MCR 2.302(H)(3), MCR 7.212 (C)(6), or MCR 7.210(A)(1), the Court is empowered own its own initiative or on a party's motion, to strike the offending brief or to require the filing of a corrected brief. *See* MCR 7.212(I). Scottsdale hereby requests an order striking the nonconforming portions the Application.

II. THE "ALLEGATIONS OF ERROR" SHOULD BE STRICKEN FOR VIOLATING MCR 7.212(C)(6)

MCR 7.212(C)(6) is clear that an appellant's statement of facts must include "[a]ll material facts, both favorable and unfavorable" and that the facts must be fairly stated without argument or bias. MCR 7.212(C)(6) further requires that the facts cite to specific page references in the transcript, the pleadings, or other document or paper filed with the trial court.

Here, Defendants have included a section in their Application entitled, "Allegations of Error" that does not comply with MCR 7.212(C)(6), as it is neither unbiased nor does it cite to the record. (Application, pp.VIII-X). Defendants' Allegations of Error only includes facts that are favorable to Defendants and recasts potentially unfavorable facts as argument and with bias. The specific portions of the Application that fail to comply with MCR 7.212 (C) and should be stricken include:

- "Failed to Apply Heightened Scrutiny to the Third Party Complaint." (Application, p.VIII);
- "The trial court erroneously denied the motion for the following reasons." (Application, p.VIII);
- "The trial court declined to apply the heightened standard, erroneously believing that it applies only in public-figure defamation actions despite Defendants providing caselaw showing that it also applies to private-figure claims." (Application, p.VIII);

- "Failed to Consider the Statement in Context."
(Application, p.VIII);

- "The trial court declined to consider the entire Article, which Defendants attached to their Answer. Thus, it failed to consider the Statement in full context, as required under *Sanders* v. *Evening News Association,* 313 Mich. 334, 340 (1946), and *Croton* v. *Gillis,* 104 Mich. App.104,108 (1981)."
(Application, p.VIII-IX);

- "Failed to Address Rhetorical Hyperbole Argument."
(Application, p.IX);

- "The Statement hyperbole that isn't provably false as a matter of law. The trial court failed to address this argument."
(Application, p.IX);

- "Failed to Apply the Substantial Truth Doctrine."
(Application, p.IX);

- "The article in which the Statement appears is based upon a decision from the Financial Industry Regulatory Authority ("FINRA Decision"), which recounts how Scottsdale facilitated pump-and-dump schemes in the penny stock market through culpable nonfeasance. Although the trial court had previously ruled that the challenged statement was substantially true, it incorrectly permitted an amended complaint that did not cure this defect by pleading material falsity."
(Application, p. IX);

- "Although the Statement is neither false nor defamatory on its face, Scottsdale also alleges that the Statement is defamatory by implication. The Complaint does not plead a factual basis for Scottsdale's alleged implication. Nor does it plead sufficient facts that, if proved, would show that Defendants intended that implication. And, in any event, the alleged implication is substantially true. The trial court failed to address these arguments."
(Application, p.IX);

- "Failed to Apply the Fair Comment Privilege."
(Application, p.X);

- "Erroneously Held that Scottsdale Adequately Pleaded Fault."
(Application, p.X);

- "Scottsdale has not pleaded facts that, if proved, would establish that Defendants knew the Statement was false or entertained serious doubts about the truth of the publication. The trial court failed to address Defendants'

argument that Scottsdale had failed to adequately plead an unprivileged publication to a third party."
(Application, p.X);

- "The trial court erroneously held that the Complaint satisfies these requirements."
(Application, p.X).

All of the foregoing statements are biased and made without citation to the record. They should, therefore, be stricken.

III. THE "GROUNDS FOR APPEAL" SHOULD BE STRICKEN FOR VIOLATING MCR 7.212(C)(6)

As stated in the proceeding section, MCR 7.212(C)(6) requires that a statement of facts include "[a]ll material facts, both favorable and unfavorable" and that the facts must be fairly stated without argument or bias. MCR 7.212(C)(6) also requires that the facts cite to specific page references in the transcript, the pleadings, or other document or paper filed with the trial court.

Here, Defendants have included a section in their Application entitled, "Grounds for Appeal" that does not comply with MCR 7.212(C)(6), as it is neither unbiased nor does it cite to the record. (Application, pp.XI-XIII). Defendants' Grounds for Appeal only includes facts that are favorable to Defendants and recasts potentially unfavorable facts as argument and with bias. The specific portions of that Application that fail to comply with MCR 7.212 (C) and should be stricken include:

- "It implicates core First Amendment principles. Scottsdale, a regulated securities broker, has sued MLM and Goode for unfavorable press coverage of a steep fine that the Financial Industry Regulatory Authority ("FINRA") imposed against Scottsdale. Scottsdale has aggressively sued those who deigned to cover the story. *See, e.g., Scottsdale Cap. Advisors Corp.* v. *S&P Global, Inc.,* Civ. No. 18-1105 (D. Ariz. 2018) (defamation case dismissed by stipulation); *Scottsdale Cap. Advisors Corp.* v. *The Deal, LLC,* 887 F.3d 17 (Cal 2018) (defamation case dismissed for lack of jurisdiction). Scottsdale even sued FINRA to stop its disciplinary proceeding. *Scottsdale Cap.*

Advisors Corp. v. *FINRA*, 844 F.3d 414 (CA4 2016) (injunctive action dismissed for lack of jurisdiction)."
(Application, p.XI);

- "The present lawsuit is about one thing: shutting down free speech. It is known as a 'strategic lawsuit against public participation' or 'SLAPP suit.' It is brought with the intent to censor the speaker's message because it is unwanted, not because it is false or defamatory."
(Application, p.XI);

- "The First Amendment no more allows a 'litigation veto' than it does a 'heckler's veto.' The Court is particularly protective of First Amendment interests in libel cases lodged against the media. It has long favored early summary disposition to protect free-speech principles, and has repeatedly emphasized that early summary disposition is an 'essential tool' for vindicating First Amendment rights."
(Application, p.XI);

- "Defendants supplied the entire article with their Answer, and relied upon the article in support of their motion. Although Rule 2.116(G)(5) requires C8 motions to be reviewed on the 'pleadings,' a defined term that includes an Answer under Rule 2.110(A)(5), the court declined to review it. Applying a lower level of scrutiny to an incomplete version of the article precluded a proper assessment of Defendants' motion, which is critical to protecting First Amendment interests."
(Application, p.XII);

- "In addition, the court declined to decide whether the challenged statement is nonactionable rhetorical hyperbole; whether Scottsdale has pleaded a claim that, as alleged, cannot be proved false by any form of admissible evidence; or whether the Third Amended Complaint pleads around the fair-comment privilege. If the statement is not actionable hyperbole, not provably false, or privileged, there is no justification for allowing a 'litigation veto' to proceed unabated."
(Application, p.XII);

- "Moreover, the trial court erroneously held that the challenged statement is capable of defamatory meaning by implication. Although Michigan recognizes claims for defamation by implication, our courts do not permit libel plaintiffs to squelch true speech by manufacturing an actionable 'implication' that is not fairly supported by the article. *See Royal Palace Homes*, 97 Mich. App at 56; *Nehls v. Hillsdale Coll.*, 178 F. Supp. 2d 771, 779 (ED Mich. 2001), *aff'd* 65 Fed. Appx. 984 (CA6 2003) (citing Michigan law). Yet that is what the SDO permits here."
(Application, p.XII);

- "The Third Amended Complaint is devoid of any alleged facts on this intent question. Nor are there any reasonable inference that can be drawn from the pleaded facts that satisfy the pleading requirement."
(Application, p.XIII);

- "Resolving these questions now would not only materially advance the timey and ultimate termination of this lawsuit, but it would also protect First Amendment interests that could not be adequately protected if Defendants must wait until an appeal of right (if one ever becomes necessary). Unlike the mine-run interlocutory appeal, where pleas to avoid the high cost of litigation are unpersuasive, the high cost of litigation in this case constitutes an injury to free speech interests. Forcing a person to finance litigation to defend the exercise of their First Amendment rights chills speech— not only for the defendant, but for all of society. It leads to self-censoring to avoid the steep financial losses attendant to protracted litigation. The Court should grant leave to protect against the corrosive effect of litigation on First Amendment liberties."
(Application, p.XIII).

All of the foregoing statements are biased and made without citation to the record. They should, therefore, be stricken.

In addition, Appellants' allegation that "Scottsdale has aggressively sued those who deigned to cover the story," (Application, p.XI), must be stricken because it violates MCR 7.210(a)(1), and MCR 2.302(h)(3) by citing to material that is not within the underlying court record.

IV. PORTIONS OF THE "GROUNDS FOR APPEAL" AND "STATEMENT OF THE CASE" SHOULD BE STRICKEN FOR VIOLATING MCR 7.212(C), MCR 7.210(A)(1), AND MCR 2.302(H)(3)

Numerous portions of the "Grounds for Appeal" and "Statement of the Case" in the Application fail to comply with MCR 7.210(A)(1), MCR 2.302(H)(3), and/or MCR 7.212(C)(6). Instead of citing to "specific page references to the transcript, the pleadings, or other document or paper filed with the trial court," Defendants cite to material outside of the record, such as unrelated case dockets and financial articles. Further, Defendants' Statement of the Case deviates from citing facts relevant to the appeal and instead makes prejudicial and irrelevant

statements regarding Scottsdale in an effort to sully its reputation before this Court. Under MCR 7.210(A)(1), MCR 2.302(H)(3), and MCR 7.212 (C), these statements, as outlined below, should be stricken:

- "Scottsdale, a regulated securities broker, has sued MLM and Goode for unfavorable press coverage of a steep fine that the Financial Industry Regulatory Authority ("FINRA")**)** imposed against Scottsdale. Scottsdale has aggressively sued those who deigned to cover the story. *See, e.g., Scottsdale Cap. Advisors Corp.* v. *S&P Global, Inc.,* Civ. No. 18-1105 (D. Ariz. 2018) (defamation case dismissed by stipulation); *Scottsdale Cap. Advisors Corp.* v. *The Deal, LLC,* 887 F.3d 17 (Cal 2018) (defamation case dismissed for lack of jurisdiction). Scottsdale even sued FINRA to stop its disciplinary proceeding. *Scottsdale Cap. Advisors Corp.* v. *FINRA*, 844 F.3d 414 (CA4 2016) (injunctive action dismissed for lack of jurisdiction)."
  (Application, p.XI);

- "This isn't Scottsdale's first lawsuit against a publisher for reporting on Scottsdale public discipline. See, e.g., Scottsdale Cap. Advisors Corp. v. S&P Global, Inc**.,** Civ. No. 18-1 (D. Ariz. 2018) (defamation case dismissed by stipulation); Scottsdale Cap. Advisors Corp. The Deal, LLC, 887 F.3d 17 (Cal 2018) (defamation case dismissed for lack of jurisdiction. SCA even sued FINRA to stop its disciplinary proceeding. Scottsdale Cap. Advisors Corp. FINRA, 844 F.3d 414 (CA4 2016) (injunctive action dismissed for lack of jurisdiction)."
  (Application, p.1, n.1);

- "A 'penny stock' is a security issued by a small company that trades at less than $5.00 per share. U.S. Secs. & Exch. Comm'n ("SEC"), Penny Stock Rules (May 9, 2013) **(**PENNY STOCK RULES") (available at http:/ /bit.lv/SEC-Penny-Stock-Rules). Also known as "microcap stocks," penny stocks are issued by companies, many of which do not file financial reports with the U.S. Securities & Exchange Commission. SEC, Microcap Stock: A Guide for Investors, Introduction (Sept. 13, 2013) (available at http:/ /bit.lv/SEC-Microcap-Guide). The SEC describes these securities as 'among the most risky,' suffering from a scarcity of publicly-available information that allows "fraudsters [to] easily spread false information about microcap companies, making profits while creating losses for unsuspecting investors." *Ibid.* They are very speculative investments, and Congress has tightly regulated broker-dealers who facilitate penny-stock trading under the Exchange Act. PENNY STOCK RULES**,** *supra* at n.3."
  (Application, p.1);

- "One fraud particularly affecting penny stocks is the classic pump-and-dump scheme. The scheme involves touting a company's stock through false and

misleading statements to the marketplace to ignite a buying frenzy that 'pumps' the price of a stock (usually a penny stock). The hucksters then sell (or 'dump') their stocks at the 'pumped' up price, realizing a handsome profit. Once they dump their shares and stop hyping the stock, the price falls and investors lose their money. SEC, 'Pump-and-Dumps' and Market Manipulations (Jun. 25, 2013) (available at http:/ /bit.lv/SEC-Pump-and-Dumps)."
(Application, pp.1-2);

- "From March-June 2013, at least eight people opened accounts with broker-dealers and deposited millions of shares of Biozoom stock. They falsely claimed that they had recently purchased the stock from Entertainment Art's original shareholders and that the stock could be freely traded. *SEC v. Tavella*, No.13-4609 (SDNY), Compl. ¶¶ 3-5 (Jul. 3, 2013) (APPX. 832a-833a). After pumping the stock, the fraudsters dumped (i.e**.,** sold) 14 million shares in three months. They netted almost $34 million, of which about $17 million was wired to overseas bank accounts. *Id.* at 2-3, ¶¶ 6-7. Eventually, the stock collapsed."
(Application, p.2);

- "In July 2013, the SEC brought an enforcement action, *US. Securities & Exchange Commsn. v. Tavella*, to recover the ill-gotten gains and make swindled investors whole. Many of the trading accounts frozen through the SEC's enforcement action were held at Scottsdale. *Tavella*, Stip. Order Granting Prelim. Inj., Asset Freeze, and Other Relief (R. 16, Jul. 16, 2013); Final J. Defs. Graciarena & Loureyro (R. 67, Dec. 8, 2014); Final Default J. Against Tavella [and Others] (R. 69, Jan. 9, 2015)."
(Application, p.2);

- "Indeed, since the filing of this lawsuit, the SEC has entered an order sanctioning Scottsdale's representative for facilitating the sale of 8.2 million Biozoom shares that generated $18.5 million in gains - just over half the shares and half the gains - for the fraudsters. *In re Timothy* C. *Scarpino***,** SEC No. 3-18483, Order Instituting Admin, and Cease-and Desist Proceedings, Making Findings, Imposing Remedial Sanctions, and a Cease-and-Desist Order (May 15, 2018). The representative's offense was 'failing] to conduct a searching inquiry into facts surrounding the proposed sales' of unregistered Biozoom stock, despite the presence of 'significant red flags.' *Id*. at 2, Part III, Summary."
(Application, p.3);

- "Among other things, it was this same kind of failure to conduct searching inquiries that resulted in FINRA taking disciplinary action against Scottsdale. FINRA imposed a $1.5 million fine against Scottsdale for 'institutionaliz[ing] misconduct as its standard way of doing business,' among other aggravating factors. Amended Extended Hr'g Panel Decision 105 at Part IV.A(l)(d),

FINRA Dept. of Enforcement v. *Scottsdale Cap. Advisors Corp*., No. 2014041724601 (Jun. 20, 2017) (the 'FINRA Decision') (APPX. 973a). Part of the institutionalized misconduct included Scottsdale's failure to revise its procedures to focus on potential sham transactions after botching its gatekeeping role in the Biozoom pump-and-dump scheme that led to the SEC's enforcement action."
(Application, p.3);

- "The statement that Scottsdale claims is libelous is contained within the Article, which was published after the Biozoom fraud. The Article includes extensive quotations from FINRA's enforcement decision. It also includes a link to the decision."
(Application, p.3);

- The statement at issue in this case does nothing more than correctly note that penny stocks were illegally traded through Scottsdale brokerage accounts. Despite the accuracy of the statement, Scottsdale has sued MLM and Goode because it objects to the "juxtaposition" of the Article's headline in conjunction with the challenged statement.
(Application, p.3).

All of the foregoing statements violate MCR 7.210(A)(1), MCR 2.302(H)(3), and/or MCR 7.212(C)(6) by failing to cite to the record, or citing to outside sources. They should, therefore, be stricken.

V. THE "PROCEDURAL HISTORY" SHOULD BE STRICKEN FOR VIOLATING MCR 7.212(C)(6)

The "Procedural History" section of the Application violates MCR 7.212(C)(6) by failing to state facts without argument or bias. Instead, Defendants describe the trial court's decisions as "correct" or "incorrect", and characterize Scottsdale's pleadings as attempts to "save" and "resurrect" claims. These statements, as detailed below, should be stricken or Defendants should resubmit their brief:

- "It correctly held that a corporation cannot maintain a false-light claim under Michigan, and that three of the four statements-including the Statement at issue on appeal-were inadequately pleaded."
(Application, p.4);

- "The trial court incorrectly held, however, that one of the statements was adequately pleaded under the doctrine of res ipsa loquitur."
  (Application, p.4);

- "The trial court granted Scottsdale leave to amend its pleading to save the other statements, if Scottsdale felt it could do so."
  (Application, p.4);

- "Thereafter, Scottsdale filed a Second Amended Complaint, which tried to resurrect only one of the three dismissed statements."
  (Application, p.4);

- "In other words, Scottsdale's defamation claim shrank from four statements to two."
  (Application, p.4);

- "In other words, Scottsdale's defamation claim has now shrunk from four statements to one."
  (Application, p.5).

All of the foregoing statements violate MCR 7.212(C)(6) by failing to state facts without argument or bias. They should, therefore, be stricken

VI. CONCLUSION

As demonstrated herein, the Application violates MCR 2.302(H)(3), MCR 7.212(C)(6), and MCR 7.210(A)(1). Therefore, pursuant to MCR 7.212(I), this Court should strike the nonconforming portions of the Application.

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Dated: May 16, 2019

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