

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN J. GREENWALD,

Plaintiff-Appellee,

v

LEE J. GREENWALD,

Defendant-Appellant.

UNPUBLISHED

August 9, 2007

No. 265814

Oakland Circuit Court

LC No. 2004-057293-CZ

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

PER CURIAM.

In this case involving a claim of tortious interference with a business expectancy, defendant appeals as of right from the trial court's grant of summary disposition to plaintiff and from its award of damages to plaintiff following a bench trial on damages. We affirm in part, reverse in part, vacate the judgment, and remand for further proceedings.

Plaintiff was demoted during the course of his employment with UBS Financial Services, Inc. (UBS), formerly known as UBS PaineWebber, Inc. He sued UBS in connection with the demotion, and he and UBS began settlement negotiations. In the case before us, plaintiff alleged that defendant, his former wife, interfered with the proposed settlement by improperly submitting to UBS privileged documents that related to plaintiff's submission of allegedly false expense reports during his employment with UBS.

Plaintiff alleged in his November 12, 2004, complaint that “[o]n or about July 19, 2002, Plaintiff was removed from his position as branch manager of a brokerage firm for UBS” He alleged that he sued UBS in connection with the removal and that, “[i]n early 2003, the Plaintiff and UBS agreed in principle to a comprehensive settlement of the case.” Plaintiff alleged that “Defendant attempted to blackmail Plaintiff by threatening to provide UBS with information subject to [a] Protective Order,^[1] i.e., alleged false expense reports filed by Plaintiff,

¹ The protective order referred to by plaintiff was dated March 6, 2002, and was issued in connection with the parties' divorce proceedings. It stated, in part:

(continued...)

if Plaintiff did not agree to split the impending settlement proceeds.” Plaintiff further alleged as follows:

15. Subsequently, Defendant made good on her threat and violated the Protective Order by disseminating information to UBS regarding Plaintiff’s alleged false expense reports.

16. On or about October 8, 2003, UBS terminated Plaintiff’s employment and withdrew from the settlement agreement, based upon Defendant’s improper disclosure of information subject to the Protective Order.^[2]

Plaintiff set forth a single count of “tortious interference with a business relationship or expectancy,” alleging that defendant improperly “caused the termination of Plaintiff’s employment from UBS and the disruption and termination of the settlement agreement.”

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), and the court issued an order denying the motion. In response to defendant’s argument regarding

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The information and documentation relating to Steven Greenwald’s weekly, monthly and/or annual expense reports and house account reimbursements made during the years 1999, 2000, 2001 and 2002 which are produced or exchanged in the course of this litigation is designated as “CONFIDENTIAL” and shall be used only for the purpose of this litigation.

* * *

A party producing confidential information shall be responsible for marking any such materials as “CONFIDENTIAL”. A copy of a confidential document shall receive the same level of protection as an original.

² James Pierce, a manager with UBS, filed an affidavit in which he stated:

2. Upon information and belief, Lee Greenwald contacted UBS on or about May 8, 2003 with information and allegations of wrongdoing of Steven Greenwald pertaining to his expense account reimbursements, among other things.

3. Based upon information provided by Lee Greenwald, UBS initiated an investigation of Steven Greenwald’s expense account reimbursements, among other things.

4. Based on its investigation, Steven Greenwald’s employment with UBS was terminated effective October 8, 2003 for submitting to UBS numerous false expense vouchers for reimbursement as business expenses and settlement discussions with Steven Greenwald were discontinued.

plaintiff's "unclean hands," the order stated that "the Wrongful Conduct Doctrine is inapplicable as to this case as a matter of law."

Plaintiff then moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff knew of the pending settlement and intentionally and improperly interfered with it. Plaintiff argued that a trial should occur with respect to damages only. Defendant then moved for summary disposition again, arguing, in part, that (1) plaintiff could not demonstrate that there had been a legitimate business expectancy with regard to the possible settlement and (2) plaintiff could not show that defendant intentionally violated a protective order. Plaintiff responded by stating, in part, that a signed agreement was not necessary to establish a valid business expectancy and that plaintiff was presumed to have known about the protective order when it was entered because her attorney knew about it.

The court granted plaintiff's motion for summary disposition, stating, in part:

Here, the settlement agreement between Plaintiff and UBS was a business expectancy that had a reasonable likelihood of future economic benefit for Plaintiff. The evidence establishes that Plaintiff and UBS had agreed to a settlement in principle at a lengthy facilitation. Subsequently, UBS memorialized such settlement in a proposed Settlement Agreement and General Release, which was forwarded to Plaintiff. Thus, there was a reasonable likelihood that Plaintiff and UBS were going to finalize their settlement and a realistic expectation by Plaintiff of future monetary benefits from the Settlement Agreement. Therefore, the first element has been met by Plaintiff.

The Court finds that Defendant's reliance upon a June 18, 2003 letter from UBS' attorney . . . does not create a genuine issue of material fact as to Plaintiff's valid business expectancy with UBS. The letter merely shows that Plaintiff and UBS had not yet reached a settlement.

* * *

In looking at the evidence in a light most favorable to Defendant, the Court further finds there is no genuine issue of material fact that Defendant's interference with the settlement was intentional and improper.

* * *

Here, in direct violation of the protective order, Defendant disseminated confidential information regarding Plaintiff to UBS. The evidence establishes that Defendant contacted UBS with information and allegations of wrongdoing regarding Plaintiff's expense account reimbursements. The same was per se wrongful conduct as it violated the Protective Order.

In response, Plaintiff argues that there is no proof that she knew about the protective order. However, this argument is without merit.

Here, the evidence indicates that on February 26, 2002, Defendant's divorce attorney . . . drafted and forwarded her stipulation to a Protective Order to . . . Plaintiff's divorce attorney [D]efendant cannot legally claim ignorance of the Protective Order in the divorce proceedings. Moreover, the evidence indicates that Defendant was present at certain court hearings on July 16, 2003 and December 10, 2003 wherein the Protective Order, and/or Defendant's violation thereof, was discussed.

After a bench trial with regard to damages, the court awarded plaintiff \$767,184, plus interest and case evaluation sanctions.

On appeal, defendant first argues that the trial court erred in ruling that the "clean hands" doctrine did not apply to the instant lawsuit. This issue involves a question of law. We review issues of law de novo. *Mather Investors, LLC v Larson*, 271 Mich App 254, 256; 720 NW2d 575 (2006).

Defendant's argument is without merit. The clean hands doctrine "closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief" *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975) (emphasis added; internal citations and quotation marks omitted). As noted in *Rose v Nat'l Auction Grp*, 466 Mich 453, 468; 646 NW2d 455 (2002), the clean hands doctrine is "only relevant in equitable actions." The instant lawsuit involved a legal claim for damages, and therefore the clean hands doctrine did not apply.

Defendant next argues that the court should not have granted plaintiff's motion for summary disposition because plaintiff did not establish certain elements of his claim as a matter of law. We review de novo a trial court's grant of summary disposition. *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003). Summary disposition under MCR 2.116(C)(10) is appropriate if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." In reviewing a motion brought under MCR 2.116(C)(10), we "consider the pleadings, affidavits, depositions, admissions, and any other evidence" *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). We view the pleadings and evidence "in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *Id.*

The elements of tortious interference with a business expectancy are:

. . . the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. [*Mino v Clio School Dist*, 255 Mich App 60; 661 NW2d 586 (2003) (internal citations and quotation marks omitted).]

Defendant contends that plaintiff failed to present evidence of a valid business expectancy. We disagree. As noted in *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 368; 354 NW2d 341 (1984), for purposes of a claim for tortious interference with a business expectancy, "[t]he expectancy must be a reasonable likelihood or probability, not mere wishful

thinking.” In *Joba Construction Co, Inc v Burns & Roe, Inc*, 121 Mich App 615, 634; 329 NW2d 760 (1982), the Court noted:

It is true that where a prospective advantage is alleged, the plaintiff need not demonstrate a guaranteed relationship because anything that is prospective in nature is necessarily uncertain. We are not here dealing with certainties, but with reasonable likelihood or probability. This must be something more than a mere hope or the innate optimism of the salesman. [Internal citations and quotation marks omitted.]

Here, the record contains a letter and proposed settlement agreement that was sent to plaintiff by UBS and that is dated April 11, 2003. Further, plaintiff stated in an affidavit that “[t]here was a reasonable likelihood that UBS and I were going to reach a final settlement and that I was going to realize over two million dollars in financial benefits, since only certain minor non-financial issues needed to be sorted out.” Moreover, in her deposition, when asked about the possible settlement, defendant stated, “I know [plaintiff] had called me and told me that he was going to get a settlement.” The evidence as a whole established “a reasonable likelihood or probability” of a settlement and “not mere wishful thinking.” *Trepel, supra* at 368. While it is true that plaintiff made counteroffers to UBS and that no settlement agreement had been finalized, the fact remains that a settlement was likely going to occur. Defendant simply did not counter this fact with evidence sufficient to survive a motion for summary disposition. Defendant indicates that a June 18, 2003, letter from UBS’s attorney to plaintiff’s attorney established that no business expectancy existed. This letter stated, in part:

As of this date, we do not have a settlement of Mr. Greenwald’s claims against [UBS]. After the March 17, 2003 facilitation, UBS sent you a Release and Settlement Agreement. You asked for a few changes, UBS agreed to some of the changes, and we sent you a revised Release and Settlement Agreement. Mr. Greenwald rejected this revised Release and Settlement Agreement and, instead, made a counter-proposal containing changes in material terms. UBS has not accepted Mr. Greenwald’s counter-proposal. Thus, as of this date, there is no settlement.

. . . UBS is conducting an investigation into certain matters involving Mr. Greenwald.

This letter merely stated that no settlement had occurred as of the date of the letter. Moreover, the letter was issued *after* defendant’s alleged interference with the business expectancy in May 2003. In sum, there was a reasonable likelihood or probability of a settlement, and the existence of this letter does not change our conclusion in this regard.

Defendant next mentions the allegedly fraudulent filing of expense reports by plaintiff and argues that

[i]t is contrary to public policy to have a valid business relationship where one party is essentially stealing from the other. Further, it is unreasonable to conclude that Steven had a reasonable likelihood or probability of a business expectancy with UBS when he was stealing from UBS.

Defendant's assertions in this regard are unsupported by any legal authority³ and therefore have been waived for purposes of appeal. As noted in *Palo Grp Foster Care, Inc v Michigan Dept of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998):

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. [Internal citation and quotation marks omitted.]

Moreover, the issue of "stealing" had not been conclusively established. Plaintiff indicated at his deposition that his submission of improper expense reports at UBS was unintentional.

Defendant next argues that the trial court erred in failing to give credence to her claim that, in transmitting information to UBS, she was motivated by "personal and business reasons." We disagree.

In *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984), the Court stated that

one who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act *or* the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another. [Emphasis added.]

"A 'wrongful act' is any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right." *Id.* at 371 n 1 (internal citations and quotation marks omitted). In *Formall v Community Nat'l Bank*, 166 Mich App 772, 780; 421 NW2d 289 (1988), the Court stated that "[a] 'per se wrongful act' is an act that is inherently wrongful or one that is never justified under any circumstances." In *CMI International v Internet*, 251 Mich App 125, 131; 649 NW2d 808 (2002), the Court stated that evidence of "specific, affirmative acts" corroborating the "unlawful purpose of the interference"

³ While defendant cites the case of *Michigan Podiatric Med Ass'n v Nat'l Foot Care Program, Inc*, 175 Mich App 723, 736; 438 NW2d 349 (1989), in her brief, she mischaracterizes the pertinent holding in that case. She states that

[t]his Court concluded that the plaintiff's complaint was legally insufficient to sustain the claim, reasoning that because illegal activities are involved, the plaintiff is unable to establish that the defendant's conduct was wrongful per se or undertaken illegally and without justification.

This is a mischaracterization of the holding in *Michigan Podiatric Med Ass'n*. See *id.* at 736-737.

is necessary “[i]f the defendant’s conduct was not wrongful per se” (emphasis added). See also *Feldman, supra* at 369-370.

Here, the pertinent information was submitted to UBS in violation of the protective order and therefore the submission clearly qualified as a “per se wrongful act.”⁴ Accordingly, that defendant may have been motivated by personal and business reasons was not pertinent to the analysis. It is true that the *Formall* Court, citing *Christener v Anderson, Nietzke & Co, PC*, 156 Mich App 330, 348-349; 401 NW2d 641 (1986), rev’d in part on other grnds 433 Mich 1 (1989), noted that the defendant’s actions in *Formall* were not “per se wrongful” and that “defendants motivated by legitimate personal and business reasons are shielded from liability against this cause of action.” See *Formall, supra* at 780. Moreover, in *Michigan Podiatric Med Ass’n v Nat’l Foot Care Program, Inc*, 175 Mich App 723, 736; 438 NW2d 349 (1989), the Court noted that in *Formall, supra* at 780, the panel “declined to find the defendant bank’s actions ‘per se wrongful’ where the defendant was motivated by legitimate personal and business reasons.” However, these cases did not involve a *direct violation of a court order*, which occurred here. The trial court did not err in concluding that defendant committed a per se wrongful act and in implicitly concluding that defendant’s alleged personal and business reasons for disseminating the confidential information were not pertinent.

Defendant next argues that the trial court erred in granting plaintiff’s motion for summary disposition because there was no evidence that the information submitted to UBS by defendant was marked confidential. The protective order stated that “[a] party producing confidential information shall be responsible for marking any such materials as ‘CONFIDENTIAL’.” However, we discern no place in the record before us where defendant made this argument in advance of the motion hearing. Accordingly, we conclude that the issue has not been preserved for appellate review, and we need not consider it. See, generally, *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95; 494 NW2d 791 (1992). We further note that the protective order clearly stated that

The information and documentation relating to Steven Greenwald’s weekly, monthly and/or annual expense reports and house account reimbursements made during the years 1999, 2000, 2001 and 2002 which are produced or exchanged in the course of this litigation is designated as “CONFIDENTIAL” and shall be used only for the purpose of this litigation.

Reversal on this basis is unwarranted.⁵

⁴ Despite the dissent’s conclusions to the contrary, we conclude that defendant’s actions clearly violated the protective order. In fact, defendant does not argue the contrary on appeal but instead makes arguments, addressed elsewhere in this opinion, that she did not know about the protective order and that the protected information was not marked confidential.

⁵ Defendant contends in a reply brief on appeal that she had no knowledge of the protective order itself. However, reply briefs cannot raise new issues but must be confined to a rebuttal of the appellee’s or cross-appellee’s arguments. MCR 7.212(G). Defendant mentions the “no
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Defendant next argues that the trial court erred in granting summary disposition to plaintiff because there was a question of fact regarding the proximate cause of the termination of the settlement negotiations.

However, as noted earlier, James Pierce, a division manager with UBS, filed an affidavit in which he stated:

2. Upon information and belief, Lee Greenwald contacted UBS on or about May 8, 2003 with information and allegations of wrongdoing of Steven Greenwald pertaining to the expense account reimbursements, among other things.

3. Based upon information provided by Lee Greenwald, UBS initiated an investigation of Steven Greenwald's expense account reimbursements, among other things.

4. Based on its investigation, Steven Greenwald's employment with UBS was terminated effective October 8, 2003 for submitting to UBS numerous false expense vouchers for reimbursement as business expenses and settlement discussions with Steven Greenwald were discontinued.

Defendant points to speculative testimony from plaintiff's deposition purportedly indicating that he was terminated for not fully cooperating in an investigation. We cannot conclude that this speculation was sufficient to raise a genuine issue of material fact concerning the reasons for plaintiff's termination.

Nevertheless, defendant raised an additional issue below with regard to proximate cause. She argued that her actions were not the true proximate cause of plaintiff's injury because the injury resulted from plaintiff's own wrongful conduct. This argument implicated the "wrongful conduct" rule discussed in *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995). As noted in *Orzel, supra* at 560, "[a] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party" (internal citations and quotation marks omitted). "To implicate the wrongful-conduct rule, the plaintiff's conduct must be prohibited under a penal or criminal statute." *Id.* at 561. Here, there was a question of fact concerning whether plaintiff essentially stole from his employer.⁶ Accordingly, we conclude that a remand for trial is appropriate with regard to whether plaintiff's claim is barred by the wrongful conduct doctrine discussed in *Orzel*.⁷ While defendant did not directly raise this issue on appeal, we nonetheless find it

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knowledge" issue in the "proximate cause" section of her appellate brief but does not develop a logical argument with respect to it in that section. Accordingly, it has not been properly presented for appellate review. *Palo Grp, supra* at 152.

⁶ As noted earlier, plaintiff denied during his deposition that the filing of the incorrect expense reports was intentional.

⁷ We decline to find that defendant's misconduct was worse in degree than plaintiff's alleged
(continued...)

appropriate, given our de novo review of the summary disposition order and given the strong evidence that the wrongful conduct doctrine does indeed apply, to reverse and remand on this basis.⁸

Defendant next raises issues regarding damages. Although these issues will be moot should defendant prevail on remand, we will address them in case they are needed for guidance during further proceedings. Defendant argues that the trial court erred “in considering and awarding prospective employment-related damages to plaintiff, where plaintiff was an at-will employee with no expectation of continued employment.” This argument essentially represents a question of law, so we will review it de novo. See *Mather Investors, supra* at 256.⁹

In its opinion and order, the court indicated that it was awarding \$767,184 in damages. This amount represented (1) \$176,960 for a lost pension plan; (2) \$255,000 in lost worker’s compensation benefits; (3) \$90,289 for a “Partner Plus account for the years 1998, 1999 and 2000;” (4) \$85,000 for “the loss of attorney fees promised under the Settlement Agreement;” and (5) \$159,935 in lost opportunity/interest costs. Defendant argues that plaintiff was entitled to no damages because “an at-will employee has no legal expectation of employment, unless the grounds for termination are contrary to public policy.” Defendant’s argument is misplaced. Plaintiff’s claim was not directed toward the termination of his at-will employment. Instead, it was directed towards the termination of a reasonably expected settlement agreement, and the court awarded damages in connection with the expected settlement. Defendant’s argument does not provide a basis for reversal.

Next, defendant argues that the trial court erred in allowing plaintiff’s expert witness, Aaron Caya, to testify concerning a damages report, because he “was not listed on plaintiff’s witness list, the final pre-trial order or any document.” We review this issue for an abuse of discretion. See, e.g., *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 605; 568 NW2d 93 (1997).

Plaintiff’s listed expert witness was Gary Lefkowitz. Plaintiff’s attorney stated as follows as trial:

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misconduct such that the wrongful conduct doctrine is inapplicable as a matter of law. See *Orzel, supra* at 569-570.

⁸ We disagree with the dissent’s conclusion that plaintiff’s own actions were the proximate cause of his injury as a matter of law. It is possible that defendant’s communication to UBS of innocent conduct (i.e., the unintentional submission of incorrect expense reports) was the proximate cause of the injury. We believe that a trial is appropriate to determine whether the submission of the expense reports was unintentional or whether it was intentional such that the wrongful conduct rule bars recovery.

⁹ Defendant’s damages claims involve certain documents and transcripts that are not contained within the lower-court record provided to us. We nevertheless consider these documents and transcripts because they are attached to the parties’ appellate briefs and have garnered no objections from the parties regarding their authenticity or their actual use during the proceedings.

Mr. Caya is the individual who prepared the [damages] report at Virchow Associates and is an associate of Mr. Lefkowitz. Mr. Lefkowitz is in trial in 48th District Court at the present time, and was going to be available but the hearing started –er the trial started at 1:30. And in his absence, uh, we ask that the Court allow the deposition –er, I’m sorry, allow the testimony of Mr. Caya as he is the person who prepared the report. I will lay the proper foundation for his testimony.

Defendant indicates that Caya prepared the damages report based on information provided to him by Lefkowitz. Defendant states that allowing Caya to testify was prejudicial because defendant’s attorney had done some research on Lefkowitz and discovered that “Mr. Lefkowitz was not only a personal friend, but had a business relationship with Plaintiff.” Defendant argues that, because Caya testified instead of Lefkowitz, defendant was unable to impeach the reliability of the damages report by referring to the friendship and business relationship between plaintiff and Lefkowitz. While it may be true that defendant lost some impeachment opportunity by way of the witness substitution,¹⁰ under the circumstances, we simply cannot conclude that the trial court *abused its discretion* in allowing Caya to testify. First, defendant’s attorney admitted that he did not depose Lefkowitz. Second, Caya was an associate of Lefkowitz and was planning to testify with respect to the *same report* that Lefkowitz would have relied on. The trial court’s allowing Caya to testify did not amount to an abuse of discretion.

Plaintiff next argues that the trial court erred in allowing the damages report into evidence based on defendant’s failure to object to it within the final joint pretrial order. We disagree. We review for an abuse of discretion the admission or exclusion of evidence by the trial court. *Badie v Brighton Area Schools*, 265 Mich App 343, 356; 695 NW2d 521 (2005).

The pretrial order dated August 24, 2004, stated that “[t]he failure to express an objection [to an exhibit listed on the joint final pretrial order] will create a presumption of admissibility.” The February 11, 2005, joint final pretrial order listed the damages report as an exhibit and did not reflect an objection from defendant. Defendant contends that this lack of objection is irrelevant, because the report was not created until March 29, 2005. However, if defendant could not agree to the admission of the report because she was not aware of its content, she should have stated as such in the joint final pretrial order. No error requiring reversal is apparent with regard to the admission of the damages report.

Defendant next argues that the damages report was inherently flawed and should not have been considered by the court because the report was based on seven additional documents that were not admitted into evidence and that constituted inadmissible hearsay. We cannot agree that an error requiring reversal occurred with respect to the seven documents.

¹⁰ Caya answered “no” when asked if he knew that Lefkowitz had socialized with plaintiff and served as plaintiff’s accountant.

The report stated, in an appendix, that “[t]he following information has been used in preparing this report and forming the opinions expressed herein:

First Amended Complaint

Settlement Agreement and General Release

Wealth Accumulation Statement as of December 31, 2002 provided by UBS PaineWebber

Stock Quotes provided by Yahoo!Finance

Agreement to Redeem Liability – Michigan Department of Consumer and Industry Services

Redemption Order – Michigan Department of Consumer and Industry Services

Ibbotson Associates, Inc. Risk Premium over Time Report 2005

Defendant argues in her appellate brief:

The attachments to the report that the surprise expert relied upon in forming his “expert” opinion were never admitted into evidence. MRE 703 states “[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence.” Therefore, before the expert can testify as to their [sic] opinion, the facts, data, documents, etc.[] that were relied upon must be admitted in to [sic] evidence. The lower court simply disregarded the “admissibility of underlying data” requirements of MRE 703.

MRE 703 states:

The facts or data in a particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

Despite defendant’s argument to the contrary, the court did admit the proposed settlement agreement into evidence. The admission was proper, given defendant’s failure to object to the listing of the agreement as an exhibit in the joint final pretrial order. Moreover, the Wealth Accumulation statement was discussed at trial, and the evidence showed that it qualified as a report made in the course of regularly conducted business activity under MRE 803(6). Regarding the stock quotes provided by Yahoo!Finance and the Ibbotson report, these too were discussed at trial, and the evidence showed that they were admissible under MRE 803(14) as market devices “generally used and relied upon” As for the first amended complaint, it is unclear to us, from the record, how the expert relied on this document in forming the damages report; as such, we can discern no reasonable basis for reversal with regard to it. With regard to the Agreement to Redeem Liability and the Redemption Order, from the record, it appears that these documents related to the worker’s compensation claim. The expert discussed these documents at trial, and, given that the information regarding the worker’s compensation claim

was already discussed within the settlement agreement, which was admitted into evidence, we find that no violation of substantial justice and no interference with substantial rights occurred with regard to the documents. See, generally, *Badiee*, supra at 356.

Defendant next argues that the trial court erred in concluding that plaintiff had no duty to attempt to mitigate his damages by proceeding with his lawsuit against UBS.¹¹ However, as suggested by the trial court, plaintiff's remedy against UBS would have been limited, given that UBS later learned of misconduct proper and sufficient to cause a termination of plaintiff's employment. See, e.g., *Wright v Restaurant Concept Management, Inc*, 210 Mich App 105, 111-112; 532 NW2d 889 (1995). More importantly, defendant has simply not demonstrated that there was a reasonable likelihood of success with regard to plaintiff's claims against UBS, and therefore she has not provided us with an adequate basis for reversal. See *Om-El Export Co, Inc v Newcor, Inc*, 154 Mich App 471, 477; 398 NW2d 440 (1986) (“[f]or purposes of trial, however, it is the burden of the defendant to prove that plaintiff has failed to take some *reasonable* step in mitigation”). (Emphasis added.)

Plaintiff also argues that the trial court should have found that defendant was obligated to mitigate his damages by filing a worker's compensation claim. Again, however, defendant has simply not demonstrated that there was a reasonable likelihood of success with regard to the worker's compensation claim, and therefore she has not provided us with an adequate basis for reversal. *Id*; see also *Palo Grp*, supra at 152.¹²

Defendant lastly argues that the trial court erred in failing to hold that plaintiff was required to file a worker's compensation claim to satisfy a condition precedent of the settlement agreement. The settlement agreement indicated that plaintiff was to file a worker's compensation claim against UBS and that the claim was to be redeemed in the amount of \$255,000. UBS was to make up any deficiency if plaintiff did not receive the full amount of the claim. We cannot agree with defendant that plaintiff was obligated to file such a claim as a “condition precedent” to receiving the \$255,000, because that “condition precedent” was mandated by the settlement agreement, which was never, in the end, put into effect. However, the \$255,000 was indeed an amount that plaintiff was guaranteed to receive under the settlement agreement and was properly included in the court's damages award.

We affirm in part, reverse in part, vacate the judgment, and remand this case for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

¹¹ This issue and the remaining issue are essentially questions of law, so we will review them de novo. See *Mather Investors*, supra at 256.

¹² Nor has defendant adequately demonstrated that MCL 600.6303, the “collateral source” provision applicable in *personal injury actions*, is applicable to plaintiff's tortious interference claim.

