

STATE OF MICHIGAN  
COURT OF APPEALS

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ALEXANDRA NATHALIE BEDFORD,  
Plaintiff-Appellant,

UNPUBLISHED  
March 26, 2013

v

ABEDEL KARIM ABUSHMAIES,  
Defendant-Appellee.

No. 310078  
Kalamazoo Circuit Court  
LC No. 2011-000464-CZ

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Before: STEPHENS, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition in favor of defendant pursuant to MCR 2.116(C)(8). We disagree with some of the trial court's reasoning and conclude that summary disposition was improper pursuant to MCR 2.116(C)(8). However, because the trial court reached the correct result, we affirm.

The parties, formerly married, have a contentious history, and the instant matter is derivative of an independent family court action. In that other action, plaintiff mother moved to change the domicile of the parties' two children to Florida, where she had received a job offer. During the hearing on that motion, the Florida would-be employer was called as a witness, and defendant, proceeding *in propria persona*, asked the employer a number of questions that were phrased in such a way that they suggested or outright stated that plaintiff's credentials were dubious. The parties' hostility and animosity toward each other is painfully apparent even from the written record, and the employer even remarked on how "unfriendly" defendant's questioning was. The family court judge ultimately denied plaintiff's motion to change domicile, and this Court denied plaintiff's motion for leave to appeal that denial. Plaintiff then commenced the instant action against defendant, based on his statements to the Florida employer in the courtroom during judicial proceedings. Because the statements were made at that time, the trial court found plaintiff's causes of action unsustainable, and granted summary disposition in favor of defendant.

A grant or denial of summary disposition is reviewed *de novo* on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most

favorable to the non-moving party. *Id.* at 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id.* at 119-120. If it is apparent that more than only the pleadings were considered, this Court will treat the motion as having been decided under a subrule that permits consideration of evidence; generally, and in this case, a lack of a material factual dispute pursuant to MCR 2.116(C)(10). See *Capitol Properties Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 425; 770 NW2d 105 (2009). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden*, 461 Mich at 120. This Court reviews the interpretation of contracts de novo as a question of law. *Klapp v United Ins Group Agency, Inc.*, 468 Mich 459, 463; 663 NW2d 447 (2003).

Plaintiff's primary argument is that defendant's statements and questions were not relevant, material, or pertinent to any issues before the court at the time. Plaintiff secondarily argues, essentially, that it is impossible to decide whether particular statements were or were not pertinent solely on the basis of the pleadings. We agree with the latter contention: the privilege does not apply to literally *all* statements made during judicial proceedings, and whether a particular statement is relevant may be difficult to evaluate without knowing the entire context. However, summary disposition will be upheld on an appropriate ground even if it was granted on an inappropriate ground. Here, there is absolutely no dispute as to the facts, being entirely of record, and the legal significance of those facts necessitates granting summary disposition in defendant's favor under MCR 2.116(C)(10).

A claim for defamation requires a plaintiff to prove that a false and defamatory statement was made concerning her, that an unprivileged communication was made to a third party, that the publisher was at least negligent, and either "defamation per se" or that the plaintiff suffered harm as a result. *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005). An absolutely privileged statement cannot be actionable. *Trimble v Morrish*, 152 Mich 624, 627; 116 NW 451 (1908). Absolute privilege covers a very narrow field, and it is well-established that it should remain so confined. *Timmis v Bennett*, 352 Mich 355, 362-363; 89 NW2d 748 (1958). "If statements made in the course of judicial proceedings, in pleadings, or in argument are relevant, material, or pertinent to the issue, their falsity or the malice of their author is not open to inquiry[ and t]hey are then absolutely privileged." *Hartung v Shaw*, 130 Mich 177, 179; 89 NW 701 (1902).

Defendant's line of questioning put to plaintiff's would-be employer was clearly aggressive and hostile. However, we cannot agree that they were not relevant, material, or pertinent within the meaning of the judicial proceedings privilege. In particular:

"In determining what is pertinent, large latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in the court, and a much larger allowance made for the ardent and excited feelings with which a party, or counsel, who naturally and almost necessarily identifies himself with his client, may become animated, by constantly regarding one side of an interesting and animated controversy, in which the dearest rights of such party may become involved." Where a party shows in his declaration a publication

presumptively privileged, it is his duty, in order to recover, to prove that the words spoken were not pertinent or relevant, and that they were not spoken bona fide. [*Hartung*, 130 Mich at 179-180, quoting *Hoar v Wood*, 44 Mass 193, 197 (1841).]

Within the narrow scope of the absolute privilege for statements made during judicial proceedings, public policy favors liberally construing the privilege to allow the maximum flexibility and freedom of disclosure without fear of subsequent liability. *Sanders v Leeson Air Conditioning Corp*, 362 Mich 692, 695-696; 108 NW2d 761 (1961), *Couch v Schultz*, 193 Mich App 292, 295; 483 NW2d 684 (1992), *Osterle v Wallace*, 272 Mich App 260, 267-268; 725 NW2d 470 (2006).

Here, plaintiff contends that defendant's defamatory statements fell into a small number of categories: impugning her credentials and competence as a veterinarian, spending money on sports cars and plastic surgery, and apparently litigating as a hobby. The former is entirely relevant to the issue of whether the move to Florida would improve the children's lives: if plaintiff could not actually maintain her employment there, the move would obviously not improve anybody's lives. The other two statements were, at best, implications. Defendant's statement that "I did not use [certain money] to pay for Porsche sport cars or plastic surgery" is not obviously about plaintiff at all and could be read as mere sarcasm; furthermore, taken literally, it is presumably a factually accurate statement. In any event, defendant could reasonably have believed that how plaintiff spent her money was relevant to whether she needed the job, and even if the family trial court determined that the inquiry was relevant, it would be within the generous scope that should be afforded to parties to speak freely at judicial proceedings. Defendant's remark about plaintiff's litigiousness could be a fair commentary on the apparently-undisputed voluminousness of the court file and relevant to either the extent to which plaintiff was likely to follow through with facilitating any parenting time with defendant after the move or the seriousness with which she would likely take her proposed new job.

All of the statements of which plaintiff complains are within the scope of the leeway that should be afforded to parties to speak freely at judicial proceedings. Consequently, they are absolutely privileged and not actionable. "The absolute privilege afforded to statements made in the judicial proceedings is available as a defense to suits for interference with prospective economic advantage." *Meyer v Hubbell*, 117 Mich App 699, 710; 324 NW2d 139 (1982).

Plaintiff further contends that the *very act of contesting plaintiff's motion* was itself actionable as intentional interference with a business expectancy. We find the argument that a party could be held liable in tort for any non-frivolous pleading unsupported by any case law with which we have been provided or that which we can find. Furthermore, any such finding would be violative of public policy.

Access to the courts is an absolutely fundamental right that *must* be enjoyed by every citizen for our system of governance to function at all. Processes exist for punishing attempts to gain *frivolous* access to the courts. Notably, however, a claim for abuse of process lies only for the improper *use* of a legal process, not the bare *issuance* of the process, irrespective of any improper motive for doing so. *Spear v Pendill*, 164 Mich 620, 623; 130 NW 343 (1911); *Dalley v Dykema Gossett*, 287 Mich App 296, 322; 788 NW2d 679 (2010). The absolute privilege

afforded to statements made at a judicial proceeding, and the public policy behind that privilege of ensuring that judicial processes work, necessarily implies that the privilege also applies to the mere fact of participating in that proceeding at all. In the absence of any showing that defendant challenged plaintiff's motion to change domicile frivolously, we conclude that defendant cannot be held liable for merely making that challenge.

In contrast to plaintiff's tort claims, her breach of contract claim may be a closer question. The elements of a breach of contract claim are the existence of a contract, a breach of that contract, and damages resulting from that breach. See *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990); *Stoken v JET Electronics and Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988). Settlement agreements are contracts and treated as such by the courts. *Massachusetts Indem and Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994). Contracts being *private* agreements between parties, there is no inherent reason why conduct that would not amount to a tort cannot amount to a breach of a contract. The trial court was not correct in concluding, without any further analysis, that plaintiff's breach of contract claim must necessarily fail because her defamation and intentional interference claims were not actionable. However, that does not necessarily mean summary disposition was ultimately improper, because plaintiff's proposed interpretation of the contract here would constitute a gross violation of important public policy.

The settlement agreement between the parties in the underlying action provided, *inter alia*, that:

Neither parent will publicly or privately disparage the other parent in the presence of the children, nor disparage the other parent in a public forum such as an internet chat room or message board, or encourage others to disparage the other parent in the presence of the children. This shall include disparagement in any public forms [sic] or forums including, but not limited to, internet, email, YouTube, letters, writings, texts, blogs or any other means.

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Neither party will take or be involved in any action, including communication in any form, that might in any way interfere with or impact either party's ability to obtain, sustain or maintain employment or professional standing, including licensing authorities and membership in professional organizations which impact on either party's professional status. Furthermore, neither party will contact current, future, past or potential employers for any reason including inquiry regarding child support or payment with the exception of Court sanctioned or authorized contact, including Friend of the Court contact after filing of a proper and appropriate motion by either party.

Plaintiff generally contends that the "any forum" language in the non-disparagement clause of the consent order includes courtrooms. Plaintiff also generally contends that defendant's challenge to her motion to change domicile "might in any way interfere with or impact" her ability to obtain employment, in violation of the non-interference clause. Consequently, she concludes that defendant violated their contract.

Plaintiff's first argument is highly dubious from the plain language of the contract, because when "any forum" is read in context, it appears to suggest a forum similar to internet chat rooms or message boards. Courtrooms would seem naturally to fall into an entirely different class. The latter, however, is a reasonable interpretation of the broad language in the consent order. All other things being equal, plaintiff makes a valid point that as a *practical* matter, it is inconceivable that she would abandon her children and move to Florida without them, so a successful challenge to her motion to change domicile *would* interfere with her ability to gain at least *that particular* employment.<sup>1</sup> As a general matter, there is no reason why consideration for a contract cannot consist of agreeing to forego a legal right. See *Morris v Metriyakool*, 418 Mich 423, 432; 344 NW2d 736 (1984) ("Private conduct abridging individual rights does not implicate the Due Process Clause unless to some significant extent the state, in any of its manifestations, has been found to have become involved in it").

However, not *all* legal rights may be contractually waived. See *Seaton v State Farm Life Ins Co*, 99 Mich App 587, 589-591; 299 NW2d 6 (1980) (discussing the limited circumstances under which the "medical privilege" may be waived). Furthermore, waivers in criminal proceedings generally must be knowing, intelligent, and voluntary, although waiver of a property right may not demand the same stringency. *D H Overmyer Co Inc of Ohio v Frick Co*, 405 US 174, 185-186; 92 S Ct 755; 31 L Ed 2d 124 (1972). Parenting rights, while not unlimited, are fundamental liberty interests. *Troxel v Granville*, 530 US 57, 65-66; 120 S Ct 2054; 147 L Ed 2d 49 (2000). Therefore, it follows that a waiver of parental rights—including the right to make custody decisions—must be knowing, intelligent, and voluntary. Significantly, "[w]hile affirming the principle of freedom of contract, we note the well-settled rule that where freedom of contract and declared public policy are in conflict, the former necessarily must yield to the latter." *Feldman v Stein Bldg & Lumber Co*, 6 Mich App 180, 184; 148 NW2d 44 (1967), overruled in part on other grounds *Gossman v Lambrecht*, 54 Mich App 641, 648-649; 221 NW2d 424 (1974).

Finally, while the right to cross-examine witnesses has been held to be one of the most fundamental rights of criminal defendants, *Pointer v Texas*, 380 U.S. 400, 404-405, 85 S Ct 1065; 13 L Ed 2d 923 (1965), it is simply axiomatic that even in civil contexts, access to the courts would be a mirage if a party could not subject witnesses to meaningful and vigorous cross-examination. It is not inherently illegal to strike a bad bargain or contract away rights. However, contracting away a *fundamental* right violates public policy except, perhaps, where it is exceedingly clear that the contracting party did so completely voluntarily, with full and unambiguous knowledge and comprehension of what he or she gave up and the implications thereof, under fair circumstances, and as a *quid pro quo* that does not shock the conscience.<sup>2</sup> Here, there is no indication in the settlement agreement that either party intended to give up such a fundamental right as the right to cross-examine witnesses in any proceeding or to allow the

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<sup>1</sup> To avoid the possibility of future unpleasantness between the parties and further wasteful litigation, we hold that we do not find plaintiff's appeal to be frivolous.

<sup>2</sup> We note as an example that plea bargains entail giving up fundamental rights, but under conditions that ensure that the plea is understanding and voluntary. See MCR 6.302.

other party unilateral control over parenting decisions not explicitly stated. We simply cannot conclude that the parties' settlement agreement included an abdication of the right to cross-examine witnesses under any circumstance.

Consequently, while we do not entirely agree with the trial court's reasoning, the trial court reached the correct result in granting summary disposition in favor of defendant.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Amy Ronayne Krause