

STATE OF MICHIGAN  
COURT OF APPEALS

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GREGG STOLL,

Plaintiff-Appellant,

v

VIRGINIA PENNALA and CRAIG  
OUTWATER,

Defendants-Appellees.

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UNPUBLISHED

May 23, 2006

No. 266157

Marquette Circuit Court

LC No. 01-038039-NZ

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff provided consulting services for clients needing wetlands permits. Defendants both worked for the Michigan Department of Environmental Quality (DEQ) and had responsibility for reviewing wetlands permit applications in Michigan's upper peninsula. Plaintiff brought this action against defendants, alleging that they committed "business defamation" and tortiously interfered with plaintiff's business relationship with his clients. Plaintiff also brought a claim against defendant Virginia Pennala, an environmental quality manager for the DEQ, for abuse of process arising from her unsuccessful attempt to obtain a personal protection order against plaintiff in August 2000.

Proceedings in the trial court were stayed pending the disposition of criminal charges against plaintiff that related to allegations in the present case. On June 10, 2003, plaintiff pleaded guilty to attempted uttering and publishing a wetlands permit application, contrary to MCL 750.249. Both this Court and our Supreme Court denied plaintiff's applications for leave to appeal his conviction.<sup>1</sup> Defendants then moved for summary disposition of plaintiff's civil action under MCR 2.116(C)(8) and (10). The trial court expressly declined to consider

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<sup>1</sup> *People v Stoll*, unpublished order of the Court of Appeals, entered October 15, 2003 (Docket No. 249594), lv den 469 Mich 1017 (2004).

defendants' motion under MCR 2.116(C)(8), noting that plaintiff had requested an opportunity to amend his complaint, but concluded that summary disposition of each of plaintiff's claims was appropriate under MCR 2.116(C)(10).

We review a trial court's decision granting summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint by the pleadings alone. *Id.* at 119-120. "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* at 119. By contrast, a motion under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden, supra* at 120. In evaluating such a motion, the court considers the affidavits, pleadings, depositions, admissions, and other evidence presented by the parties, in a light most favorable to the nonmoving party, to determine if there is a genuine issue of fact for trial. *Id.* at 120-121; MCR 2.116(G)(4).

As an initial matter, we note that plaintiff's brief on appeal is deficient in several respects. First, in discussing his issues, plaintiff inappropriately relies on standards applicable to review of motions under MCR 2.116(C)(8). The trial court did not rely on MCR 2.116(C)(8) as a basis for granting defendants' motion, but instead examined whether there was factual support for each of the four counts alleged in plaintiff's amended complaint, regardless of the legal sufficiency of the specific allegations. Hence, appellate relief is not warranted unless plaintiff can show, by substantively admissible evidence, that he established a genuine issue of material fact for trial when responding to defendants' motion for summary disposition. *Maiden, supra* at 120-121. Plaintiff's failure to address the basis for the trial court's decision, a necessary issue, could alone preclude appellate relief. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

Second, plaintiff's arguments on appeal lack citation to the record. "Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." MCR 7.212(C)(7). This Court will not search the record for factual support for a plaintiff's claim. *Derderian, supra* at 388. Where an appellant fails to properly brief the merits of a cause of action, this Court may deem the issue abandoned. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Despite these deficiencies, we have considered plaintiff's arguments to the extent feasible and conclude that plaintiff has not demonstrated any basis for appellate relief.

With regard to Count II of his amended complaint, plaintiff's reliance on *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570; 575 NW2d 531 (1998), is misplaced because plaintiff does not allege that defendants are individually liable to him for a regulatory taking of his property, without just compensation, under the Fifth Amendment. The gravamen of plaintiff's tortious interference with an advantageous business relationship claim is that defendants arbitrarily and capriciously reversed the DEQ's approval of plaintiff's planned development of the Gulliver Lake lots in July 2000. For purposes of this appeal, we shall assume, without deciding, that an allegation of arbitrary and capricious conduct is sufficient to withstand a motion for summary disposition under MCR 2.116(C)(8).

To prevail on his tortious interference claim, plaintiff must establish a per se wrongful act or the doing of a lawful act with malice and unjustified in the law for the purpose of invading plaintiff's business relationship with another. *CMI Int'l, Inc v Internet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002). A "per se wrongful act" is an act that is inherently wrongful or cannot be justified under any circumstances. *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772, 780; 421 NW2d 289 (1988). To establish that a lawful act was done with malice and without justification, plaintiff must show, with specificity, affirmative acts of the interferer that corroborate the improper motive for interference. *Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003).

Viewed in a light most favorable to plaintiff, the evidence indicated that the circumstances underlying plaintiff's tort claim arose from defendant Craig Outwater's decision in 2000, in his capacity as an environmental quality analyst, and Pennala's decision, as part of her function to grant informal review of Outwater's decisions, to deny a wetlands permit for lot "C" as designated in a 1999 survey of plaintiff's property. The evidence, which included a transcript of plaintiff's own statements at the plea hearing in his criminal case, established that plaintiff's guilty plea to attempted uttering and publishing of a wetlands permit in 1999 involved lot "B" in this same survey. Plaintiff successfully obtained permits for lots "A" and "B" in the survey, using permit applications that contained false information about the ownership of the land, before the permit application for lot "C" was denied.

We find no record support for plaintiff's claim that the trial court determined that his guilty plea collaterally estopped him from pursuing a tortious interference claim against each defendant arising from the denial of the permit application. As a doctrine of issue preclusion, collateral estoppel would merely preclude relitigation of the issue actually and necessarily decided in the criminal case, namely, plaintiff's attempted uttering and publishing of a wetlands permit on May 4, 1999. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001); see also *Monat v State Farm Ins Co*, 469 Mich 679; 677 NW2d 843 (2004) (discussing the defensive use of collateral estoppel). Rather, the trial court's decision indicates that the court relied on the evidence of plaintiff's guilty plea to find that there was no genuine issue of material fact regarding whether plaintiff would be able to establish that either defendant committed a per se wrongful act or an act unjustified in law in connection with the denied wetlands permit. Having considered the record and plaintiff's cursory argument on appeal, we too are not persuaded that plaintiff established a genuine issue of material fact. Therefore, we reject plaintiff's claim that the trial court erred in granting defendants' motion with respect to Count II of the amended complaint.

With regard to Count I, the gravamen of plaintiff's claim is that defendants advised developers of the Stony Point golf course not to use plaintiff as a consultant, which caused the developers to terminate his consulting services. The evidence offered by plaintiff in opposition to defendants' motion indicated that the claim arose from statements made by one defendant, Outwater, to a developer, Steve Hawkins, regarding an August 22, 2000, meeting concerning the wetlands permit application for the golf course. The supplemental affidavit of Hawkins that plaintiff submitted to the trial court in opposition to defendants' motion established a disputed factual issue regarding what Outwater told Hawkins about Pennala's safety concerns and anticipated toughness at a scheduled August 22, 2000, meeting if plaintiff attended the meeting.

But we agree with the trial court that plaintiff's evidence was insufficient to avoid summary disposition under MCR 2.116(C)(10). Although the trial court postulated that Outwater attempted to advise Hawkins that plaintiff had lost credibility with the DEQ, summary disposition would have been appropriate under MCR 2.116(C)(10) even without such postulation, because plaintiff did not present evidence that Outwater's statements were per se wrongful. *Formall, supra* at 780. Further, plaintiff did not demonstrate that Outwater committed a lawful act with malice and unjustified in the law for the purpose of invading plaintiff's business relationship with the developers of the golf course. *Mino, supra* at 78; *CMI Int'l, supra* at 131. Hence, defendants were entitled to judgment as a matter of law with respect to this claim. *Maiden, supra* at 120.

With regard to the defamation claim in Count III of plaintiff's amended complaint, we shall assume, without deciding, that plaintiff's general allegations were sufficient to avoid summary disposition under MCR 2.116(C)(8). But we have limited our factual review of this claim to the three specific defamation claims identified by the trial court from its review of plaintiff's brief. To the extent plaintiff suggests some other factual basis for the defamation claim on appeal, we do not address it because plaintiff failed to properly present it to the trial court. *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 330; 539 NW2d 774 (1995).

Underlying the first defamation claim are the same statements at issue in Count I involving Pennala's safety concerns and, in particular, Hawkins's averment in a supplemental affidavit that Outwater told him that Pennala would require the presence of an armed conservation officer to protect her if plaintiff attended the August 22, 2000, meeting. The trial court determined that the statements were not actionable because they were expressions of opinion. Plaintiff has not established any basis for disturbing this decision. *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 402; 538 NW2d 24 (1995) (expressions of opinion are protected from defamation actions); see also *Ireland v Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998) (statement must be provable as false under an objective standard to be actionable).

Underlying the second defamation claim is Pennala's petition for a personal protection order against plaintiff. The trial court determined that Pennala's statements in the petition were not actionable because they represented an expression of her opinion that she felt threatened and, alternatively, were absolutely privileged. Given plaintiff's cursory treatment of this claim, we decline to consider whether the petition contained any actionable statements. *Peterson Novelties, Inc, supra*. We note, however, that even if some statements could be considered actionable, we would not reverse because statements in pleadings are absolutely privileged. See *Maiden, supra* at 134; *Sanders v Leeson Air Conditioning Corp*, 362 Mich 692, 695; 108 NW2d 761 (1961).

Underlying the third defamation claim identified by the trial court is Outwater's statement to David Muxlow that he should use the "right" consultant, which was perceived by Muxlow to mean that he should not use plaintiff. The trial court determined that Outwater was entitled to an absolute or qualified privilege in making this statement. Assuming for purposes of our review that the factual basis for plaintiff's claim is Muxlow's averments in his affidavit

regarding what Outwater told him about selecting the “right” consultant, we find no basis for reversal.

We find merit to plaintiff’s argument that Outwater was not entitled to an absolute privilege. See *Kefgen v Davidson*, 241 Mich App 611, 618; 617 NW2d 351 (2000). But whether the trial court properly found no genuine issue of material fact concerning Outwater’s entitlement to at least a qualified privilege is a separate issue that we find unnecessary to address. We agree with defendants that the trial court’s decision may be affirmed on the basis of plaintiff’s failure to establish that Outwater’s statements to Muxlow were actionable. Defendants raised this specific issue in the trial court when responding to arguments in plaintiff’s brief. Although the trial court did not specifically rule on defendants’ argument, we will not disturb a trial court’s grant of summary disposition where the right result was reached. *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 354; 686 NW2d 756 (2004).

Whether a statement is false is relevant to both the actionability of the statement and a qualified privilege. See *Ireland, supra* at 616 (statement in defamation action must be provable as false), and *Prysak v R L Polk Co*, 193 Mich App 1, 15; 483 NW2d 629 (1992) (the actual malice necessary to overcome a qualified privilege requires proof of knowledge of the falsity or reckless disregard for the truth). To proceed on a theory of defamation by implication, a plaintiff must prove defamatory implications that are materially false. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 330; 583 NW2d 725 (1998). Whether a statement is capable of having a defamatory implication and whether a plaintiff can prove falsity in the implication are different inquiries. *Locricchio v Evening News Ass’n*, 438 Mich 84, 130; 476 NW2d 112 (1991).

We conclude that Outwater’s statements regarding the “right” consultant are not actionable because, taken literally, they are neither false nor statements about plaintiff. Further, there is no evidence of any implication provable as a false statement about plaintiff. *Ireland, supra* at 616. Any inference that Muxlow drew from Outwater’s statements is subjective in nature. Therefore, defendants were entitled to summary disposition on the ground that plaintiff did not establish evidence of an actionable statement made by Outwater to Muxlow. Thus, it is not necessary to consider whether Outwater had a qualified privilege in making the statement that was overcome by evidence of actual malice.

Finally, we find no basis for disturbing the trial court’s grant of summary disposition in favor of Pennala with respect to the abuse of process claim in Count IV of plaintiff’s amended complaint. We agree that the trial court erred to the extent that it relied solely on the absolute privilege applied to statements in a judicial proceeding. *Maiden, supra* at 134. The actionability of Pennala’s statements was not dispositive of the abuse of process claim. An abuse of process requires proof of “(1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding.” *Friedman v Dozorc*, 412 Mich 1, 30; 312 NW2d 585 (1981).

Nonetheless, the record reflects that Pennala sought summary disposition on the basis that there was no factual support for an abuse of process claim, not on the basis of privilege. It was incumbent on plaintiff to set forth specific facts establishing a genuine issue of material fact when responding to the motion. *Maiden, supra* at 121. Contrary to plaintiff’s argument on appeal, neither malice nor a lack of probable cause is an element of an abuse of process claim.

*Friedman, supra* at 30-31. Rather, these are elements of the distinct tort of malicious prosecution. See *Friedman, supra* at 48; *Young v Motor City Apartments Ltd Dividend Housing Ass'n No 1 & No 2*, 133 Mich App 671, 675-677; 350 NW2d 790 (1984). Limiting our review to plaintiff's abuse of process claim against Pennala, we agree with defendants that the trial court's decision may be affirmed because plaintiff failed to establish factual support for his claim. Because the trial court reached the right result, we affirm its decision granting summary disposition with respect to Count IV in favor of Pennala. *Grand Trunk W R, supra* at 354.

Affirmed.

/s/ David H. Sawyer  
/s/ Kirsten Frank Kelly  
/s/ Alton T. Davis