

STATE OF MICHIGAN  
COURT OF APPEALS

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DAVID L. MCMILLIAN,

Plaintiff-Appellant,

v

DEAN NOWICKI,

Defendant-Appellee.

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UNPUBLISHED

March 22, 2005

No. 253917

Wayne Circuit Court

LC No. 02-240826-CZ

Before: Talbot, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant in plaintiff's action for defamation, tortious interference with contract and business relations, and intentional infliction of emotional distress. We affirm.

On appeal, plaintiff argues that the trial court erroneously granted summary disposition in favor of defendant on each of his claims. We disagree.

This Court reviews de novo a trial court's ruling on a motion for summary disposition made under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In evaluating a motion under MCR 2.116(C)(10), "a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

With regard to plaintiff's defamation claims, "appellate courts must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression." *Faxon v Michigan Republican State Central Comm*, 244 Mich App 468, 473; 624 NW2d 509 (2001).

A communication is defamatory if, under all of the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or it deters others from associating or dealing with the individual. In order to establish a claim of defamation, a plaintiff must show: (1) a false or defamatory statement concerning the plaintiff; (2) an unprivileged publication to a

third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication (defamation per quod). [*Mino v Clio School Dist*, 255 Mich App 60, 72; 661 NW2d 586 (2003) (internal quotation marks and citations omitted).]

Furthermore, a statement must be provable as false to be actionable. *Ireland v Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998). A court may decide as a matter of law whether a statement is actually capable of defamatory meaning, and where no such meaning is possible, summary disposition is appropriate. *Id.* at 619.

As defendant points out in his brief on appeal, plaintiff, in his pleadings and in his brief on appeal, failed to specifically identify any defamatory statements made by defendant. Plaintiff only identified a number of comments in the reference checker's report as defamatory during his deposition. Even assuming that plaintiff is bringing this action based on every comment critical of plaintiff in the performance feedback memorandum and in the reference checker's report, none of these statements are actionable.

First, none of these statements are objectively provable as false. Rather, they are merely defendant's opinions of plaintiff's work performance on a particular project based on defendant's personal observations, as plaintiff admitted in his deposition. Second, there was no unprivileged publication to a third party. With regard to defendant's comments to Gary Skodak, defendant and Skodak shared a common interest in plaintiff's performance because both of them were responsible for the performance of their division in the Mustang electrical group. Defendant was privileged to communicate his concerns about an employee's work performance to Skodak on a job for which they were both responsible.

With regard to defendant's comments to the reference checker, there was no publication. Hunter was acting as plaintiff's agent and no one else ever saw the report; therefore, the report was never published to a third party. Additionally, plaintiff hired the reference checker to solicit a reference from defendant, knowing that defendant did not have entirely positive things to say about him, thus consenting to any publication to the reference checker. A person who consents to another's conduct may not assert a claim in tort for that conduct's resultant harm, and the defendant is entitled to judgment under MCR 2.116(C)(10). *Smith v Calvary Christian Church*, 462 Mich 679, 686; 614 NW2d 590 (2000).

Because defendant's statements regarding plaintiff's work performance were not provable facts, and were nonetheless privileged even if they were, defendant has failed to make out a prima facie case of defamation, and it is unnecessary to analyze the remaining elements. Also, because defendant's comments are not actionable, plaintiff's argument that defendant violated Ford's internal policies in giving a performance review to an independent contractor is irrelevant in making out a claim of defamation. The trial court properly granted summary disposition in favor of defendant.

Next, we move on to plaintiff's argument that the trial court erred in granting summary disposition in favor of defendant with respect to plaintiff's claims of tortious interference with contractual and business relations. The elements of tortious interference with a contract are: (1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant.

*Derderian v Genesys Health Care Systems*, 263 Mich App 364, 382; 689 NW2d 145 (2004) The elements of tortious interference with a business relationship are: (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, (4) and resultant damage to the plaintiff. *Mino, supra* at 60.

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. *Derderian, supra* at 364. To establish that a lawful act was done with malice and without justification, plaintiff must demonstrate, with specificity, affirmative acts by defendant that corroborate the improper motive of the interference. *Mino, supra* at 60. Where defendant's actions were motivated by legitimate business reasons, his actions would not constitute improper motive or interference. *Id.*

As noted in the analysis of defendant's defamation claims, defendant had an interest in communicating his opinions regarding plaintiff's work performance to Skodak. Specifically, defendant was responsible for the production of his team, which had to work with Skodak's team, including plaintiff. Defendant also had an interest in giving his honest opinion of plaintiff's performance to the Hunter reference checker, who defendant believed was a prospective employer. If defendant recommended plaintiff for a job for which defendant thought plaintiff was incapable, defendant would have exposed himself to the possibility of a lowered reputation in the business community or even potential liability if plaintiff proved incompetent at the position for which defendant recommended him. Defendant's interests in both of these instances are legitimate business reasons for defendant's allegedly tortious communications. The trial court properly granted summary disposition in favor of defendant on plaintiff's claims for tortious interference.

Lastly, we address plaintiff's argument regarding the trial court's dismissal of his claim of intentional infliction of emotional distress. To establish a prima facie claim of intentional infliction of emotional distress, plaintiff must present evidence of (1) defendant's extreme and outrageous conduct, (2) defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of plaintiff. *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004). Liability attaches only when a plaintiff can demonstrate that the defendant's conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Id.* (citation and quotation marks omitted).

Defendant's communication of his opinion of plaintiff's work performance, which included a number of positive comments, to Skodak and to the reference checker does not in any form meet this Court's threshold for extreme and outrageous conduct. Regardless of Ford's internal policies, defendant's comments regarding plaintiff's performance do not exceed the bounds of decency and by no stretch of the imagination would be "regarded as atrocious and utterly intolerable in a civilized community." Furthermore, plaintiff does not even allege that he suffered any severe emotional distress. Although plaintiff claims that he sought treatment from a psychiatrist during "the latter part of 2001," plaintiff has offered no proof of this or the reason why he sought the aid of a psychiatrist. By plaintiff's own admission, he has been in good health

since leaving his position at Compuware in October of 2001. The trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ Michael J. Talbot

/s/ Kathleen Jansen

/s/ Hilda R. Gage