

STATE OF MICHIGAN
COURT OF APPEALS

CEDRONI ASSOCIATES, INC.,

Plaintiff-Appellant,

v

TOMBLINSON, HARBURN ASSOCIATES,
ARCHITECTS & PLANNERS, INC.,

Defendant-Appellee.

FOR PUBLICATION

November 16, 2010

9:05 a.m.

No. 287024

Genesee Circuit Court

LC No. 08-088761-CK

Advance Sheets Version

Before: MURPHY, C.J., and K. F. KELLY and STEPHENS, JJ.

MURPHY, C.J.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant. This case involves a claim of tortious interference with a business expectancy arising out of, allegedly, defendant's improper conduct, communications, and recommendations that resulted in a school district's decision not to award plaintiff a construction project despite plaintiff's submission of the lowest bid. We hold that genuine issues of material fact existed with respect to the elements of plaintiff's cause of action. More specifically, we reject the trial court's determination that, as a matter of law, plaintiff lacked a valid business expectancy. Plaintiff, as the lowest bidder, submitted evidence sufficient to create a factual dispute with respect to whether it was a "responsible" contractor to the extent that the trier of fact could have concluded that there existed a reasonable probability or likelihood that plaintiff would have been awarded the project absent the alleged tortious interference. Therefore, there was a genuine issue of material fact with respect to whether plaintiff had a valid business expectancy. We emphasize that the submission of the lowest bid, in and of itself, was inadequate to sustain plaintiff's suit. We reject any rule per se that would allow litigation to proceed simply on the basis of proof of the lowest bid, except, of course, if no additional criteria needed to be satisfied, which is unlikely. Absent sufficient additional evidence on relevant award criteria, there would be no valid business expectancy. We further reject the trial court's determination that, as a matter of law, plaintiff failed to show that defendant did anything improper. Plaintiff submitted evidence sufficient to create a factual dispute with respect to whether defendant's conduct was intentional and improper, motivated by malice and not legitimate business reasons. On this issue, we emphasize that the exercise of professional business judgment in making recommendations relative to governmental contracts and projects must be afforded some level of protection and deference. But we will not preclude litigation when there exists evidence suggesting that the ostensible exercise of professional business judgment is in reality a disguised or veiled attempt to

intentionally and improperly interfere with the contractual or expectant business relationships of others. Here, issues of fact were established and, accordingly, we reverse and remand.

I. BACKGROUND

The Davison Community Schools (DCS) opened bidding on a construction project that entailed work at two school sites. Pursuant to a contract, defendant, an architectural firm, assisted the DCS with the bid-selection process by reviewing and evaluating bid applications, investigating competing contractors and their references, expressing opinions and views on contractor competence and workmanship, and making recommendations regarding which contractor should be awarded the project. Plaintiff's bid was the lowest submitted to the DCS by any contractor. After entertaining all the submitted bids, the DCS, as recommended by defendant, elected to award the contract on the construction project to the contractor that had submitted the second lowest bid, not plaintiff.

Plaintiff filed suit against defendant, alleging a single count of, as framed by plaintiff, tortious interference with prospective economic relations.¹ Plaintiff asserted that there existed an expectancy of a valid business relationship developing between it and the DCS, that defendant was aware of the expectancy, that defendant intentionally interfered with the expectant relationship by wrongfully claiming that plaintiff was unqualified to perform the work on the project, that defendant's wrongful interference terminated the expectancy, and that plaintiff suffered damages as a result of the interference, including lost profits. In our analysis, we shall explore in detail the nature of the documentary evidence and how it relates to the issues presented.

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), ruling that the evidence failed to show that plaintiff had a reasonable or valid expectation of entering into a business relationship with the DCS and that the evidence fell short of showing that defendant did anything improper.

II. ANALYSIS

A. STANDARD OF REVIEW AND GENERAL SUMMARY-DISPOSITION PRINCIPLES

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's cause of action. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and

¹ For purposes of this opinion, we shall refer to plaintiff's claim as "tortious interference with a business expectancy."

other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). The trial court's task in reviewing the motion entails consideration of the record evidence and all reasonable inferences arising from that evidence. *Skinner*, 445 Mich at 161. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The trial court is not permitted to assess credibility, to weigh the evidence, or to determine facts, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Skinner*, 445 Mich at 161; *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

B. VALID BUSINESS EXPECTANCY

On appeal, plaintiff first argues that the trial court erred by granting the motion for summary disposition when there was evidence sufficient to create a factual issue regarding whether plaintiff, as a qualified and responsible bidder that submitted the lowest bid, had a valid business expectancy. We agree.

1. THE CASELAW

With respect to a claim of tortious interference with a business expectancy, a plaintiff must prove (1) the existence of a valid business expectancy, (2) knowledge of the expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a termination of the expectancy, and (4) resultant damage to the plaintiff. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 323; 788 NW2d 679 (2010); *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 254; 673 NW2d 805 (2003). A valid business expectancy is one in which there exists a reasonable likelihood or probability that the expectancy will come to fruition; mere wishful thinking is not sufficient to support a claim. *First Pub Corp v Parfet*, 246 Mich App 182, 199; 631 NW2d 785 (2001), vacated in part on other grounds 468 Mich 101 (2003); *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984).

In *Joba Constr Co, Inc v Burns & Roe, Inc*, 121 Mich App 615; 329 NW2d 760 (1982), the plaintiff was a corporation that engaged in underground and heavy-duty construction, and the defendant was a firm of consulting engineers that had been retained by the Detroit Public Lighting Commission (PLC) under contract relative to a planned expansion of a utility station. Comparable to defendant's duties here, the engineering firm had contracted "to prepare construction specifications, evaluate bids made by contractors and make recommendations to the PLC as to which contractor should be awarded contracts." *Id.* at 624. The plaintiff submitted the lowest bid, but the engineering firm recommended that the PLC award the construction contract to another contractor "as it felt plaintiff was unqualified to perform the contract." *Id.* The PLC followed the defendant's recommendation, and the plaintiff was denied the contract. On another utility project, a general contractor had been awarded a construction contract by the PLC, and that contractor had designated the plaintiff as a subcontractor. The engineering firm, however, indicated that the plaintiff was an unacceptable subcontractor, and the plaintiff was then removed

from the project. The plaintiff sued the defendant for tortious interference with prospective advantageous economic relations, and the jury returned a verdict in favor of the plaintiff in the amount of \$272,368. *Id.* at 624-625.

On appeal, the defendant claimed that the trial court had erred by denying its motion for a directed verdict, arguing “that it was entitled to a directed verdict as plaintiff failed to produce sufficient evidence to raise a question of fact as to a valid expectancy that the contracts would have been awarded to plaintiff absent defendant’s alleged interference.” *Id.* at 633. The defendant maintained that “the *discretionary* factors going into the determination of who is the lowest *qualified* bidder preclude[d] plaintiff from proving it had an expectation of being awarded the contracts.” *Id.* at 634 (emphasis added). The *Joba Constr* panel stated that, to support the tortious-interference claim, the plaintiff had to prove that it was reasonably likely or probable that a specific and reasonable economic advantage or expectancy would indeed develop and occur. *Id.* at 634-635. The panel stated that the plaintiff was not required to demonstrate a guaranteed relationship, considering that anything defined as prospective in nature would necessarily be uncertain, and stated that while certainties need not be shown, there must be something more than innate optimism or mere hope. *Id.* at 635. This Court concluded that the plaintiff had submitted “sufficient evidence to create a question of fact as to whether it was the lowest qualified bidder and thus had a legitimate expectancy in obtaining the contracts” *Id.*²

In *Trepel*, 135 Mich App at 377-381, this Court tackled the issue of whether the trial court had properly granted summary disposition on a counterclaim of tortious interference with a prospective advantage, focusing attention on the lower court’s determination that no valid business expectancy existed. The counterclaim was pursued by one of the defendants, a hospital, against the plaintiff, a radiologist. The hospital had applied for approval of a bond issue from the Michigan State Hospital Finance Authority (the authority), and the authority had granted tentative approval of a proposed sale of municipal bonds. The final step before consummation of the sale was obtaining approval of the sale by the Municipal Finance Commission (MFC), but the scheduled approval was substantially delayed and, as a consequence, the hospital ran out of money and had to obtain alternative financing at a much higher interest rate. The plaintiff had allegedly made good on threats to the hospital to send letters to the MFC in which he claimed that certificates of need filed by the hospital were defective. The alleged intent behind the sending of the letters by the plaintiff was to interfere with the hospital’s application for approval of the bond issue, which approval was ultimately never obtained. *Id.* at 366-369.

The *Trepel* panel, examining whether the hospital had a valid business expectancy in obtaining approval of the bond issue from the government, first noted that there was an absence of Michigan caselaw “relating to interference with *discretionary* governmental action.” *Id.* at 378 (emphasis added). This Court proceeded to review three federal court decisions, two of which approved of interference suits brought by parties that had submitted the most favorable

² While the *Joba Constr* opinion did indicate that the plaintiff was the lowest bidder on the first project, it did not reveal the nature of the evidence presented at trial with respect to the plaintiff being a “qualified” bidder.

bids on governmental contracts, *Lewis v Bloede*, 202 F 7 (CA 4, 1912), and *Pedersen v United States*, 191 F Supp 95 (D Guam, 1961), and one in which the court rejected a suit arising out of a city council's decision relative to a request to close and relocate an alley that was delayed because of the need to hear from interested parties, *Carr v Brown*, 395 A2d 79 (DC App, 1978). *Trepel*, 135 Mich App at 379-380. The *Trepel* panel then ruled as follows:

In the instant case, the discretion to be exercised by the MFC appears to be somewhat greater than that attributed to the governmental bodies in *Lewis* and *Pedersen*, *supra*, but significantly less than that in *Carr*. We perceive that *Carr* is a gloss on the general rule. It applies to situations where too many factors are in play to be able to reasonably infer that, but for defendant's allegedly wrongful action, plaintiff likely would have obtained the desired advantage. In this case, the MFC's grant of approval must be preceded by the determinations required by statute. A trier of fact might be persuaded that defendant hospital could ascertain with reasonable certainty whether the items listed in the statute were satisfied so that MFC approval was a probability. If the question were whether defendant hospital's application for a loan was denied because of [the plaintiff's] interference, defendant hospital would have made out a cause of action because a trier of fact could assess the causal effect of the [plaintiff's] actions.

However, where the MFC approval is only delayed, as alleged here, the problem becomes more difficult. The MFC is required to make findings of fact before granting approval. Obviously, that task takes a certain amount of time to accomplish. However, the procedure involved is not a notice and comment type hearing, as in *Carr*, designed to let interested parties express their opposition. Defendant hospital should have the opportunity to prove its allegation that approval was "scheduled" for September 11, 1979.

In *Lewis*, [202 F at] 20-21, and *Carr*, [395 A2d at] 84, reference is made to the prior history of the governmental entity in granting approval. Defendant hospital has sought to introduce evidence by way of affidavit of the MFC's perfect record in approving bond issues already approved by the Michigan State Hospital Finance Authority. We believe such evidence if otherwise admissible could persuade a trier of fact at a contested trial. [*Id.* at 380-381.]

From *Joba Constr*, *Trepel*, and *First Pub*, and cases relied on therein, we derive the following principles to apply in determining whether there exists a valid business expectancy: (1) the presence of some level of discretion exercisable by a governmental body or decision-maker does not automatically preclude a recognition of a valid business expectancy, (2) if the discretion is expansive and not restricted by limiting criteria and factors to an extent that it makes it impossible to reasonably infer that the claimed expectancy would likely have come to fruition, there is no valid business expectancy, (3) an expectancy must generally be specific and reasonable, (4) it must be shown that there was a reasonable likelihood or probability that the expectant relationship would have developed as desired absent tortious interference with the expectancy, (5) a party need not prove that the expectancy equated to a certainty or guarantee, (6) innate optimism or mere hope are insufficient, and (7) the prior history of the governmental body or decision-maker and governing internal and external rules, policies, and laws constitute factors for a court to consider in determining whether a business expectancy was valid and likely

achievable. Of course, when addressing a motion for summary disposition under MCR 2.116(C)(10), these principles must be viewed in the context of determining whether a genuine issue of material fact exists on contemplation of the documentary evidence.

2. APPLICATION OF THE LAW TO THE FACTS

We begin by examining the documents governing the DCS and the bid-selection process. DCS's fiscal management policy (FMP) indicates multiple times that the DCS Board of Education (Board) has and reserves the right to reject any or all bids. In one section of the FMP, it provides that the reservation of the right to reject bids includes "the bid of any contractor who is not reasonably determined to be 'responsible' in conjunction with this policy." The FMP, however, also provides:

The Board . . . hereby establishes this policy to satisfy its statutory duty to competitively bid contracts for construction of a new school building, or an addition to or repair or renovation of an existing school building of the [DCS], except for repairs in emergency situations. Bids *shall* be awarded in compliance with applicable bidding obligations imposed by law to the "*lowest responsible bidder*." [Emphasis added.]

This language, including use of the word "shall," indicates that if a bidding contractor submits the lowest bid on a project and is deemed "responsible," the Board is mandated to award the project to that contractor. *In re Kostin Estate*, 278 Mich App 47, 57; 748 NW2d 583 (2008) ("Shall" is mandatory."). There appears to be some tension between this provision and the FMP's language that gives the Board the authority to reject any or all bids, giving rise to the question whether the Board has the discretion to reject a bid from the "lowest responsible bidder." The term "lowest responsible bidder" is defined in the FMP as being

[t]he Responsible Contractor that has submitted a fully complete and responsive bid that provides the lowest net dollar cost for all labor and materials required for the complete performance of the work of the Construction Project let for bid. Such bid must satisfy the requirements of all applicable local, state, and federal laws, this Policy, any administrative rules associated with this Policy developed by the Superintendent at the Board's direction, and bid documents used to solicit bids, and any other guidelines and specifications required for the Construction Project. Because a bidder with the net lowest dollar cost bid may not be a Responsible Contractor, the lowest dollar cost bidder may not always receive award of the bid.

This definition refers to the term "Responsible Contractor," and the FMP also defines that term as being

[a] contractor determined by the Board to be sufficiently qualified to satisfactorily perform the Construction Project, in accordance with all applicable contractual and legal requirements. The Board's determination shall be based upon: (1) an overall review of the Responsibility Criteria listed below and the contractor's responses, or failure to respond, to same; (2) the contractor's compliance with this Policy and all applicable local, state and federal laws; (3) the input of the

District's architect(s) [here defendant] and/or construction manager(s), if any; (4) review of the contractor's proposed subcontractors; and (5) other relevant factors particular to the Construction Project.

The FMP then provides a definition of "Responsibility Criteria," which sets forth a nonexclusive list of criteria that can be examined and weighed by the Board in determining whether a contractor is responsible.

In his affidavit, the superintendent of the DCS, R. Clay Perkins, averred that the DCS had the authority and right under the FMP to reject any or all bids and that the FMP specifically apprised contractors that the lowest bidder might not always be awarded a project.

The trial court was also provided with a project manual drafted by defendant that addressed the advertisement of bids and the planned construction to be undertaken at the two work sites, Hill Elementary School and Siple Elementary School. The project manual twice indicates that the DCS "reserves the right to accept or reject any or all offers." But the manual also provides that the DCS "reserves the right to reject any or all bids *where* incomplete or irregular, lacking bid bond, data required by bidding documents, or where proposals exceed funds available." (Emphasis added.) This provision suggests that there is somewhat of a limitation on the grounds pursuant to which a bid can be rejected.

Defendant's reliance on the language in the FMP and project manual that gives the DCS the right to reject any or all bids reflects a failure to appreciate the language in the FMP that requires the DCS to award a project to the lowest responsible bidder. Indeed, defendant fails to even acknowledge the provision concerning the "lowest responsible bidder" mandate, let alone argue that it is negated by or subject to the language in the FMP and project manual on which defendant relies. Defendant's position suggests that the DCS has complete and unfettered discretion to reject a bid, but this is inconsistent with the "lowest responsible bidder" provision that mandates an award and inconsistent with the language in the project manual that indicates that the DCS has the right to reject bids, but only for certain reasons.

We hold, as a matter of law, that the multiple provisions reserving the right to reject bids are subject to the provision requiring an award to be made to the lowest responsible bidder; otherwise, the "lowest responsible bidder" provision is rendered meaningless and nugatory. In *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003), our Supreme Court stated:

Just as "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory," courts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. [Citation omitted.]

We find no reason not to apply this same construction principle when interpreting the FMP. Further, our interpretation does not render the "right to reject" provisions surplusage or nugatory, given that they remain entirely enforceable in all circumstances other than a particular situation in which the bid being addressed was submitted by the lowest responsible bidder. Aside from the "lowest responsible bidder" provision itself, our conclusion finds some additional

support in the FMP, in which, as already indicated, one of the provisions reserving the right to reject a bid also provides that the reservation encompasses “the bid of any contractor who is not reasonably determined to be ‘responsible’ in conjunction with this policy.” This language tends to honor and can be read consistently with the “lowest responsible bidder” mandate. Further support can be found in the FMP’s definition of “lowest responsible bidder,” which provides, “Because a bidder with the net lowest dollar cost bid may not be a Responsible Contractor, the lowest dollar cost bidder may not always receive award of the bid.” By corollary, this language suggests that if a contractor submits the lowest bid, it would be awarded the project at issue if the contractor is also properly characterized as being “responsible.” Ultimately, our ruling rests on the fact that any other interpretation would render surplusage and nugatory the FMP’s language that “[b]ids *shall* be awarded in compliance with applicable bidding obligations imposed by law to the *‘lowest responsible bidder.’*” (Emphasis added.)

We next need to address whether plaintiff submitted evidence sufficient to create a genuine issue of material fact on the question whether it had a valid business expectancy, accepting the undisputed fact that plaintiff submitted the lowest bid and taking into consideration our construction of the FMP. Our attention must focus on the requirement that the contractor or bidder be “responsible.” The Board certainly has some discretion in making this determination. However, we are not prepared to rule that, as a matter of law, a contractor that submitted the lowest bid on a project, thereby satisfying one of the FMP award prerequisites of the “lowest responsible bidder” clause, can never establish a valid business expectancy merely because the Board had some discretion in determining whether that contractor was responsible.

The Board’s discretion in awarding a project is not expansive or unrestricted by limiting criteria and factors to an extent that it makes it impossible to reasonably infer that plaintiff’s claimed expectancy would likely have come to fruition. Rather, the FMP limits the discretion to an assessment of whether a contractor is “responsible,” and that determination is subject to the factors and criteria delineated in the definitional section of the FMP. In determining whether a contractor is responsible, the ultimate question to be answered by the Board, according to the FMP, is whether the contractor is “sufficiently qualified to satisfactorily perform the Construction Project, in accordance with all applicable contractual and legal requirements.” Certainly, a contractor submitting the lowest bid on a project, such as plaintiff, may be able to prove with testimony and other evidence that it was sufficiently qualified to complete the project in a satisfactory and legally and contractually compliant manner, to the extent that a trier of fact could conclude that there existed a reasonable likelihood or probability that the contractor would have been awarded the project absent tortious interference by a defendant. Supporting evidence that goes beyond innate optimism or mere hope could easily exist if a contractor truly has a stellar track record in the construction field; certainty or a guarantee of an award need not be shown.

We shall now examine the documentary evidence presented in the trial court. Defendant’s representative, Jackie Hoist, contacted and interviewed persons identified on plaintiff’s bidder-qualification form in order to obtain opinions on the quality and timeliness of

plaintiff's work on past projects. Hoist's typewritten notes of the responses and opinions supposedly communicated to her reflect some negative reviews of plaintiff's work, the harshest of which came from Hoist herself, who had worked with plaintiff on multiple projects.³ The notes, however, also reflect some positive reviews, e.g., Richard Cedroni⁴ "managed it well," "hands on job," "supervision was good," "would work with them again," "asked [plaintiff] to bid a lot of their jobs," "did a good job," "very dependable," "do what they [s]ay they will," "[s]chedule was fine," "[w]ork was very good as a whole," "[v]ery reasonable on change orders," "[w]ork quality was good," "redid work when necessary," and "[p]aperwork end was good." These responses and opinions came from many individuals and concerned several projects.⁵ Additionally, the lower court record contains an affidavit by Cedroni and a letter from Cedroni to the DCS, which was also distributed at a public meeting to DCS committee members who were engaged in making a recommendation to the Board to award the project to US Construction and Design Services, LLC. Cedroni's affidavit and his circulated letter averred and expressed that plaintiff had performed quality work, had timely completed awarded projects, and had received excellent reviews, all with respect to numerous construction projects. The affidavit and letter were detailed and discussed specifics regarding the various projects, and they addressed and challenged the proclaimed negative opinions garnered by Hoist in her investigation conducted on behalf of defendant.⁶

In light of the documentary evidence indicating that plaintiff was sufficiently qualified to complete the project in a satisfactory manner, we conclude that a genuine issue of material fact existed concerning whether plaintiff was a responsible contractor to the extent that a trier of fact could conclude that there existed a reasonable likelihood or probability that plaintiff would have been awarded the project absent the alleged tortious interference by defendant. Stated otherwise, there was a genuine issue of material fact regarding whether plaintiff had a valid business expectancy.

As indicated in our introduction, we emphasize that the submission of the lowest bid, in and of itself, was inadequate to sustain plaintiff's suit. We reject any per se rule that would allow litigation to proceed simply on the basis of proof of the lowest bid, except, of course, when

³ Hoist noted that, on one project, some of plaintiff's work was the worst that she had ever seen.

⁴ Cedroni is plaintiff's president and principal representative.

⁵ The documentary evidence is not clear regarding whether Hoist's notes themselves were shared with the DCS; however, defendant's brief in the trial court indicated that the notes were indeed shared and that the DCS chose another contractor on the basis of the notes and the information contained therein.

⁶ Hoist's notes and Cedroni's affidavit and letter do raise concerns about hearsay. However, neither party argued in the trial court, nor argues on appeal, that any of the documentary evidence should be disregarded and not considered on the basis of hearsay. Indeed, both parties place some reliance on all three of the documents. Given that the parties have effectively agreed to allow consideration of the documents and their contents, we shall not engage in any hearsay analysis.

no additional criteria needed to be satisfied, which is unlikely. Absent sufficient additional evidence on relevant award criteria, there would be no valid business expectancy.

We find it necessary to address some of the criticisms leveled by the dissent regarding the issue whether there could be a valid business expectancy. Initially, the dissent asserts that no cause of action exists to protect bidders on a governmental contract, citing *Talbot Paving Co v Detroit*, 109 Mich 657, 661-662; 67 NW 979 (1896). First, *Talbot Paving* addressed an action by a contractor against a municipality, and here plaintiff is not suing the DCS, but is proceeding on a tortious-interference claim against defendant. Next, *Talbot Paving* allowed for the possibility of a suit against a municipality if fraud were involved. *Id.* at 662. As can be gleaned from our discussion later in this opinion, there was evidence presented suggesting fraudulent conduct on the part of defendant. The dissent also cites *Leavy v City of Jackson*, 247 Mich 447, 450-451; 226 NW 214 (1929), another suit against the municipality itself, and *Leavy* recognized that a suit by a bidder could be maintained if the municipality did not act in good faith in the exercise of honest discretion or if fraud, injustice, or a violation of trust permeated the bidding process. Once again, as reflected later in our opinion, there is evidence indicating bad faith, a lack of honesty, injustice, and fraud.

The dissent contends that there could be no valid business expectancy because MCL 380.1267 gave the DCS unfettered discretion to reject a bid, since the statute provides no limiting criteria and because the FMP does not have the force of law. MCL 380.1267(6) provides, in part, that “[t]he board, intermediate school board, or board of directors may reject any or all bids, and if all bids are rejected, shall readvertise in the manner required by this section.” We first note that MCL 380.1267(6) does not restrict a board from imposing its own criteria and limitations on itself relative to the bidding process and the acceptance and rejection of bids. While the statutory language, standing alone, places no limits on discretion, the dissent’s position ignores the reality that the FMP governed the bidding process. Superintendent Perkins averred that the FMP guided the bidding process and that the process involved identifying the lowest responsible bidder. The FMP itself provides that projects “requiring competitive bids shall be made in accordance with current statutes, the creation of bid specifications, and adherence to the District’s bidding procedure[.]” (Emphasis added.) The FMP further provides that the requirements of the FMP “shall be incorporated into all bid documents used to solicit bids for construction projects[.]” We therefore conclude that the FMP is absolutely relevant to analyzing the issue whether plaintiff had a valid business expectancy.

Finally, we reject the dissent’s reliance on unpublished opinions. MCR 7.215(J).

C. TORTIOUS INTERFERENCE—INTENTIONAL AND IMPROPER CONDUCT

Plaintiff next argues that the trial court erred by granting the motion for summary disposition when a genuine issue of material fact existed with respect to whether defendant’s communications to the DCS that plaintiff was not qualified constituted intentional and improper conduct.

1. THE CASELAW

In regard to a claim of tortious interference with a business expectancy, a plaintiff must demonstrate that the defendant acted both intentionally and either improperly or without justification. *Dalley*, 287 Mich App at 323. “[O]ne 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.” *Badiee v Brighton Area Sch*, 265 Mich App 343, 367; 695 NW2d 521 (2005), quoting *CMI Int’l, Inc v Internet Int’l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002), quoting *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984) (quotation marks omitted). A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances. *Badiee*, 265 Mich App at 367; *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992). When a defendant’s conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference. *Badiee*, 265 Mich App at 367. To establish that a lawful act was done with malice and without justification, a plaintiff must prove, with particularity, affirmative acts taken by the defendant that corroborate the improper motive of the interference. *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003); see also *Dalley*, 287 Mich App at 324. “Where the defendant’s actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.” *Id.* (quotation marks and citation omitted).

A false accusation may provide a basis to pursue a claim of tortious interference. *First Pub*, 246 Mich App at 199. In *Trepel*, 135 Mich App at 377, this Court noted that the defendant’s counterclaim of tortious interference “clearly allege[d] unethical conduct—ending letters knowing them to contain false allegations.”

2. APPLICATION OF THE LAW TO THE FACTS

The FMP provides that the determination whether a contractor is a responsible contractor shall be based, in part, on “the input of the [DCS’s] architect,” which in this case was defendant. The contract between the DCS and defendant provides that defendant “shall assist the [DCS] in obtaining competitive bids and shall assist the [DCS] in awarding and preparing contracts for construction.” Superintendent Perkins averred that plaintiff had submitted the lowest bid, but, “[b]ased on the review by the Board Committee and the recommendations of [defendant], [the DCS] decided to award the Project to US Construction[.]” There is no dispute that, consistently with its obligation to provide assistance in the bid-selection process, defendant made a recommendation and conveyed information to the DCS regarding plaintiff and its bid. Hoist sent a letter on behalf of defendant to the DCS in which she stated:

We have reviewed the apparent low bidder[’]s proposal, references, past experience and qualifications. At the close of the review, we recommend that you move to the second low bidder, US Construction They have provided construction services for other projects designed by [us] & for [the DCS], and have performed the work adequately.

It can reasonably be inferred from this letter that Hoist, and thus defendant, found that plaintiff had a poor work history and consequently would not adequately perform the work on the project at issue. And Perkins’s averment indicating that the award decision was based, in part, on defendant’s recommendation provides evidence of a causal relationship between defendant’s conduct and the decision to award the project to US Construction instead of plaintiff. Further support of a causal relationship is an e-mail to Perkins from the DCS’s director of finance and operations, Daniel Romzek, in which he stated that Hoist “still stands by her

recommendation not to proceed with the low bidder, and I told her that we will rely on her reference checks and recommendation for our recommendation to the board.” For these reasons, we respectfully disagree with the dissent’s position that plaintiff failed to establish causation.

There was conflicting evidence presented regarding plaintiff’s workmanship on various projects. In Hoist’s notes, she indicated that the contact person on a construction project involving toilet buildings at the Island Lake State Park stated that plaintiff had failed to meet the project’s schedule, failed to follow the plans and specifications, failed to provide supervision, and failed to follow up on matters. The contact person also stated that plaintiff’s work was of poor quality and that he believed that “the state put [Cedroni] on their ‘may not bid’ list.” Cedroni asserted in his affidavit that the contact person on the Island Lake project was employed by defendant, which acted as the architect on the project. Cedroni further averred that plaintiff “timely and properly completed all work on the project considering the design errors of [defendant].” Cedroni additionally attested that “[t]he work was fully completed and was of good quality, as proven by [plaintiff’s] receipt of full payment for the project[, and plaintiff] had on-site supervision during the entire course of the project.”

In Hoist’s notes, she indicated that she spoke with a person from Architectural Systems Group regarding a prime subcontract and that the individual stated that plaintiff was “[n]ot good to deal with.” In Cedroni’s affidavit, he averred that plaintiff “is currently working with Architectural Systems Group as part of a \$170,000 contract[.]”

In Hoist’s notes, she indicated that Ken Kander, a contact person on a construction project involving the Holly Academy, stated that he would not say anything negative about plaintiff, nor would he say anything positive. Another contact person on the Holly Academy project supposedly told Hoist that he would never hire plaintiff for the DCS construction project. In Cedroni’s affidavit, he attested as follows regarding the Holly Academy project, for which defendant provided architectural services:

Ken Kander will attest that Cedroni completed quality work on the project, had appropriate levels of supervision, and addressed any concerns of the owner. The problems on this construction project were due to [defendant]. [Plaintiff] suggested an alternative ballast to the one [defendant] had specified. [Defendant] rejected [plaintiff’s] proposal. [Defendant’s] specified ballasts were problematic and [plaintiff’s] subcontractor has made repeated visits to the construction project to address the problems. In fact, Holly Academy has since retained a new architect rather than work any further with [defendant].^{7]}

⁷ Returning to our hearsay concern, aside from again noting that neither party raises hearsay issues, we would note that Cedroni’s claims with respect to what others told him about plaintiff’s workmanship would not be hearsay in the context of this issue because their statements would not be offered to prove the truth of the matter asserted. MRE 801(c). For purposes of this issue, statements that, for example, plaintiff did quality work on a project would not be used to prove that plaintiff indeed did quality work, but simply to show that the declarant made a statement

In his letter presented to the DCS committee involved in the bidding process, Cedroni stated that he had spoken to the owner of the Holly Academy numerous times “and he was very happy with our quality and performance on the project and would not hesitate to utilize our services again.”

Hoist’s notes also reflect her own thoughts regarding plaintiff’s workmanship on projects that plaintiff and defendant worked on together. According to Hoist, plaintiff’s work at Holly Academy lacked supervision and showed poor workmanship. She also indicated that the quality of plaintiff’s work on the project was reflective of their bid “and about what I expected from Cedroni, but in addition to the low quality, his follow-up on construction issues, especially with regard to their lighting problem, is unacceptable to me.” In an e-mail from Hoist to Kander regarding the Holly Academy project, Hoist complained of plaintiff’s failure to deal with a problem with lights, and she then stated, “So, here’s where the rubber may hit the road for Cedroni, [h]e was low bidder on some work we are doing for [the DCS].” Regarding a construction project involving a maintenance building in Rochester Hills, Hoist described some of plaintiff’s work as the worst that she had ever seen. With respect to that project, Cedroni averred that the problems were caused by defendant.

In his letter presented to the DCS committee, Cedroni made the following observations regarding his company:

I have personally contacted all parties on this document [Hoist’s notes] and all admitted to talking to Jackie. They all reported giving good reviews and glowing reports of our performance, except for one architect. After speaking with this architect and explaining to him that his comment could be viewed as damaging, he stated he didn’t think his review was particularly bad and he would have no problem working with us in the future.

* * *

. . . I have found no definitive reason as to why my company should not be recommended for this project. I am offering to complete this job at nearly \$50,000 less than the next lowest bidder We have never been removed from a project and never received a poor review from any architect/owner we’ve worked with. Even after our last project with [defendant], I was told they had no issue with our performance and we could use them as a reference for future work.

Viewing the conflicting and inconsistent evidence and the inferences arising from it in a light most favorable to plaintiff, a trier of fact could reasonably conclude that defendant acted with malice, in a wrongful manner per se, unethically, with an improper motive and absence of justification, or deceitfully with respect to the damaging information and recommendation conveyed to the DCS. If plaintiff’s evidence were found to be credible by the trier of fact, it could reasonably conclude that defendant acted intentionally and improperly in an effort to

contrary to one attributed to him or her in Hoist’s notes, calling into question Hoist’s truthfulness and showing improper conduct. See *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998).

interfere with plaintiff's business expectancy, i.e., being awarded the construction project by the DCS. It is quite evident in reviewing the documentary evidence that a great deal of friction and animosity had developed between plaintiff and defendant over past projects by the time the bid-selection process took place here, and a trier of fact could determine that defendant's recommendation was motivated by malice and not legitimate business reasons. Summary disposition was simply inappropriate in light of the record.

As indicated in our introduction, we emphasize that the exercise of professional business judgment in making recommendations relative to governmental contracts and projects must be afforded some level of protection and deference. But we will not preclude litigation when there exists evidence suggesting that the ostensible exercise of professional business judgment is in reality a disguised or veiled attempt to intentionally and improperly interfere with the contractual or expectant business relationships of others. There is evidence here indicating that defendant, through Hoist, was being untruthful and inaccurate in its portrayal of plaintiff. The trier of fact must sort through all the conflicting evidence and assess the credibility of the parties' claims and their witnesses.

Finally, the dissent posits that there was no evidence that Hoist provided false information to the DCS or had an improper motive and that the information supplied by Hoist simply constituted a negative opinion. The dissent asserts that the evidence merely reflected professional disagreements. We respectfully conclude that the dissent fails to view the evidence in a light most favorable to plaintiff and fails to consider reasonable inferences arising from the evidence. A reasonable inference arising from Cedroni's affidavit is that Hoist was lying, and Cedroni's letter indicates that glowing reviews were given to Hoist, which, if true, would directly establish that she was lying. Taking into consideration Cedroni's affidavit and letter, along with the other documentary evidence, and viewing it in a light most favorable to plaintiff, this case entails more than professional disagreements and negative opinions.

D. DEFENDANT'S RELATIONSHIP WITH THE DCS

The dissent argues that defendant is entitled to summary disposition on the basis that defendant was not a third party to the prospective contract or relationship between plaintiff and the DCS; rather, defendant was an agent of the DCS and thus a tortious-interference cause of action cannot be maintained. We initially note that defendant itself does not make this argument, nor did the trial court address this issue.

A plaintiff must establish that the defendant was a third party to the contract or business relationship in order to maintain a tortious-interference claim, and therefore corporate agents are not liable for tortious interference with respect to corporation contracts and relationships when acting for the benefit of the corporation and within the scope of their authority. *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 593; 683 NW2d 233 (2004); *Reed v Mich Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). For purposes of examining and applying this particular principle of law, we first question whether it is proper to classify defendant as a "corporate agent" rather than a "third party" relative to the relationship between plaintiff and the DCS. The caselaw addressing the principle has almost always been in the context of a situation in which the defendant was an actual employee or officer of the corporation or entity involved in the relationship or prospective relationship. *Reed*, 201 Mich App at 13 (executive director and chief officer of the defendant Girl Scout council); *Bradley v Philip Morris, Inc*, 194 Mich App

44, 46; 486 NW2d 48 (1992), vacated in part on other grounds 440 Mich 870 (1992) (employees of tobacco company); *Feaheny v Caldwell*, 175 Mich App 291, 294-295; 437 NW2d 358 (1989) (top executives of Ford Motor Company); *Dzierwa v Mich Oil Co*, 152 Mich App 281, 283; 393 NW2d 610 (1986) (president and director of oil company); *Stack v Marcum*, 147 Mich App 756, 758; 382 NW2d 743 (1985) (employee supervisor at phone company); *Tash v Houston*, 74 Mich App 566, 568; 254 NW2d 579 (1977) (president of union). There is no indication that Hoist or any of defendant's personnel were employees or officers of the DCS. While *Lawsuit Fin* did not involve a defendant who was an employee or officer, the alleged interference occurred within the sanctity of the attorney-client relationship. *Lawsuit Fin*, 261 Mich App at 583.

Nevertheless, assuming for the sake of argument that defendant was an agent of the DCS and not a third party relative to the relationship between plaintiff and the DCS, that would not automatically insulate defendant from liability. Instead, even an agent can be held liable for tortious interference if the agent acts not for the benefit of the corporation or entity involved in the transaction or prospective transaction, but for his or her own benefit or pursuant to a personal motive. *Reed*, 201 Mich App at 13; *Bradley*, 194 Mich App at 50-51 (examining whether actions were based on personal motivation or for personal benefit); *Feaheny*, 175 Mich App at 294-295 (examining whether the defendants acted out of a personal motive to harm the plaintiff or to acquire a pecuniary advantage); *Stack*, 147 Mich App at 759-760 (examining whether the conduct at issue was to further the defendant's own ends); *Tash*, 74 Mich App at 571-574 (stating that the defendant agent must not act for a strictly personal motive and must proceed with an honest belief that actions will benefit the company).

Reviewing the evidence in a light most favorable to plaintiff, and taking into consideration reasonable inferences arising from the evidence, a genuine issue of material fact existed regarding whether Hoist was honestly acting for the benefit of the DCS or whether she was acting solely for her own benefit and out of motivation to harm plaintiff. As already indicated, a trier of fact, on the basis of the evidence, could reasonably conclude that defendant acted with malice, in a wrongful manner per se, unethically, with an improper motive and absence of justification, or deceitfully in regard to the damaging information and recommendation conveyed to the DCS. There was evidence of an acrimonious relationship between Hoist and Cedroni, and it could reasonably be inferred from the e-mail Hoist sent to Kander, when considered in conjunction with the other evidence, that Hoist was out to sabotage plaintiff's efforts in the bid process. If the information conveyed to the DCS was fabricated, and given the history between Hoist and Cedroni, one could conclude that Hoist was driven by a personal motive to get back at Cedroni and not by a good-faith attempt to benefit the DCS. The winning contractor was to work with defendant in completing the project, and Hoist's recommendation benefited her in that she would not be forced to work on the project with Cedroni, of whom she had a very negative opinion. Again, issues of fact abound and summary disposition was improper. We further note that very little discovery had taken place before the summary disposition motion was granted, and further discovery could greatly sharpen the issues presented. Finally, this Court's decision in *Joba Constr* would effectively have to be ignored on the issue now raised by the dissent, given that the defendant engineering firm in that case was also arguably an agent for the city.

III. CONCLUSION

In light of the documentary evidence indicating that plaintiff was sufficiently qualified to complete the project in a satisfactory manner, we conclude that a genuine issue of material fact existed concerning whether plaintiff was a responsible contractor to the extent that the trier of fact could conclude that there existed a reasonable likelihood or probability that plaintiff would have been awarded the project absent the alleged tortious interference by defendant. Thus, there was a genuine issue of material fact regarding whether plaintiff had a valid business expectancy.

Furthermore, viewing the conflicting and inconsistent evidence and the inferences arising from it in a light most favorable to plaintiff, a trier of fact could reasonably conclude that defendant acted intentionally and improperly in an effort to interfere with plaintiff's business expectancy.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, plaintiff is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens