STATE OF MICHIGAN

COURT OF APPEALS

KRISTINA MATHIS,

Plaintiff/Counter-Defendant-Appellant,

v

CONTROLLED TEMPERATURE, INC., and PATRICIA DREFFS-SCHULTZ,

Defendants/Counter-Plaintiffs-Appellees.

UNPUBLISHED
March 25, 2008

No. 275323
Oakland Circuit Court
LC No. 2005-068478-CZ

Before: White, P.J., and Hoekstra and Schuette, JJ.

PER CURIAM.

Plaintiff Kristina Mathis appeals as of right from a judgment awarding defendants Controlled Temperature, Inc. (CTI), and Patricia Dreffs-Schultz (Schultz) $5,200 on their counterclaim for breach of contract. Plaintiff challenges the trial court's order granting defendants' motion for summary disposition of her breach of contract claim under MCR 2.116(C)(10), and her additional contract, tort, and statutory claims under MCR 2.116(C)(7) and (10). Plaintiff also challenges the trial court's order allowing defendants to amend an affirmative defense and file their counterclaim. We affirm.

I. Background

Plaintiff was employed by CTI between July 2001 and June 2003. Schultz, a partner and vice-president of CTI, was responsible for running the business operations. In July 2003, Schultz, on behalf of CTI, and plaintiff executed an agreement to settle discrimination and retaliation charges filed by plaintiff with the Michigan Department of Civil Rights and Equal Employment Opportunity Commission. The CTI settlement agreement required plaintiff to repay the settlement amount to CTI if she "breaches or attempts to breach" the agreement.

In May 2004, plaintiff began receiving temporary work assignments through Accountants Connection. Plaintiff was assigned to work with Dawn Smart, a credit manager at Awrey Bakeries, Inc., (Awrey) until Smart's assistant returned in January 2005 from an extended disability and maternity leave. During plaintiff's assignment, Smart contacted CTI about plaintiff's past employment in an effort to get plaintiff hired by Awrey, but no position was ever

available or created for plaintiff. A hiring freeze was in place by February 2005, when Awrey began bankruptcy proceedings.

Plaintiff applied for an accounting position with the Farbman Group in January 2005. Wolanin & Associates, Inc. (Wolanin), a company that performs background checks of potential employees for its clients, checked plaintiff's former employment on behalf of the Farbman Group. Plaintiff was also interviewed and took accounting and drug tests, but was not offered the position.

In March 2005, plaintiff filed the instant action against CTI and Schultz, seeking damages for alleged derogatory and inaccurate information provided to potential employers during background checks of her CTI employment. Plaintiff's amended complaint included counts against both defendants for breach of the CTI settlement agreement, unlawful retaliation for filing the settled discrimination complaint, defamation, intentional interference with a business relationship, intentional infliction of emotional distress, and gross negligence. Among defendants' amended affirmative defenses was an allegation that plaintiff's claims were barred to the extent that they were prohibited by a release contained in the CTI settlement agreement.

In April 2006, the trial court granted defendants' motion to amend their affirmative defenses to add an allegation that plaintiff's claim based on her employment application with the Farbman Group was barred by a release contained in the application, and also granted defendants' motion to file a counterclaim alleging plaintiff's breach of the CTI settlement agreement. Plaintiff later withdrew her claims for gross negligence and intentional infliction of emotional distress. The trial court subsequently granted defendants' motion for summary disposition with respect to plaintiff's remaining claims, denied plaintiff's cross-motion for summary disposition, and entered judgment in favor of defendants on their counterclaim.

II. Motion to File Counterclaim and Amend Affirmative Defense

We first consider plaintiff's challenge to the trial court's decision granting defendants' motion to file a counterclaim and amend their affirmative defenses. An affirmative defense is waived unless stated in a party's responsive pleading, as originally filed or amended under MCR 2.118. See MCR 2.111(F)(3). A counterclaim must be filed with the answer or an amendment under MCR 2.118. See MCR 2.203(E). Because defendants did not file their counterclaim with their original answer, we review both of defendants' motions under the abuse of discretion standard applicable to amended pleadings under MCR 2.118. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9; 614 NW2d 169 (2000).

An abuse of discretion occurs when a trial court's decision "results in a decision falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). Under MCR 2.118(A)(2), leave to amend a pleading "shall be freely given when justice so requires." A motion for leave to amend should ordinarily be granted absent "any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment." *Cole*, *supra* at 9-10; see also *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). Delay alone does not justify denying the motion, but "a

court may deny a motion to amend if the delay was in bad faith or the opposing party suffered actual prejudice as a result." *Weymers*, *supra* at 659. Prejudice, in this context, means that the amendment would prevent the nonmoving party from having a fair trial. *Id*.; *Sands Appliance Services, Inc*, *supra* at 239 n 6.

Here, after conducting an in-chambers meeting with counsel on April 12, 2006, the trial court indicated that it intended to grant defendants' motion to file the counterclaim based on the rule of liberal amendments. The trial court also expressed agreement with defense counsel, who had argued that the information supporting the counterclaim was not discovered until Smart's deposition was taken in March 2006. Plaintiff has not stated or otherwise demonstrated any basis for concluding that the trial court abused its discretion in granting defendants' motion with regard to the counterclaim.

Instead, plaintiff's argument focuses on the trial court's grant of defendants' motion to amend its affirmative defenses to add a defense based on the release in plaintiff's January 14, 2005, employment application with the Farbman Group. We note that the trial court questioned the adequacy of the parties' pleadings with respect to this issue. Following the in-chambers meeting, it indicated that it had instructed the parties to "clean up their pleadings." While we agree with plaintiff that defendants' motion could have been brought earlier, the trial court accommodated plaintiff by revising the scheduling order and assessing costs against defendants related to the amended affirmative defense. Considering that plaintiff's amended complaint did not even mention the Farbman Group, we conclude that the trial court did not abuse its discretion by allowing the amended affirmative defense.

III. Awrey

Next, we consider plaintiff's challenge to the trial court's decision granting defendants' motion for summary disposition under MCR 2.116(C)(10) with respect to plaintiff's four claims involving her alleged employment opportunity at Awrey. We also consider plaintiff's challenge to defendants' motion for summary disposition under MCR 2.116(C)(10) with respect to its counterclaim for breach of contract.

> A trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo to determine whether a genuine issue of material fact exists or whether the moving party is entitled to judgment as a matter of law. . . . A court may not make factual findings when deciding a motion for summary disposition. However, when no genuine issue of material fact exists, summary disposition is appropriate. And when the nonmoving party would have the burden of proof at trial, the nonmoving party must establish that a genuine issue of material fact exists by admissible documentary evidence. [*Ghaffari v Turner Constr Co*, 268 Mich App 460, 463; 708 NW2d 448 (2005) (citations omitted).]

A. Defamation

In order to establish a claim of defamation, a plaintiff must show: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either

actionability of the statement irrespective of special harm or the existence of special harm caused by publication. *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005). Here, the trial court determined that plaintiff failed to establish the first of these elements, i.e., an actionable statement. Although plaintiff argues on appeal that she was defamed by a statement that her employment at CTI was unfavorable, she cites no factual support for her argument in the record. In order to properly present a claim on appeal, the facts relied on by a party "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). We will not search the record for factual support for plaintiff's claim. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

Regardless, even if we were to overlook the deficiency in plaintiff's argument, we would not reverse the trial court's decision. We shall assume for purposes of review that plaintiff's argument is based on Smart's deposition testimony and related documentation concerning her fax communication with CTI. Because defendants' motion for summary disposition was based on MCR 2.116(C)(10), we must examine this evidence in a light most favorable to plaintiff. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Smart testified that she telephoned CTI on January 26, 2005, in an effort to gather information about plaintiff so that she could convince her supervisor to contact the human resources manager about creating a position for plaintiff. Someone at CTI gave her a telephone number to fax the request to "Patty." In response to the request, Smart received a return fax with the dates of plaintiff's employment, the position she held, and a contact person identified as "Jody." Afterward, Smart received a telephone call from someone at CTI, seeking confirmation that she received the fax. According to Smart the caller "apologized that they couldn't answer the rest of [her] questions," indicating that "due to [plaintiff's] unfavorable employment and the legalities of the situation, they couldn't go any further than that."

Examined in context, we agree with the trial court that the phrase "unfavorable employment" merely expresses an opinion regarding plaintiff's work performance. Although not all expressions of opinion are protected speech, a statement must be provable as false to be actionable. *Ireland v Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998). "If a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment." *Id*. at 614. The statement of opinion here is vague and subjective. It does not relate any specific facts. Because it cannot be reasonably interpreted as stating actual facts about plaintiff, it is not actionable as a matter of law. Cf. *Mino v Clio School Dist*, 255 Mich App 60, 77; 661 NW2d 586 (2003) (subjective opinion about a school superintendent's leadership style and management of the school budget was not actionable).

We also reject plaintiff's argument that the date information in the faxed document is an actionable statement. All circumstances are considered in determining if a communication is defamatory, but the appropriate context to consider if a written statement is defamatory is the context of the writing itself, as read by a reasonable person. *Ireland*, *supra* at 618-619. A defamatory statement is one that tends to so harm the reputation of another as to lower that person in the estimation of the community or to deter third persons from associating or dealing with that person. *Id*. at 619. Here, while it is undisputed that the document faxed to Smart contained the wrong ending date for plaintiff's employment with CTI, the date statement alone is

incapable of a defamatory meaning. Therefore, we affirm the trial court's grant of summary disposition with respect to plaintiff's defamation claim involving Awrey.

B. Breach of Contract

In general, "[t]he party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). However, even if the damages do not naturally arise from the breach, they may be recovered if the damages were contemplated by the parties at the time that the contract was made. *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 6-7; 516 NW2d 43 (1994).

The trial court granted summary disposition in favor of defendants with respect to plaintiff's breach of contract claim after considering plaintiff's failure to rebut the evidence that Awrey did not have a position for plaintiff. Accordingly, the trial court found that there was no genuine issue of material fact that plaintiff did not suffer damages.

Plaintiff's sole argument on appeal is that she should have been permitted to recover punitive damages by showing that defendants acted recklessly, negligently, or maliciously. Although the trial court did not address this specific issue, plaintiff raised this claim in response to defendants' motion. A party should not be punished for a trial court's failure to rule on an issue that was properly raised. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

In considering plaintiff's argument, it is necessary to distinguish punitive damages designed to punish a party for misconduct from punitive damages having a compensatory purpose. Punitive damages designed to punish a party for misconduct are generally not recoverable in Michigan, absent statutory authority. *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 400; 729 NW2d 277 (2006). Punitive damages serving a compensatory purpose are known as exemplary damages. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 419; 295 NW2d 50 (1980). They may provide compensation for harm to the plaintiff's feelings. *Id*.

"Punitive damages are ordinarily not recoverable for breach of contract." *Isagholian v Carnegie Institute of Detroit, Inc*, 51 Mich App 220, 222; 214 NW2d 864 (1974). "[T]he goal in contract law is not to punish the breaching party, but to make the nonbreaching party whole." *Corl v Huron Castings, Inc*, 450 Mich 620, 625-626; 544 NW2d 278 (1996). But exemplary damages in a contract case properly can be regarded as serving a compensatory purpose where "'[t]hey are given as compensation for kinds of harm that cannot easily be estimated in terms of money.'" *Kewin*, *supra* at 420, quoting 5 Corbin, Contracts, § 1077, p 442. A circumstance where exemplary damages have been allowed for breach of contract is a breach of a promise to marry. *Id*. at 420. But where the injury is a financial one, susceptible to accurate pecuniary estimation, as in the case of a commercial contract, exemplary damages are not allowed absent proof of tortious conduct. *Id*. at 420-421.

We conclude that plaintiff has not demonstrated anything about the CTI settlement agreement that would entitle her to exemplary damages absent tortious conduct. Indeed, we view plaintiff's claim that she should have been allowed to show reckless, negligent, and

malicious conduct as one sounding in tort. The material question, therefore, is whether plaintiff can establish a tort claim independent of her breach of contract claim. *Casey*, *supra* at 401-402. The trial court did not deprive plaintiff of an opportunity to establish a tort claim, as is evident from its consideration of plaintiff's claims for defamation and intentional interference with a business relationship, and plaintiff withdrew her remaining tort claims for intentional infliction of emotional distress and gross negligence.

Therefore, while the trial court did not expressly rule on plaintiff's request for "punitive damages" when granting defendants' motion for summary disposition of the breach of contract claim under MCR 2.116(C)(10), it reached the right result. Plaintiff's entitlement to exemplary damages depended on her ability to recover under the two tort claims that she pursued in response to defendants' motion. Accordingly, our determination that the trial court properly granted defendants' motion for summary disposition of those tort claims is dispositive of this issue.

Turning to defendants' counterclaim for breach of contract, we again note that plaintiff has failed to provide citations to the record for the factual support for her argument. *Derderian*, *supra* at 388. Again, however, we would not reverse the trial court's decision even if we were to overlook this deficiency.

Plaintiff does not challenge the trial court's determination that Smart's deposition testimony regarding plaintiff's statements to her was uncontradicted and established that there was no genuine issue of material fact. Upon considering that testimony, we agree with the trial court that there is no genuine issue of material fact that plaintiff breached the CTI settlement agreement.[1] In reaching this conclusion, we are guided by the following contract principles:

> The construction and interpretation of a contract present questions of law that we review de novo. The goal of contract construction is to determine and enforce the parties' intent on the basis of the plain language of the contract itself. It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10). Conversely, if reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists. [*St Clair Medical, PC v Borgiel*, 270 Mich App 260, 264; 715 NW2d 914 (2006) (citations and internal quotation marks omitted).]

The CTI settlement agreement contains plaintiff's agreement to repay the settlement amount to CTI "in the event that she breaches or attempts to breach the Agreement." Defendants

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[1] We note that, on appeal, the parties rely on a copy of the CTI settlement agreement dated July 10, 2003. Although not substantively different, we have based our review of this issue on a copy of the CTI settlement agreement that was signed by plaintiff on July 9, 2003, and by Schultz, on behalf of CTI, on July 15, 2003, inasmuch as the latter copy was presented to and considered by the trial court.

relied on three provisions to establish its entitlement to repayment of the settlement amount. The first provision contained the parties' agreement that "the fact of and terms of this Agreement are strictly confidential and shall not verbally or through disclosure in writing of any kind be communicated . . . to any person or entity by any means . . . ." The second provision imposed a specific duty on plaintiff that "she shall not verbally or in writing by any means to any other person . . . disparage, criticize, condemn, or impugn the reputation or character of CTI, its shareholders, affiliates, agents, officers, directors and/or employees." The third provision specifies that the settlement "shall never be treated as an admission of liability or responsibility at any time or in any manner whatsoever by any party hereto."

Although the trial court focused on the first of these provisions to find that Smart's deposition established that the agreement was violated, it also expressed agreement with defendants' argument as a whole. Smart testified that plaintiff told her about her legal situation with CTI after she did a reference check with CTI. Smart was uncertain if plaintiff used the word "lawsuit," but indicated that plaintiff had told her that she won and informed her a "little bit" about how she was harassed by the owner, manager, or her boss. She also told Smart that she "had some problems with her manager treating her badly."

Smart's testimony, if believed, establishes that plaintiff violated the CTI settlement agreement. It is immaterial that Smart did not use the phrase "settlement agreement" when stating what she was told by plaintiff about the legal situation. Under the CTI settlement agreement, repayment was required even if plaintiff attempted a breach. More importantly, plaintiff's statements to Smart indicate that she treated the CTI settlement agreement as adjudicating CTI's liability to her in a legal matter predicated on harassment by her boss. It is immaterial whether plaintiff was expressing an objectively verifiable or subjective opinion regarding how she was treated by her boss. The CTI settlement agreement prohibited plaintiff from disparaging, criticizing, condemning, or impugning the reputation or character of CTI or its employees.

Because Smart's deposition testimony establishes that plaintiff violated the CTI settlement agreement, and because plaintiff failed to rebut that testimony, the trial court did not err in granting defendants' motion for summary disposition of this claim under MCR 2.116(C)(10). *Ghaffari, supra* at 463; see also *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) ("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"). Whether plaintiff could be excused from performance of her contractual obligations, based on the evidence that her statements were preceded by someone at CTI telling Smart that she could not answer Smart's questions because of plaintiff's "unfavorable employment and the legalities of the situation," is a separate question. Because plaintiff has not briefed this issue, but only contends that her remarks should be viewed as responsive and explanatory, we decline to consider it. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) (where an appellant fails to brief the merits of an allegation of error, this Court may deem the issue abandoned).

C. Tortious Interference with a Business Relationship

Tortious interference with a business relationship or expectancy requires proof of "(1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or

expectancy by the interferer, (3) an intentional and wrongful interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the party whose relationship or expectancy was disrupted." *PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 148; 715 NW2d 398 (2006). With regard to the harm suffered, the plaintiff must show that the "business expectancy is a reasonably likely or probable expectation." *Id*. at 150.

The trial court granted defendants' motion for summary disposition because there was no evidence that plaintiff was likely to be offered a position at Awrey. Even if we were to consider Smart's opinion in her deposition that she believed that information provided by CTI "probably sealed the deal," that opinion was not material in light of the uncontradicted evidence that Smart was not the decisionmaker and was unsuccessful in having a position created for plaintiff in her department. According to Smart, the position was not created because "they didn't want the expense of it and I was pushing them to have the expense of it because we needed the help." Therefore, viewing the evidence in a light most favorable to plaintiff, the trial court did not err in granting defendants' motion for summary disposition with respect to this claim.

D. Retaliation

Under the Civil Rights Act, MCL 37.2101 *et seq*., it is unlawful to "[r]etaliate or discriminate against a person because the person has opposed a violation of th[e] act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under th[e] act." MCL 37.2701(a). Proof of a causal connection between the plaintiff's protected activity and the adverse employment action is essential to an action for retaliation. See *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). The plaintiff must show that the protected activity was a significant factor in the adverse employment action. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). A mere temporal connection between the protected activity and adverse employment action is inadequate. *West*, *supra* at 186. "A causal connection can be established through circumstantial evidence, such as close temporal proximity between the protected activity and adverse actions, as long as the evidence would enable a reasonable fact-finder to infer that an action had a discriminatory or retaliatory basis." *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004). Mere conjecture and speculation do not establish a genuine issue of material fact to preclude summary disposition under MCR 2.116(C)(10). *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

The trial court concluded that plaintiff failed to present any evidence to support a reasonable inference of retaliation. Because plaintiff offered no direct evidence of retaliation, we must consider whether there was sufficient circumstantial evidence that, viewed in a light most favorable to plaintiff, would support a reasonable inference of retaliation.

There was no close temporal proximity between the actions taken at CTI in January 2005, when responding to Smart's inquiry about plaintiff's past employment, and the earlier retaliation and discrimination charges that were settled by plaintiff and Schultz, on behalf of CTI, in July 2003. See *Aho v Dep't of Corrections*, 263 Mich App 281, 289; 688 NW2d 104 (2004). Although plaintiff asserts on appeal that no one made any employment inquiry to CTI before the

relevant time period in January 2005, she does not cite the factual support for her argument. *Derderian*, *supra* at 388.

Furthermore, plaintiff does not identify any admissible evidence that would support a reasonable inference that CTI's response to the employment inquiry was an attempt by Schultz to retaliate against her for the complaint she settled in July 2003. Although Schultz testified in her deposition that she was hurt by plaintiff's past accusation of discrimination, she also testified that she did not provide CTI's response to the inquires about plaintiff's employment in January 2005. The form that was faxed to Smart identified "Jody" as the contact person. Jody Dandy-Rushlow, who worked for CTI between about August 2003 and March 2005, testified in her deposition that she completed the paperwork. Rushlow acknowledged placing the wrong ending date for plaintiff's employment on the form, but indicated that she obtained that date from information in CTI's computer system. Smart's deposition did not contradict this evidence, except to indicate that someone from CTI called to confirm her receipt of the faxed form and, in the course of doing so, stated that plaintiff's "unfavorable employment" and the "legalities of the situation" preclude a further response. Smart could not, however, remember who made the phone call.

This evidence, viewed in a light most favorable to plaintiff, does not support a reasonable inference that the incorrect date was provided to Smart as retaliation by Schultz or CTI for plaintiff's past complaint charging discrimination and retaliation. Further, while Smart's deposition indicates that someone called her from CTI who had some knowledge about plaintiff's employment or the "legalities" of the situation, any conclusion that it was Schultz who made the phone call or that the caller's motivation was to effectuate some type of retaliation on behalf of CTI, would be pure speculation. Because speculation is insufficient to create a genuine issue of material fact for trial, *Libralter Plastics, Inc*, *supra* at 486, the trial court did not err in granting defendants' motion for summary disposition with respect to this claim.

IV. The Farbman Group

Finally, we shall consider plaintiff's challenge to the trial court's decision dismissing each of her claims involving the loss of an alleged employment opportunity with the Farbman Group, under MCR 2.116(C)(7), based on the release that she signed in her employment application with the Farbman Group. Our review is again de novo. *Cole*, *supra* at 6. A motion under MCR 2.116(C)(7) should only be granted if no factual development could provide a basis for recovery. *Id*. at 7.

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. [*Maiden*, *supra* at 119 (citations omitted).]

Plaintiff's employment application with the Farbman Group included a release that provided, in pertinent part, "I hereby release from liability any and all individuals and

organizations, any firm, institute or court, releasing data pertinent to the review of my application and information released in good faith and without malice concerning my professional competence, ethics, character and other qualifications." Upon review de novo, we reject plaintiff's claim that the trial court erred by failing to articulate a definition for "good faith and without malice," or in finding that there was no genuine issue of material fact with regard to the requirements of "good faith and without malice."

A release contained in an employment application is a form of contract, subject to contract principles applicable to third-party beneficiaries where a nonparty seeks to enforce the release. See *Woodfield v Providence Hosp*, 779 A2d 933, 937 (DC, 2001); see also *Brunsell v City of Zeeland*, 467 Mich 293, 296; 651 NW2d 388 (2002) (intended third-party beneficiary may enforce contract promise under MCL 600.1405). The scope of a release is governed by the parties' intent, as expressed in the release. *Cole*, *supra* at 13. "If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language expressed." *Id*.; see also *Batshon v Mar-Que Gen Contractors, Inc*, 463 Mich 646, 649 n 4; 624 NW2d 903 (2001).

A resort to a lay dictionary is appropriate when determining the meaning of a word or phrase in a contract that has not been given a prior legal meaning. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007). The phrase "good faith" is defined in *Random House Webster's College Dictionary* (1992), p 575, as "accordance with standards of honesty, trust, sincerity." It is considered a standard that measures the state of mind, perceptions, honest beliefs, and intentions of a party. *Miller v Riverwood Recreation Ctr*, 215 Mich App 561, 570; 546 NW2d 684 (1996); *Shaffner v Riverview*, 154 Mich App 514, 518; 397 NW2d 835 (1986). But the phrase is used in a variety of contexts, and its meaning can vary depending on the context. See 2 Restatement Contracts, 2d, § 205, comment a, p 99-100 (discussing the duty of good faith and fair dealings imposed on contracting parties). "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." *Id*. at 100.

"Malice" has been defined as "a desire to inflict harm or suffering on another" and a "harmful intent on the part of a person who commits an unlawful act injurious to another." *Random House Webster's College Dictionary* (1992), p 821. But "malice" has acquired a peculiar meaning in the law. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 683; 719 NW2d 1 (2006). In a communicative context, the meaning of "malice" may be appropriately determined with reference to how it is understood for purposes of a defamation claim because such a claim is inexorably tied to communications. See *id*. at 687 n 66; (2006) (construing the meaning of "malice" in MCL 331.531, which establishes immunity for providing information for peer review of health care). Under this standard, malice can be established when a person supplies information with knowledge of its falsity or with reckless disregard for its truth or falsity. *Id*. at 667.

The instant case involves communications made by CTI in the context of a request for information associated with plaintiff's employment application with the Farbman Group. Initially, we shall assume that the information supplied by CTI was within the scope of the release, inasmuch as there would be no need to apply the "good faith and without malice"

condition if the release did not apply to the information. In other words, we shall assume that the release in plaintiff's employment application superseded any prohibition against disclosure in the earlier settlement agreement executed by plaintiff and Schultz, on behalf of CTI, in July 2003. Although the circumstances of this case do not involve a situation where plaintiff and CTI entered into a superceding contract that conflicted with the settlement agreement, but rather CTI's enforcement of the release in the employment application as a third-party beneficiary, a party may waive a contractual provision by affirmative representation or a course of affirmative conduct. See *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 378-379; 666 NW2d 251 (2003). The waiver requires mutual assent by the contracting parties, but "[t]he mutuality requirement is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract." *Id*. at 372.

In substance, plaintiff's argument is based, in part, on a statement provided by CTI that is outside the scope of both the release and CTI settlement agreement. On its face, the CTI settlement agreement prohibits CTI from disclosing the fact and terms of the agreement and provides that CTI "shall not verbally or in writing by any means to any other person or entity . . . disparage, criticize, condemn, or impugn the reputation or character of Mathis." In a separate provision, CTI agreed, "upon request, it shall provide a neutral reference for Mathis' future employment, confirming the dates and positions of her employment with CTI only." There was no evidence that plaintiff or anyone acting on her behalf requested that CTI provide a neutral reference for future employment. The release executed by plaintiff in her employment application with the Farbman Group contemplated a release of data and information concerning plaintiff's professional competence, ethics, character and other qualifications," and provided immunity for a release of this information if done in "good faith and without malice."

According to the submitted evidence, Wolanin faxed the release to CTI when investigating plaintiff's background on behalf of the Farbman Group. Plaintiff has not established anything about the written response that Wolanin received from CTI, with the same erroneous employment ending date that Rushlow prepared for Awrey, that would be actionable under the terms of the release in the Farbman Group employment application. We reject plaintiff's argument that the release itself should be declared invalid on the ground that she did not knowingly and intelligently sign it. Although plaintiff argued below that the release should be treated as a form of duress, she did not argue that she did not knowingly and intelligently enter into the release. Therefore, this argument is unpreserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Even if we were to consider the issue, however, reversal is not warranted because plaintiff has not established an error of law. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002) (this Court may overlook preservation requirements to consider a question of law for which the necessary facts have been presented). "A release must be made fairly and knowingly to be valid." *Batshon*, *supra* at 649 n 4. The latter requirement will be satisfied, "even if it is not labeled a 'release,' or the releasor failed to read its terms, or thought the terms were different, absent fraud or intentional misrepresentation designed to induce the releasor to sign the release through a strategy of trickery." *Xu v Gay*, 257 Mich App 263, 272-273; 668 NW2d 166 (2003). Plaintiff's failure to present evidence of such conduct on part of the Farbman Group precludes reversal on this ground.

Turning to plaintiff's claim based on verbal statements made to Wolanin, we agree with plaintiff that Wolanin's January 24, 2005, report regarding the results of its investigation indicates that someone at Wolanin made contact with CTI. The report indicates:

> Contact with this company reveals the given supervisor, Patricia Preville, could provide no information and referred us to Pattie Schultz, an owner. She indicated they are a very small company and subject mainly did billing and some payroll, not full accounting. She further indicated, after receiving a letter and signed release from us, that she is very shocked that the subject would list them as a reference. Pattie preferred to make no further comment and indicated she could only verify dates of employment and position. She indicated the given reason for leaving, lack of work, is inaccurate.

Notwithstanding this information, Wolanin's president, Susan Pierce, who authored the report, testified in her deposition that she did not remember who she spoke to at CTI. Pierce remembered making more than one telephone call to CTI, where no one wanted to talk to her. Somewhere along the way, she was told to fax the release and reference request to the attention of "Jody." It was possible that Pierce spoke with "Jody," but did put her name in the report. Pierce thought it was probable that the "she" mentioned in the report referred to Preville or Schultz, who each had the first name of Patricia. It was also probable that Pierce tried to press whomever she spoke with to verify some information in plaintiff's employment application. By comparison, Jody Rushlow indicated in her deposition that she made a remark about being shocked to receive a request for an employment verification. Rushlow explained that she was shocked because it was the second request that she received from the same company and she did not know anything about plaintiff. Schultz testified in her deposition that she never spoke personally to anyone at Wolanin about plaintiff's employment.

Thus, although there is some evidence that verbal statements were exchanged between Wolanin and CTI representatives, in considering whether Wolanin's report contains admissible evidence sufficient to create a genuine issue of material fact with respect to whether the release bars plaintiff's claims, we must consider the purpose of the evidence. "That our Rules of Evidence preclude the use of evidence for one purpose simply does not render it inadmissible for other purposes." *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). The proponent of evidence has the burden of establishing its relevancy and admissibility. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004).

Here, even if Wolanin's report was admissible for a proper purpose, it was still necessary that plaintiff establish a foundation regarding the source of the statements to allow their admission either under an exception to the hearsay rule or for a nonhearsay purpose. See *Merrow v Bofferding*, 458 Mich 617, 627-628; 581 NW2d 696 (1998) (discussing the admissibility of statements contained in a business record admissible under MRE 803(6)). We are not persuaded that plaintiff established a sufficient foundation to use the Wolanin report as evidence that Schultz made the statements contained therein. Therefore, while the trial court did not separately analyze defendants' liability, we conclude that plaintiff's various claims against Schultz predicated on those statements fail as a matter of law because the admissible evidence did not establish a genuine issue of material fact. We may affirm a trial court's order of summary disposition if the right result was reached, even if we do not fully agree with its reasoning. See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

Although the statements in the Wolanin report could still be attributed to someone else at CTI, we are not persuaded that the statement made to Pierce about the accuracy of plaintiff's "lack of work" explanation for her employment ending at CTI would be actionable under the terms of the release in the Farbman Group employment application. As defendants point out on appeal, the CTI settlement agreement acknowledges that plaintiff's employment "ceased for a variety of reasons, including a lack of work." There was no evidence to support a reasonable inference that CTI acted in bad faith or with malice when commenting on the accuracy of plaintiff's information.

We agree with plaintiff, however, to the extent that she argues that the "shocked" statement attributed by Pierce to someone at CTI was outside the scope of the release. This statement does not involve data pertinent to the review of the employment application. Nor can it reasonably be construed as releasing information about plaintiff's qualifications, but rather is an indication of the speaker's state of mind.

But we agree with defendants that they were entitled to summary disposition of plaintiff's claims under MCR 2.116(C)(10), because the "shocked" statement is not defamatory. Although a Farbman Group employee, Maureen Maher, testified in her deposition that the "shocked" statement in the Wolanin report would have caused her concern, albeit she could not remember why she did not hire plaintiff, the statement cannot reasonably be interpreted as stating actual facts about plaintiff. *Ireland*, *supra* at 607. Further, we fail to see how the "shocked" statement violates the confidentiality or non-disparagement requirements in the CTI settlement agreement. Contrary to plaintiff's argument on appeal, the "shocked" statement cannot reasonably be construed as constituting a release of information about her. We have previously determined that the statement is not subject to the release in the employment application for this reason. Finally, to the extent that plaintiff's tortious interference and retaliation claims against CTI are also based on the "shocked" statement, we are satisfied that this mere expression of the speaker's state of mind is insufficient to establish a genuine issue of material fact with respect to either claim, thereby justifying summary disposition under MCR 2.116(C)(10). *Ghaffari*, *supra* at 463.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Bill Schuette