STATE OF MICHIGAN

COURT OF APPEALS

MEISNER & ASSOCIATES, P.C., Plaintiff-Appellant,	UNPUBLISHED January 29, 2009
v	No. 280190 Washtenaw Circuit Court
STAMPER & COMPANY and JEFFREY J. PODOLSKI, Defendants-Appellees.	LC No. 06-000906-CZ

Before: Owens, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

In this defamation case, plaintiff appeals as of right from the trial court's orders granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10), and denying plaintiff's motion to amend its complaint to add two additional claims based on conduct committed in 1999. We affirm.

I. Plaintiff 's Original Complaint

Plaintiff was retained as legal counsel for Woodside Meadows Condominium Association. Defendant Stamper & Company was the managing agent for Woodside until Woodside terminated the relationship in February 2006. Plaintiff's complaint alleges that in January 2006, Stamper's assistant vice president and senior property manager, defendant Jeffrey Podolski, made defamatory statements regarding plaintiff in the following email that he sent to Woodside's board members:

> One more thing. I just received the invoice that you sent to me via fax for Meisner. My first observation is that the amount being charged to the Association for the hourly rate is very high. Given that it is partially our job to assist the Board in looking at cost saving measures, *I would suggest potentially switching attorneys to a legal firm that is equally qualified and significantly cheaper in hourly rate. If the Board chooses to continue to use Meisner, the Board should seriously consider adding more money to the budget for legal expenses to offset the future inflated legal bills that the Association will continue to incur. By adding money to cover the legal expenses, other areas of the budget will likely be underfunded and therefore the dues will ultimately have to be raised as a result of*

> *legal expenses alone. The general membership of Co-Owners may find it troubling to pay exorbitant amounts of money for legal bills when legal services can be obtained for much less elsewhere.* Please review this email with the rest of the Board and let me know your thoughts.

In response to defendants' motion for summary disposition, the trial court concluded that Podolski's statements were not defamatory because they were mere expressions of opinion, because the statements were generally true, and because they were subject to a qualified privilege. Accordingly, it granted defendants' motion.

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court granted summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999); *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

A claim for defamation requires proof of the following elements:

> (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 (defamation per se) or the existence of special harm caused by publication. *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992) (libel); *Ledl v Quik Pik Food Stores, Inc*, 133 Mich App 583, 589; 349 NW2d 529 (1984) (defamation). [*Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).]

"A communication is defamatory if, under all the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or deters others from associating or dealing with the individual." *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000). But

> not all defamatory statements are actionable. If a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment. *Milkovich v Lorain Journal Co*, 497 US 1, 20; 110 S Ct 2695; 111 L Ed 2d 1 (1990); *Garvelink v Detroit News*, 206 Mich App 604, 608-609; 522 NW2d 883 (1994). Thus, at least some expressions of opinion are protected. *Milkovich*, at 18-20. [*Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998).]

"A court may determine, as a matter of law, whether a statement is actually capable of defamatory meaning." *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 9; 602 NW2d 233 (1999). "Where no such meaning is possible, summary disposition is appropriate." *Id.*

Viewing Podolski's email in its entirety, it is apparent that Podolski was advising Woodside that plaintiff's fees were higher than other law firms and that Woodside could save money by switching to another law firm that charged a lower hourly rate. Although this portion of Podolski's email can be considered factual, the evidence established that there were other law firms who charged lesser hourly rates than plaintiff. Therefore, this portion of Podolski's email has not been shown to be false. Podolski's statements about saving money and the prospect of future legal expenses were primarily expressions of opinion about the relative cost of plaintiff's services.

Plaintiff places great emphasis on Podolski's references to plaintiff's bills as "inflated" and the expectation that Woodside would be paying "exorbitant" amounts to plaintiff for legal services if Woodside continued to use plaintiff's services. Plaintiff attempts to isolate these terms to argue that Podolski's comments were intended to show that plaintiff charged fees for work it never performed, or that its fees did not conform to standards set by the profession. When Podolski's statements are read in context, however, a jury could not reasonably find that the statements are defamatory in the way plaintiff suggests. It is apparent that Podolski took issue with plaintiff's higher rate and believed that Woodside could save money by switching to another law firm. Podolski's comments cannot reasonably be interpreted as impugning the character of the services actually provided by plaintiff. Accordingly, the trial court did not err in finding that the statements were not capable of defamatory meaning.

We also agree with the trial court's determination that the statements were subject to a qualified privilege.

"[A] qualified privilege extends to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty and embraces cases where the duty is not a legal one but is of a moral or social character of imperfect obligation." *Hall v Pizza Hut of America, Inc,* 153 Mich App 609, 619; 396 NW2d 809 (1986).

The elements necessary for a qualified privilege are

> (1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only. [*Prysak v R L Polk Co,* 193 Mich App 1, 15; 483 NW2d 629 (1992).]

The plaintiff may overcome a qualified privilege only by showing that the statement was made with actual malice or with knowledge of its falsity or reckless disregard of the truth. *Id.* "General allegations of malice are insufficient to establish a genuine issue of material fact." *Id.* "Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation." *Grebner v Runyon,* 132 Mich App 327, 333; 347 NW2d 741 (1984).

We find no merit to plaintiff's argument that a qualified privilege may not be found because Woodside had fired Stamper as its managing agent before the email was sent on January 5, 2006. Although there was evidence that Woodside notified Stamper before the date of the

email that Stamper's contract with Woodside was not being renewed, plaintiff concedes that the Woodside/Stamper contract did not end until February 28, 2006. Thus, Stamper was still working as Woodside's management firm at the time the email was sent. Indeed, the second sentence of the email mentions that Woodside had just faxed Stamper a copy of plaintiff's invoice.

We agree with the trial court that all elements for a qualified privilege were shown to exist. It is apparent from the face of the email that Woodside sent plaintiff's invoice to Podolski for payment. Defendants, as Woodside's management company at the time, had an interest in helping Woodside contain its expenses and clearly could convey that Woodside could save money by switching to another law firm. At his deposition, Podolski testified that his duties included assisting Woodside with its budget and, when he reviewed plaintiff's invoice before paying it, he thought the hourly rates seemed high in comparison to the hourly rates charged by other law firms that other clients regularly used. Podolski's comments were limited in scope to this purpose and were made on a proper occasion when Podolski was asked to pay plaintiff's invoice. Further, Podolski's email was sent only to members of Woodside's board, not to other persons.

In sum, Podolski, as Woodside's management agent charged with paying plaintiff's invoice, had a qualified privilege to comment on the nature of plaintiff's fees, and the evidence established that Podolski's statements were properly limited in scope and purpose, and sufficiently restricted to appropriate parties, to be subject to a qualified privilege. Further, plaintiff failed to produce evidence of actual malice to overcome this privilege. Even if Podolski's statements were made without adequate investigation, as plaintiff alleges, this is insufficient to prove reckless disregard for the truth or to establish actual malice. *Grebner, supra* at 333.

For these reasons, the trial court did not err in dismissing plaintiff's defamation claim pursuant to MCR 2.116(C)(10).

II. Plaintiff's Motion to Amend

Plaintiff alleges that during discovery, it learned that defendants made similar statements in 1999 to plaintiff's former client, Schultz Estates II Condominium Association. Plaintiff sought to amend its complaint to add new claims for defamation and tortious interference with contractual relations based on defendants' conduct in 1999. Plaintiff does not dispute that, absent some tolling provision, its new claims would be barred by the applicable statutes of limitation. Plaintiff relied on fraudulent concealment, MCL 600.5855, to argue that the statutes of limitation were tolled. The trial court found that there was no basis for concluding that any claim was fraudulently concealed and, therefore, denied plaintiff's motion to amend.

A trial court's decision to deny a motion for leave to amend the pleadings will not be reversed absent an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004).

MCL 600.5855 provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

In order for the statute of limitations to be tolled due to fraudulent concealment, the acts relied on must be fraudulent and of an affirmative character. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 642; 692 NW2d 398 (2004). "The plaintiff must prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery. Mere silence is insufficient." *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996). The plaintiff is also charged with the discovery of facts that, with the exercise of reasonable diligence, he ought to have discovered. *Shember v Univ of Michigan Medical Ctr*, 280 Mich App 309, 316; ___ NW2d ___ (2008), lv pending. "The plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment." *Sills, supra*.

In *DeHaan v Winter*, 258 Mich 293, 296; 241 NW 923 (1932), the Supreme Court defined fraudulent concealment as follows:

> "Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent."

Plaintiff failed to present any evidence showing that defendants committed any affirmative acts or made any misrepresentations that prevented it from discovering or acquiring information regarding Schultz Estates's decision to terminate plaintiff's services. Although plaintiff asserts that defendants did not reveal why Schultz Estates decided to terminate plaintiff's contract, mere silence does not establish fraudulent concealment. There is no evidence, and plaintiff does not allege, that defendants falsely informed plaintiff that its services were terminated for some other reason. The trial court properly found that plaintiff's claims were not fraudulently concealed, that the statutes of limitations therefore were not tolled, and thus any amendment would be futile. Accordingly, the court did not abuse its discretion in denying plaintiff's motion to amend.

Plaintiff argues that the trial court's ruling was premature because discovery was ongoing. However, it was plaintiff who sought a decision on its motion to amend, and amendment depended on plaintiff establishing fraudulent concealment. Without plaintiff showing fraudulent concealment, there was no basis for the trial court to grant plaintiff's motion. Moreover, although plaintiff asserted that it had served a subpoena requesting information from Schultz Estates, fraudulent concealment must be based on actions by a defendant directed at the plaintiff. Plaintiff did not offer any reason for believing that Schultz Estates would have

information that could establish how defendants fraudulently concealed a cause of action from plaintiff. For these reasons, we reject plaintiff's argument that the trial court erred by prematurely ruling on plaintiff's own motion to amend.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jane E. Markey