

STATE OF MICHIGAN
COURT OF APPEALS

MCM MARINE, INC,

Plaintiff-Appellant,

v

OTTAWA COUNTY ROAD COMMISSION,

Defendant,

and

PREIN & NEWHOF, INC,

Defendant-Appellee.

UNPUBLISHED

April 13, 2010

No. 286294

Ottawa Circuit Court

LC No. 05-053642-CZ

MCM MARINE, INC,

Plaintiff-Appellant,

v

OTTAWA COUNTY ROAD COMMISSION,

Defendant,

and

PREIN & NEWHOF, INC,

Defendant-Appellee.

No. 290702

Ottawa Circuit Court

LC No. 05-053642-CZ

Before: K. F. KELLY, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

This case stems from the Ottawa County Road Commission's public, competitive bidding process for a water intake filtration bed repair project where a previous bed had been constructed in 2001-2002. In Docket No. 286294, plaintiff MCM Marine, Inc. appeals as of right the trial

court's grant of summary disposition in favor of the Ottawa Road Commission's project engineer, defendant Prein & Newhof, Inc. MCM Marine contends that Prein & Newhof racially discriminated against MCM Marine and wrongfully excluded MCM Marine from being awarded the repair project. We conclude that the trial court did not err in granting summary disposition in favor of Prein & Newhof.¹ Accordingly, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The Ottawa Road Commission operates the Northwest Ottawa Water System, which provides public water to communities in the northwest portion of Ottawa County, Michigan. Prein & Newhof is a civil engineering firm that Ottawa Road Commission hired to serve as project engineer and representative on both the original bed project and the repair project. MCM Marine is a marine contractor with nearly 25 years of experience. MCM Marine has long been recognized as a minority-owned business enterprise.

Between December 2000 and September 2002, the Ottawa Road Commission planned and constructed a new water intake filtration bed near the Grand Haven channel. Great Lakes Dock & Material was the primary contractor on the job, and MCM Marine performed excavation work on the project as a subcontractor for Great Lakes Dock & Material. During the course of the original bed project, delays occurred, which Prein & Newhof attributed to MCM Marine. According to Mark Lee, Prein & Newhof's Project Engineer, MCM Marine was having personnel issues, including workers "walk[ing] off the job."

In June 2003, the Ottawa Road Commission discovered that sand was entering the water treatment plant, which was eventually attributed to a failure in the intake bed, due in part to over-excavation. Prein & Newhof requested that Great Lakes Dock & Material repair the project under its warranty; however, Great Lakes Dock & Material responded that the warranty would not cover the repairs and that they would require additional compensation. By Spring 2004, neither the dispute nor the defect had been resolved, and the parties were at an impasse. Therefore, in May 2004, the Ottawa Road Commission terminated Great Lakes Dock & Material as the contractor on the project. Litigation between Great Lakes Dock & Material, the Ottawa Road Commission, and Prein & Newhof followed.

In February 2005, the Ottawa Road Commission began soliciting bids for repair of the bed project, ostensibly seeking the lowest responsible, responsive bidder. MCM Marine submitted a bid in March 2005. In addition to its general contract bid, MCM Marine also submitted proposals to other bidders on the project, including Great Lakes Dock & Material,

¹ MCM Marine also brought claims against the Ottawa Road Commission in Docket No. 286294. And in Docket No. 290702, MCM Marine appealed as of right the trial court's award of attorney fees and costs to the Ottawa Road Commission. However, in March 2010, after oral arguments were heard in the Court of Appeals, MCM Marine and the Ottawa Road Commission executed a stipulation for voluntary dismissal of the appeals as to the Ottawa Road Commission. Therefore, we do not address any of the claims against the Ottawa Road Commission in Docket No. 286294 or any of the claims in Docket No. 290702.

Luedtke Engineering, and Durocher Marine to perform a portion of the work as a subcontractor. In total, bids were received from five contractors, ranging from \$774,383 to \$1,475,000:

1. Great Lakes (with MCM Marine as subcontractor).....\$774,383
2. MCM Marine (with Great Lakes as subcontractor).....\$817,098
3. Luedtke Engineering (with MCM Marine as subcontractor).....\$1,064,200
4. King Company\$1,139,500
5. Durocher Marine (with MCM Marine as subcontractor).....\$1,475,000

MCM Marine was the only bidder with minority ownership.

Pat Staskiewicz, Public Utilities Engineer for the Ottawa Road Commission, admitted that MCM Marine's bid was responsive, and Ken Zarzecki, Director of Public Utilities for the Ottawa Road Commission, admitted that MCM Marine was a responsible contractor. However, in a written staff report, Zarzecki recommended rejection of MCM Marine's bid, explaining as follows:

MCM Marine, Inc. ("MCM") submitted the next lowest bid. For a number of reasons, staff does not recommend that the bid of MCM be accepted. First, MCM proposes to use [Great Lakes Dock & Material] as its subcontractor, which is unacceptable. Further, MCM was a subcontractor of [Great Lakes Dock & Material] on the original construction of the South Intake. That prior experience was not good, as there were delays on the part of MCM to have [sic] equipment and laborers on the project and in performing the work. Moreover, the work plan submitted by MCM having its dredge working between barges raises a concern that the work may be very sensitive to weather conditions. Therefore, Staff does not believe that acceptance of this bid would be in the best interests of the OCRC or the Water System.

Zarzecki recommended rejection of Great Lakes Dock & Material's bid based on the fact that it was the primary contractor responsible for the original project, which failed. Zarzecki also recommended rejection of Luedtke's bid, noting that Luedtke proposed to use MCM Marine as a subcontractor, which, for the reasons stated above, Zarzecki found unacceptable. Ultimately, Zarzecki recommended acceptance of King Company as the lowest acceptable bidder.

King Company, which was the only bidder that did not have any minority participation, had performed maintenance work on the original intake bed for several years. Before bidding on this project, King Company had numerous conversations with Prein & Newhof concerning the nature of the work and the anticipated costs. Indeed, the Ottawa Road Commission had considered giving King Company the job without even seeking other bids. However, Staskiewicz directed Prein & Newhof to get quotes from other contractors to "at least show that [the Ottawa Road Commission] had put forth an effort to get the best price[.]" In an August 2003 memorandum to the Ottawa Road Commission, Staskiewicz explained,

2) We have met with King Construction to discuss the repair. They can perform the work and they think they can complete the work yet this year, but that all depends on us authorizing them to start as soon as possible. They will be submitting a written proposal to us on Monday. . . .

* * *

5) We are also investigating concerns that were raised with respect to whether we can simply “hire King” or whether our policy of Treasury Department guidelines requires competitive bids/quotations. We obviously want to keep this issue as clean as possible.

Pursuant to a contract between Prein & Newhof and the Ottawa Road Commission, Prein & Newhof was required to evaluate and recommend an award for the project. The Ottawa Road Commission directed Prein & Newhof to find reasons to support the rejection of MCM Marine’s bid. Thereafter, Prein & Newhof requested that MCM Marine submit a statement of its qualifications, references, financial status, contracts in progress, and similar information. According to the Ottawa Road Commission, the reason for the request was to give the Ottawa Road Commission another level of information to consider the contractors. However, Zarzecki, Staskiewicz, and Lee admitted that no one contacted MCM Marine’s references. Prein & Newhof then contacted MCM Marine to inquire about its plan for completing the project. Neither Prein & Newhof nor the Ottawa Road Commission voiced any concern regarding MCM Marine’s proposed plan.

Prein & Newhof then directed Luedtke to contact King Company regarding its possible replacement of MCM Marine as Luedtke’s subcontractor. However, King Company declined. Luedtke then advised Prein & Newhof that King Company had declined, and Luedtke assured Prein & Newhof that it did not have any concerns with MCM Marine’s qualifications, that it was comfortable with MCM Marine, and that it would address any alleged concerns that Prein & Newhof had relative to MCM Marine. After meeting with the Ottawa Road Commission, Luedtke was under the impression that the commission was “seriously considering” awarding it the project, regardless whether MCM Marine was used as a subcontractor.

However, in April 2005, the Ottawa Road Commission awarded King Company the project. It was later revealed that before the award of the project, King Company stated that, if it was awarded the project, it would provide the Ottawa Road Commission a \$100,000 credit “guaranteed” at the end of the project and would not “gouge for extras.” And, although Zarzecki and Staskiewicz admitted that it was improper to consider the credit, they accepted it regardless. Notably, including the \$100,000 credit, the final contract amount, with approved extras, was \$1,521,783.02, \$704,685.02 higher than MCM Marine’s bid.

MCM Marine then filed its complaint, alleging racial discrimination.² More specifically, MCM Marine alleged that Prein & Newhof violated 42 USC 1981, the Fifth Amendment, and

² MCM alleged claims against the Ottawa Road Commission. However, as stated, appeal of those claims has been dismissed, and we need not address them.

the Fourteenth Amendment by denying MCM Marine the right to work on the repair project because MCM Marine is a Native American-owned business. MCM also alleged claims of tortious interference with business expectancy and malpractice against Prein & Newhof. MCM alleged that Prein & Newhof “intentionally and maliciously” interfered with MCM Marine’s business expectancy to contract with the Ottawa Road Commission when it “wrongfully induced” the Ottawa Road Commission to award the project to King Company and reject MCM Marine. MCM also alleged that, as a professional engineer, Prein & Newhof breached its duty to the project bidders “to use that standard of care commonly employed by similarly situated engineers within the engineering community.”

Prein & Newhof moved for summary disposition of the claims against it under MCR 2.116(C)(10).

At the beginning of a February 2008 hearing on the motion, Prein & Newhof requested to withdraw its argument on the malpractice claim for insurance reasons. No objections were made; therefore, the trial court granted the request.

In March 2008, the trial court issued its 20-page opinion and order, dismissing all of MCM Marine’s claims against Prein & Newhof, except the malpractice claim. Prein & Newhof later re-filed its motion for summary disposition on the malpractice claim, which the trial court granted. MCM Marine now appeals.

II. MOTION FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.³ The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.⁴ We review de novo the trial court’s ruling on a motion for summary disposition.⁵

B. TORTIOUS INTERFERENCE WITH BUSINESS EXPECTATION

The necessary elements for tortious interference with a business expectation are:

(1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) an intentional interference causing a breach or termination of the relationship or expectancy; and

³ MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

⁴ MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

⁵ *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

(4) resulting damage to the party whose relationship or expectancy has been disrupted.^[6]

More specifically, with respect to the third element, a plaintiff 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.”⁷ “A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances.”⁸ “If the defendant’s conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference.”⁹ An improper act is one that is illegal, unethical, or fraudulent.¹⁰ “Where the defendant’s actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.”¹¹

MCM Marine argues that the trial court erred in dismissing its claim for tortious interference with business expectation against Prein & Newhof where there was evidence that the interference was improper in nature and all other elements were met. In so arguing, MCM Marine also points out that the trial court “acknowledged that there is evidence that [the Ottawa Road Commission and Prein & Newhof] intentionally avoided granting the contract to” MCM Marine. However, this statement cannot be taken out of context. The trial court immediately thereafter stated that “[t]his avoidance . . . must be based on an improper or unlawful reason.”

We agree with the trial court that there was some evidence that Prein & Newhof assisted in intentionally avoiding awarding the contract to MCM Marine. The evidence raised a question of fact whether the Ottawa Road Commission had a prior-set intention to award the contract to King Company and was only going through the formality of the bidding process to adhere to protocol. And the facts indicated that the Ottawa Road Commission instructed Prein & Newhof to assist in developing reasons on which to reject MCM Marine’s bid. However, MCM Marine has not provided any evidence of racial discrimination and MCM Marine has not alleged any other illegal or malicious act. To the contrary, the record evidences that Prein & Newhof had legitimate reasons to make the recommendations that it did. MCM Marine’s participation in the project was not acceptable because of the problems with the original construction. Therefore, the evidence suggests that Prein & Newhof was merely performing its contractual duty to

⁶ *Joba Construction Co, Inc v Burns & Roe, Inc*, 121 Mich App 615, 634; 329 NW2d 760 (1982).

⁷ *Badiee v Brighton Area Schools*, 265 Mich App 343, 367; 695 NW2d 521 (2005) (quotations and citations omitted).

⁸ *Id.*, quoting *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992).

⁹ *Id.*, quoting *CMI Int’l, Inc v Intermet Int’l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002); *Feldman v Green*, 138 Mich App 360, 369-370; 360 NW2d 881 (1984).

¹⁰ *Weitting v McFeeters*, 104 Mich App 188, 198; 304 NW2d 525 (1981).

¹¹ *Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003) (quotation and citation omitted).

recommend the best bidder for the Ottawa Road Commission. And, considering MCM Marine's involvement in the original, failed project and its personnel issues, it was not the best bidder.

Additionally, MCM Marine argues Prein & Newhof's conduct was unethical, contending that "the NSPE Code of Ethics sets forth an identifiable written standard of ethical conduct for engineers, and therefore for [Prein & Newhof]." However, none of MCM Marine's claims of unethical conduct show that Prein & Newhof acted with malice for the specific purpose of invading MCM Marine's business relationship with the Ottawa Road Commission. In other words, there is no evidence that Prein & Newhof acted intentionally to actively induce the Ottawa Road Commission to not award MCM Marine the contract.¹² Again, the evidence suggests that Prein & Newhof was merely performing its contractual duty for the Ottawa Road Commission. And "[w]here the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference."¹³

Because we conclude that Prein & Newhof did not intentionally interfere with any alleged business expectancy of MCM Marine, we need not address the other three elements of tortious interference with a business expectation.¹⁴

Accordingly, we conclude that the trial court properly granted Prein & Newhof summary disposition on MCM Marine's tortious interference with business expectancy claim because there was no question of fact as to whether Prein & Newhof intentionally interfered with any alleged business expectancy of MCM Marine.

C. MALPRACTICE CLAIM

MCM Marine argues that the trial court erred in dismissing its malpractice claim against Prein & Newhof because a project engineer on a public project owes a duty of care to a bidder.

To prove negligence, a plaintiff must prove: "(1) the existence of a legal duty owed by the defendant to the plaintiff, (2) a breach of such duty, (3) a proximate causal relationship between the breach of such duty and an injury to the plaintiff, and (4) damages suffered by the plaintiff."¹⁵ "The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff."¹⁶ "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the

¹² See *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772, 780-781; 421 NW2d 289 (1988); *Feldman*, 138 Mich App at 375-376.

¹³ *Mino*, 255 Mich App at 78 (quotation and citation omitted).

¹⁴ *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 43; 732 NW2d 56 (2007) (stating that use of the word "and" in a statute "makes it perfectly clear" that the Legislature intended that all elements must be met).

¹⁵ *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 512-513; 739 NW2d 402 (2007).

¹⁶ *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

injured person.”¹⁷ The factors that are relevant in determining whether a legal duty exists are “foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct an injury, moral blame attached to the conduct, policy of preventing future harm, and . . . the burdens and consequences of imposing a duty and the resulting liability for breach.”¹⁸ As against professional engineers, a “malpractice claim requires proof of simple negligence based on a breach of a professional standard of care.”¹⁹

As the trial court concluded, it is foreseeable that a project engineer’s supervision of a bid process could result in a bidder not being selected and losing the opportunity to profit from the contract. However, foreseeability of harm alone is not sufficient to impose a duty.²⁰ The Michigan Supreme Court has stated that “[t]he most important factor to be considered is the relationship of the parties.”²¹ Where there is no relationship between the parties, there is no duty owed to the other party, and the court does not need to address the other factors.²² Here, Prein & Newhof entered a contract with the Ottawa Road Commission to evaluate bids for the repair project. Therefore, Prein & Newhof’s obligation was to make a recommendation for the benefit of the Ottawa Road Commission and the community. Prein & Newhof had no contractual or any other type of relationship with MCM Marine. Thus, Prein & Newhof did not have a duty to act for the benefit of MCM Marine, or any other potential bidder.

MCM Marine nevertheless relies on *Bacco Construction Co v American Colloid Co*,²³ for the proposition that privity between the parties is not required when the victim is foreseeable. Specifically, MCM Marine relies on the *Bacco* Court’s statement that “design professionals are liable for foreseeable injuries to foreseeable victims which proximately result from negligent performance of their professional duties.”²⁴ However, *Bacco* and the cases it relies on are distinguishable from the present facts.

In *Bacco*, this Court addressed the issue whether a contractor may maintain an action against a project engineer or architect in the absence of a contractual relationship.²⁵ After reviewing cases from other jurisdictions that indicated a “clear trend . . . to allow a negligence

¹⁷ *Brown v Brown*, 478 Mich 545, 552-553; 739 NW2d 313 (2007), quoting *Moning v Alfono*, 400 Mich 425, 438-439; 254 NW2d 759 (1977).

¹⁸ *Buczowski v McKay*, 441 Mich 96, 101 n 4; 490 NW2d 330 (1992).

¹⁹ *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 409; 516 NW2d 502 (1994).

²⁰ *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 406; 224 NW2d 843 (1975).

²¹ *In re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 505; 740 NW2d 206 (2007).

²² *Id.* at 507.

²³ *Bacco Construction Co v American Colloid Co*, 148 Mich App 397, 414; 384 NW2d 427 (1986).

²⁴ *Id.*

²⁵ *Id.*

action without direct privity of contract,” this Court concluded that a project engineer that made improper calculations and specifications for a construction job was liable to a third-party subcontractor that relied on those erroneous calculations and specifications when performing the construction.²⁶ Similarly, in the two primary cases on which the *Bacco* Court relied, *Donnelly Construction Co v Oberg/Hunt/Gilleland*²⁷ and *A R Moyer, Inc v Graham*,²⁸ the Arizona Supreme Court and the Florida Supreme Court each held that a third-party general contractor, who may foreseeably be injured by an architect’s negligence and errors in preparing and approving construction plans, has a cause of action against the architect, notwithstanding absence of privity.

The facts of *Bacco*, *Donnelly*, and *A R Moyer* are clearly different than the facts here. In each of those cases the third-party contractor, or subcontractor, was pursuing a claim against a project engineer or architect for negligence that led to the contractor or subcontractor suffering injuries on a project on which it was currently working. As the *Bacco* Court recognized, the “risk of harm” in that situation was “the financial hardship created by having to cure the defects which may very well not be caused by the contractor.”²⁹ Here, MCM Marine was not relying on Prein & Newhof’s specifications or plans in the performance of an existing construction project. It was merely bidding to work on a project in the future. Thus, while MCM Marine may have lost the opportunity to profit from the contract, it was entirely dissimilar to the contractors in *Bacco*, *Donnelly*, and *A R Moyer* who suffered actual losses from the negligence of the engineer or architect.

Further, MCM Marine is simply a disappointed bidder on a construction project, and Michigan law makes clear that disappointed bidders have no protected interest in being awarded a government contract.³⁰ Indeed, a panel of this Court has recognized that there is no authority for a cause of action for damages in connection with alleged improprieties, like the failure to act in good faith, in the award of public contracts.³¹ And, as the trial court recognized, MCM Marine’s claim that Prein & Newhof owed it a duty was, essentially, based on its claimed entitlement as a bidder to benefit from or be protected by the competitive bidding process. But it is well settled that competitive bidding is designed for the benefit of taxpayers, and not for the

²⁶ *Id.* at 414-416.

²⁷ *Donnelly Construction Co v Oberg/Hunt/Gilleland*, 677 P2d 1292, 1296 (Ariz, 1984).

²⁸ *A R Moyer, Inc v Graham*, 285 So 2d 397, 402 (Fla, 1973), overruled in part by *Abstract Corp v Fernandez Co*, 458 So 2d 766 (Fla, 1984).

²⁹ *Bacco*, 148 Mich App at 416.

³⁰ *Talbot Paving Co v Detroit*, 109 Mich 657, 661-662; 67 NW 979 (1896).

³¹ *EBI-Detroit, Inc v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued April 30, 2009 (Docket No. 277953). We note that although this case is not binding, MCR 7.215(C)(1), we may view it as persuasive, *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003).

benefit or enrichment of the bidders.³² Therefore, Prein & Newhof, acting on behalf of the public and the Ottawa Road Commission, owed no duty to MCM Marine.

Further, as Prein & Newhof points out, design professionals must be free to provide professional opinions candidly to their clients, without risk that disgruntled, disappointed bidders will sue them. In the context of bid solicitations, the design professional's duty to give candid advice to its client supersedes any alleged duty to one of the competing bidders.

Accordingly, we conclude that the trial court properly granted Prein & Newhof summary disposition on MCM Marine's malpractice claim because there was no relationship between Prein & Newhof and MCM Marine, and Prein & Newhof owed no duty to MCM Marine, who was simply a disappointed bidder.

D. 42 USC 1981 LIABILITY FOR INTERFERENCE WITH THIRD-PARTY CONTRACT

MCM Marine argues that Prein & Newhof should be liable pursuant to 42 USC 1981 for interfering with the Ottawa Road Commission and MCM Marine's right to make and enforce a contract, even though MCM did not seek to contract with Prein & Newhof.

42 USC 1981 protects the right to "make and enforce contracts." To prove a violation of § 1981, a plaintiff must show that the defendant purposefully discriminated based on race.³³ Showing a mere disparate impact on a specific race is insufficient.³⁴ Purposeful discrimination can be shown by direct or circumstantial evidence.³⁵ Because MCM Marine does not provide any direct evidence that Prein & Newhof intentionally discriminated against it based on race, we consider the circumstantial evidence.

The trial court relied on two cases in ruling that Prein & Newhof was not liable under 42 USC 1981. In *PAS Communications, Inc v Sprint Corp*,³⁶ the United States District Court for the District of Kansas concluded that the plaintiff could not show that it attempted to contract with the defendant because the defendant did not own the buildings or control the janitorial service contracts on the property that the plaintiff attempted to win. And in *McDonald v Union Camp Corp*,³⁷ the United States Court of Appeals for the Sixth Circuit held that "a statement by an intermediate level management official is not indicative of discrimination when the ultimate decision to discharge is made by an upper level official." Moreover, as Prein & Newhof points out, this Court has also stated that to establish a prima facie case of intentional discrimination on the basis of circumstantial evidence, a plaintiff must show that "the person who discharged [him

³² *Lasky v City of Bad Axe*, 352 Mich 272, 276; 89 NW2d 520 (1958).

³³ *General Building Contractors Assoc, Inc v Pennsylvania*, 458 US 375, 391; 102 S Ct 3141; 73 L Ed 2d 835 (1982).

³⁴ *Id.* at 383 n 8.

³⁵ *Amini v Oberlin College*, 440 F3d 350, 358 (CA 6, 2006).

³⁶ *PAS Communications, Inc v Sprint Corp*, 139 F Supp 2d 1149, 1171 (D Kan, 2001).

³⁷ *McDonald v Union Camp Corp*, 898 F2d 1155, 1161 (CA 6, 1990).

or] her was predisposed to discriminate against persons in [the] plaintiff's protected class and actually acted on that predisposition in discharging [him or] her.”³⁸

Here, there was no contract between Prein & Newhof and MCM Marine. Further, MCM Marine was not seeking to contract with Prein & Newhof.³⁹ Rather, MCM Marine was seeking to contract with the Ottawa Road Commission. And, although Prein & Newhof assisted in the selection process, Prein & Newhof did not actually make the final decision regarding which bidder the Ottawa Road Commission chose to award the contract.⁴⁰ There was no question of fact that the Ottawa Road Commission made the final decision to award the contract to King Company based solely on its own staff report.⁴¹

MCM Marine cites *Lewis-Kearns v Mayflower Transit*,⁴² to support that “Section 1981, however, ‘proscribes not only discrimination by the contracting party. . . but also discriminatory interference by a third party with the exercise of the right to make contracts.’” But the *Lewis-Kearns* Court went on to state that “[a]s long as the interference prevents or impedes the formation of the contract, it is covered by section 1981.”⁴³ The *Lewis-Kearns* Court then ruled that there was a genuine issue of fact regarding whether the defendants “actually influenced” the contracting party’s decision. But here, again, there was no question of fact that the Ottawa Road Commission made the final decision to award the contract to King Company based *solely* on its own staff report.

Accordingly, we conclude that the trial court properly granted Prein & Newhof summary disposition on MCM Marine’s 42 USC 1981 claim because Prein & Newhof could not have deprived MCM Marine a right to contract. Prein & Newhof was not the final decision maker in awarding the contract, and there was no question of fact that the Ottawa Road Commission made the final decision to award the contract to King Company based *solely* on its own staff report.

III. CONCLUSION

The trial court properly granted Prein & Newhof summary disposition on MCM Marine’s tortious interference with business expectancy claim because there was no question of fact that Prein & Newhof did not intentionally interfere with any alleged business expectancy of MCM Marine. Further, the trial court properly granted Prein & Newhof summary disposition on MCM Marine’s malpractice claim because there was no relationship between Prein & Newhof and MCM Marine, and Prein & Newhof owed no duty to MCM Marine, who was simply a disappointed bidder. And the trial court properly granted Prein & Newhof summary disposition

³⁸ *Harrison v Olde Financial Corp*, 225 Mich App 601, 607 n 6; 572 NW2d 679 (1997).

³⁹ See *PAS Communications*, 139 F Supp 2d at 1171.

⁴⁰ See *McDonald*, 898 F2d at 1161.

⁴¹ See *Harrison*, 225 Mich App at 607 n 6.

⁴² *Lewis-Kearns v Mayflower Transit*, 932 F Supp 1061, 1070 (ND Ill, 1996) (quotation and citation omitted).

⁴³ *Id.* (quotation and citation omitted).

on MCM Marine's 42 USC 1981 claim because Prein & Newhof could not have deprived MCM Marine a right to contract when Prein & Newhof was not the final decision maker in awarding the contract and there was no question of fact that the Ottawa Road Commission made the final decision to award the contract to King Company based *solely* on its own staff report.

We affirm.

/s/ Kirsten Frank Kelly

/s/ Joel P. Hoekstra

/s/ William C. Whitbeck