

STATE OF MICHIGAN
COURT OF APPEALS

JOHN NICKLAS, M.D.,

Plaintiff-Appellant,

v

GREEN GREEN & ADAMS, P.C., and PHILIP
GREEN,

Defendants-Appellees.

UNPUBLISHED

June 12, 2012

No. 299054

Washtenaw Circuit Court

LC No. 08-001168-NH

Before: BORRELLO, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals by right from the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff retained defendant Philip Green and his firm to represent plaintiff in a lawsuit against plaintiff's cardiology colleagues at the University of Michigan Hospital. In 1998, Green filed a lawsuit on plaintiff's behalf against various named defendants and two unnamed defendants, alleging claims for defamation and tortious interference with a business relationship. In 2002, Green attempted to file an amended complaint naming Dr. Keith Aaronson and Dr. Kim Eagle as defendants. By that time, however, most of plaintiff's claims against Dr. Aaronson and Dr. Eagle were time-barred. Dr. Eagle was added as a party, but only in connection with plaintiff's tortious interference claim, limited to events after 1999. The case proceeded to trial, and a jury returned a verdict of no cause of action.

In 2008, plaintiff filed this action against Green and his firm for legal malpractice, alleging that Green was negligent in failing to name Dr. Aaronson and Dr. Eagle as defendants before the expiration of the limitations period. The trial court granted defendants' motion for summary disposition.

We review de novo a trial court's grant or denial of a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id.* "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

Plaintiff first argues that the trial court erred in dismissing the entire case, on the ground that the trial court's findings applied only to malpractice on plaintiff's defamation claims, not to malpractice on plaintiff's tortious interference claims. The trial court ruled that Dr. Aaronson's and Dr. Eagle's statements were subject to a qualified privilege, and that plaintiff failed to create a genuine issue of fact whether Dr. Aaronson or Dr. Eagle abused that privilege. The court further ruled that even if plaintiff had evidence that defendants could have pursued a claim for defamation per se, defendants were protected under the attorney-judgment rule. The record on appeal demonstrates that defendants were entitled to summary disposition on the malpractice claims arising from both the defamation and the tortious interference theories.

The elements of a legal malpractice claim are: (1) the existence of an attorney-client relationship (i.e., duty), (2) negligence in the legal representation of the plaintiff (i.e., breach of duty), (3) that the alleged injury was a natural and direct result of the negligence (i.e., proximate causation), and (4) the fact and extent of the injury. *Kloian v Schwartz*, 272 Mich App 232, 240; 725 NW2d 671 (2006). To establish proximate cause in a legal malpractice claim, a plaintiff must show that a defendant's action was a cause in fact of the plaintiff's alleged injury. *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004). "Hence, a plaintiff must show that, but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit." *Id.* This is "the 'suit within a suit' requirement in legal malpractice cases." *Id.* Thus, to prove that defendants committed legal malpractice, plaintiff was required to prove his claims against Dr. Aaronson and Dr. Eagle for defamation and tortious interference with a business relationship.

With regard to the underlying defamation claim, "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992), quoting 3 Restatement Torts, 2d, § 559, p 156. "To establish a claim for defamation, the plaintiff must show (1) that 'a false and defamatory statement concerning the plaintiff' was made, (2) that the defendant made 'an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statements irrespective of special harm, or the existence of special harm caused by the publication.'" *Wilson v Sparrow Health Sys*, 290 Mich App 149, 154-155; 799 NW2d 224 (2010), quoting *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 76-77; 480 NW2d 297 (1991). "A court may determine, as a matter of law, whether a statement is actually capable of defamatory meaning." *Kevorkian v American Med Ass'n*, 237 Mich App 1, 9; 602 NW2d 233 (1999).

Plaintiff alleges that Dr. Eagle made four defamatory statements and that Dr. Aaronson made two defamatory statements. Our review of the challenged statements indicates that none are capable of a defamatory meaning. Although plaintiff asserts that various comments by Dr. Eagle in an email can be interpreted as containing negative implications about him or his program at the hospital, none of the comments refer to plaintiff directly. Further, it is apparent from the context of Dr. Eagle's comments that he was merely expressing his impressions of Dr. Aaronson and Dr. Todd Koelling. There is nothing about the comments that can be viewed as defamatory of plaintiff. The remaining allegedly defamatory statements by Dr. Eagle discuss only the heart programs at the hospital; they neither concern plaintiff specifically nor refer to a

“connection between [] plaintiff and the defamatory words” as required to establish a claim for defamation. *Gonyea*, 192 Mich App at 77.

Similarly, plaintiff has not established that either of the two statements by Dr. Aaronson can be considered defamatory. The first statement consists of a series of notes allegedly made by Dr. Aaronson in preparation for a meeting with the Chief of Cardiology, Dr. Elizabeth Nabel. To establish a claim for defamation, it is necessary to prove “an unprivileged publication to a third party[.]” *Id.* Plaintiff presented no evidence that Dr. Aaronson’s notes were actually published to Dr. Nabel, or to any other person. Absent proof of “publication of the alleged defamatory words[.]” plaintiff cannot establish a claim for defamation. *Gonyea*, 192 Mich App at 77. The second statement by Dr. Aaronson consists of a letter that he wrote to Dr. Nabel and Dr. Eagle in which he suggested certain changes to the heart programs in order to improve the quality of patient care and to maximize physician productivity. Plaintiff is mentioned in the letter, but the focus of the letter concerns the heart programs in general, not plaintiff specifically. Although plaintiff argues that a “lay low” comment suggests that other private conversations occurred between Dr. Aaronson and others, which plaintiff asserts was unprofessional, plaintiff has not identified any other specific conversation, let alone one that would be actionable, and he agreed that the “lay low” comment itself was not defamatory. Accordingly, there is nothing about the comments that can be viewed as defamatory of plaintiff.

Furthermore, some communications are subject to a “qualified privilege.” *Trimble v Morrish*, 152 Mich 624, 627; 116 NW 451 (1908). “[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 of 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 defendant has the burden of proving the existence of a qualified privilege. *Lawrence v Fox*, 357 Mich 134, 141; 97 NW2d 719 (1959). “A plaintiff may overcome a qualified privilege only by showing that the statement was made with actual malice, i.e., with knowledge of its falsity or reckless disregard of the truth.” *Prysak*, 193 Mich App at 15. “General allegations of malice are insufficient to establish a genuine issue of material fact.” *Id.*

The submitted evidence warrants the conclusion that the challenged statements are subject to a qualified privilege. All of the communications concerned the operation of hospital heart programs and were made in the context of a business relationship by, and to, parties who had a bona fide interest in the operation and administration of those programs. Defendants’ evidence also established that the allegedly defamatory statements were made in good faith. The evidence showed that Dr. Nabel solicited the communications by Dr. Aaronson and Dr. Eagle, who provided their thoughts on the heart programs and changes they would like to see to improve the programs. The focus of the communications concerned the programs, not plaintiff. Dr. Nabel, Dr. Aaronson, and Dr. Eagle all had an “interest to be upheld” regarding the integrity of the heart programs and the University of Michigan Health System in general. The content of the correspondence was “limited in its scope” to the specific purpose of evaluating the heart

programs. Further, because the correspondence was made in response to inquiries from Dr. Nabel, and the communications were made to parties who were involved with or had responsibility over the administration of the heart programs, defendants established a “proper occasion” and “publication in a proper manner and to proper parties only.” Moreover, plaintiff failed to demonstrate that he could overcome the existence of a qualified privilege with evidence that the statements were made with actual malice, i.e., with knowledge of their falsity or reckless disregard of the truth. *Prysak*, 193 Mich App at 15. Thus, the trial court did not err in determining that the allegedly defamatory statements were subject to a qualified privilege.

Because the evidence showed that plaintiff did not have a viable defamation claim against either Dr. Aaronson or Dr. Eagle, the trial court properly granted summary disposition of plaintiff’s legal malpractice claim against defendants for failure to timely bring a defamation claim. Stated another way, because plaintiff failed to show the existence of a viable claim for defamation, he cannot sustain his burden of proving causation in the legal malpractice action.

The evidence also established that plaintiff did not have a viable claim against Dr. Aaronson or Dr. Eagle for tortious interference with a business relationship or expectancy. “The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resulting damage to the plaintiff.” *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 323; 788 NW2d 679 (2010), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Mich (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). “To fulfill the third element, intentional interference inducing or causing a breach of a business relationship, a plaintiff must demonstrate that the defendant acted both intentionally and either improperly or without justification.” *Id.* “To establish that a defendant’s conduct lacked justification and showed malice, ‘the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference.’” *Id.* at 323-324, quoting *BPS Clinical Laboratories*, 217 Mich App at 699.

The submitted evidence does not support an inference that Dr. Aaronson or Dr. Eagle acted intentionally to interfere with plaintiff’s business relationships, or acted either improperly or without justification. Dr. Aaronson and Dr. Eagle provided input to Dr. Nabel’s inquiries regarding improving and restructuring the heart programs. None of their statements involved a personal attack on plaintiff, but rather critiqued the programs in general. Plaintiff did not demonstrate with specificity any affirmative acts by Dr. Aaronson or Dr. Eagle that corroborated an improper motive of interference. Thus, plaintiff failed to establish a genuine issue of material fact with respect to whether he could have successfully established a claim of tortious interference with a business relationship or expectancy against either Dr. Aaronson or Dr. Eagle. See *Mino v Clio Sch Dist*, 255 Mich App 60, 78-79; 661 NW2d 586 (2003). Therefore, the trial court properly granted summary disposition of plaintiff’s legal malpractice claim against defendants for failure to timely bring a claim for tortious interference with a business relationship or expectancy.

Plaintiff also argues that the trial court erred in determining that defendants were protected under the attorney-judgment rule. Given that the record fails to support plaintiff’s

assertions concerning the alleged loss of his defamation and tortious interference claims, we need not address this argument.

Lastly, plaintiff appears to argue that summary disposition was improper because he presented evidence that Green violated various rules of professional conduct. Plaintiff did not raise this issue in the trial court, so we decline to consider it. See *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 721; 706 NW2d 426 (2005). We note, however, that a violation of the Michigan Rules of Professional Conduct does not, by itself, give rise to an actionable claim. MRPC 1.0(b); Cf. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 192; 650 NW2d 364 (2002). Accordingly, plaintiff is not entitled to relief with respect to this issue.

Affirmed.

/s/ Stephen L. Borrello
/s/ Peter D. O'Connell
/s/ Michael J. Talbot