STATE OF MICHIGAN

COURT OF APPEALS

BELLA OSAK,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN REGENTS, JOLANTA GREMBECKA, PHD and TOMASZ CIERPICKI, PHD,

Defendants-Appellees.

UNPUBLISHED
October 18, 2012

No. 306239
Court of Claims
LC No. 10-000088-MZ

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

Plaintiff Bella Osak appeals as of right the trial court's order granting summary disposition in favor of defendants University of Michigan Regents, Jolanta Grembecka, PhD, and Tomasz Cierpicki, PhD. Plaintiff was an experienced research scientist who was employed by defendants as a research laboratory specialist in Grembecka and Cierpicki's laboratory. Plaintiff sued defendants for defamation and for tortious interference with a business relationship on the basis of Grembecka's letter to plaintiff and to the University of Michigan (U of M) human resources (HR) department stating that plaintiff's employment had been terminated for falsifying scientific data. The trial court dismissed both claims pursuant to MCR 2.116(C)(7), (8), and (10). We affirm.

When plaintiff was hired, she was subject to U of M's six-month probation policy, under which she could be terminated at any time. Grembecka and Cierpicki were the principle investigators in their laboratory, meaning, among other things, that they were supervisors and responsible for all experiments conducted in the laboratory. Plaintiff was responsible for laboratory setup, management, and biochemical and cell-based experiments associated with defendants' research. Plaintiff and Grembecka had a poor working relationship. Plaintiff testified that Grembecka did not like her and was always suspecting her of doing something "bad behind her back." Grembecka apparently did not like or trust plaintiff. At one point, plaintiff offered to leave the laboratory, but Grembecka and Cierpicki nevertheless asked her to remain. She testified that Cierpicki had at one point told her that her and Grembecka's personalities "didn't match." Grembecka allegedly threatened to destroy plaintiff's reputation and ensure that plaintiff would never work at U of M again.

Plaintiff's termination arose out of two incidents, the true circumstances of which are, as the trial court noted, not genuinely known. In one experiment Grembecka directed plaintiff to test duplicate samples in order to obtain reliable results. Grembecka and Cierpicki reviewed the test results, and based on the closeness of the test readouts, they believed that plaintiff had not tested duplicate samples. Plaintiff could not remember that experiment at her deposition. The second incident involved the labeling of certain plates. Plaintiff testified that she had "made some mistakes in pre-labeling" the plates for an experiment; due to other obligations, she did not correct all of the labels immediately, but rather made a note to herself to change them later, which she ultimately did. However, Grembecka was allegedly in the practice of checking and photographing plaintiff's work, so prior to her correction of those plates, Grembecka inspected them and determined that they were improper. When plaintiff showed them to him later, he noticed that some of them had been erased and relabeled. Plaintiff and Grembecka dispute whether plaintiff told him that she had changed the labels before they confronted her.

It is not disputed that relabeling experiment data is not necessarily improper per se. Grembecka and Cierpicki contend that plaintiff did so improperly and without adequate documentation. Furthermore, because it would have been faster to run an experiment without running duplicates and to change the labels to show duplicates, they concluded that plaintiff had not in fact run duplicates but rather falsified information. Plaintiff testified that she noted which labels needed to be changed on a scrap of paper, which she "tossed" after the experiment, and that she had not intentionally mislabeled the plates. Plaintiff's lab journal did not contain any notations about these experiments. According to Grembecka, because plaintiff had not run duplicates, because plaintiff had changed the original labels "with no logical or documented explanation," and because the reporting data did not match, Grembecka considered at least some of the data to be false.

Plaintiff wrote a letter to U of M's HR department stating that Grembecka's accusations of "lying . . . and attempting to sabotage their experiments" were illogical and absurd. Plaintiff was subsequently approached by Grembecka, Cierpicki, and an HR employee. Plaintiff testified that the HR employee informed her that she was being "let go for falsification of data." Plaintiff wrote a letter to Kevin Neuman, a different HR employee, that was very similar to the letter that plaintiff had previously sent to HR. Grembecka wrote a letter to plaintiff stating that the "major reason for termination of your appointment is falsification of the data for the experiment[,] the luciferase assay . . . [Y]ou did not prepare duplicates . . . [, but] the final results of the luciferase assay you provided to me included duplicates which were not set up in the experiment." Grembecka sent a copy of the letter to Neuman. Plaintiff did not know whether Grembecka ever shared the letter with anyone other than Neuman and did not know whether Grembecka ever communicated with anyone else about plaintiff's employment.

Plaintiff concedes that Grembecka and Cierpicki had a right to terminate her employment. And as noted, it is not known what actually transpired in the laboratory. However, plaintiff testified that the way Grembecka terminated plaintiff's employment destroyed her career at U of M. Plaintiff alleged that the termination letter had been made a part of her personnel file.

After her termination, plaintiff applied for a position with another professor at U of M, Dr. David Markovitz. Markovitz emailed plaintiff to inform her that he planned to offer her a

position, but later emailed plaintiff to inform her that "I contacted my administrator, and she told me that you are listed as a Probationary Period Discharge, which results in an automatic Do Not Hire status." Markovitz emailed plaintiff a few days later to inform her that under the circumstances, he could not hire her.

Plaintiff filed a Notice of Intent (NOI) to sue on September 21, 2010, and filed her complaint the same day. Defendants moved for summary disposition on July 29, 2011, asserting that plaintiff had not filed a timely NOI, that defendants were protected by governmental immunity, and that plaintiff had not provided evidence of issues of material fact on several of the elements of defamation and tortious interference with a business relationship. The trial court granted summary disposition "for the reasons stated on the record by the defendants." The trial court's written order granted the motion under MCR 2.116(C)(7), (8), and (10), and further ordered that U of M would respond to external requests for employment verification with neutral references and that the parties would not discuss the plaintiff's termination with any third parties. Plaintiff appeals. We note that defendants have not cross-appealed the trial court's entry of the protective order.

We review de novo a trial court's grant of summary disposition. See *Burton v Reed City Hosp Corp*, 471 Mich 745, 750; 691 NW2d 424 (2005). When it is unclear which section of MCR 2.116(C) the trial court relied on to grant the motion, but it considered matters outside the pleadings, we treat the motion as though it was granted under MCR 2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). We consider the entire record, including affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

Plaintiff first argues that the trial court made improper credibility determinations and findings of fact when deciding the motion and applied the wrong burden of proof. We disagree.

"A court may not make a finding of fact or weigh credibility when ruling on a motion for summary disposition" under MCR 2.116(C)(10). *Anzaldua v Neogen Corp*, 292 Mich App 626, 637; 808 NW2d 804 (2011) (citation omitted). A reading of the trial court's statements in context indicates that the statements were neither credibility determinations nor findings of disputed facts for purposes of granting summary disposition. Two of the trial court's statements, that "nobody knows what happened" and that the trial court believed that defendants had cause to fire plaintiff but "that's between employee and employer and that's where it needs to stay," were unambiguously in the context of explaining why it was issuing the protective order. Furthermore, plaintiff conceded that she did not technically follow the protocols set forth by Grembecka and Cierpicki, so no credibility determination was at issue.

The trial court also stated that "the letter went to a couple of people within the department." Plaintiff did not submit any evidence showing a genuine question of fact whether the letter had been published to anyone outside of U of M's HR department. Markovitz's email did not in any way suggest that he saw the letter, but only that plaintiff had been internally and automatically flagged "Do Not Rehire" because of when, not why, she had been terminated. Therefore, the trial court's statement was simply an accurate summary of the undisputed evidence, not a finding of a disputed fact.

Plaintiff asserts that the trial court applied the wrong burden of proof when deciding defendants' motion. Specifically, plaintiff challenges whether the trial court viewed the evidence in the light most favorable to her, given that it made impermissible factual findings in favor of defendant. However, as discussed above, none of the alleged findings of fact formed the basis for the trial court's grant of summary disposition but, rather, were the reasons the trial court believed plaintiff was entitled to certain reasonable protections. In addition, the trial court stated the appropriate standard on the record: "even in looking at the light most favorable to the non-moving party, that the plaintiffs will not be able to sustain their burden on either count." Finally, as discussed below, the trial court properly granted summary disposition.

Plaintiff next argues that she presented a genuine issue of material fact on the fault element of defamation because she showed that Grembecka acted with actual malice. We disagree.

As stated in *Kevorkian v American Med Ass'n*, 237 Mich App 1, 8-9; 602 NW2d 233 (1999), to establish a defamation claim, the plaintiff must show:

> (1) a false and defamatory statement concerning the plaintiff[;] (2) an unprivileged publication 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 the publication (defamation per quod).

We find that reasonable minds could differ as to whether the allegedly defamatory statement that plaintiff had falsified data was false. Defendants' assertion that the resulting data were incorrect is irrelevant because the defamatory statement is that the data were "falsified," not that the data were correct. Plaintiff did not dispute whether the data was correct, but rather has consistently and repeatedly maintained that her actions were the result of a mistake and were not a deliberate falsification. When the truth of an assertion that would be a material fact depends on a witness's credibility, there is a genuine issue of material fact. *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994). When a jury could find a defamatory statement to be literally false, summary disposition is not appropriate on the falsity element. See *Hawkins v Mercy Health Serv, Inc*, 230 Mich App 315, 327; 583 NW2d 725 (1998). Reasonable minds could find that the statement was literally false because plaintiff had made a mistake rather than a deliberate falsification.

However, a defamatory statement will be subject to the shared interest privilege if it is a "bona fide communication[] concerning any subject matter in which a party has an interest or a duty owed to a person sharing a corresponding interest or duty." *Rosenboom v Vanek*, 182 Mich App 113, 117; 451 NW2d 520 (1989). When a communication falls under this privilege, the burden shifts to the plaintiff to prove actual malice. *Id.* "Actual malice exists where the publication was made with knowledge of the falsity of the statements or with reckless disregard of their truth or falsity. *Ireland v Edwards*, 230 Mich App 607, 615; 584 NW2d 632 (1998). "Reckless disregard is not measured by whether a reasonably prudent man would have published, . . . but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published." *Id.* at 622 (internal quotations and citation omitted). The

privilege attached here because Grembecka argued that her letter was only circulated to the HR department, and plaintiff offered no proof to the contrary.

Whether a plaintiff has presented enough evidence of actual malice is a question of law. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 111; 793 NW2d 533 (2010). To survive a motion for summary disposition, the plaintiff must present evidence "sufficient to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Ireland*, 230 Mich App at 622. "Clear and convincing proof is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the precise facts in issue." *Smith*, 487 Mich at 114-115. Evidence may not necessarily be clear and convincing even when it is uncontroverted. *Id.* at 115.

The difficulty for plaintiff in this case is that plaintiff must establish that Grembecka personally and actually harbored any serious doubts as to whether plaintiff had falsified data. Plaintiff submitted affidavits from three PhD-level scientists agreeing that re-labeling during an experiment does not deviate from the accepted standards within the scientific community and that they had reviewed the allegations that plaintiff had falsified data and concluded that the allegations were incorrect. These affidavits are clearly probative of whether Grembecka's statement was or was not literally true. However, they are not probative of the state of Grembecka's own mind.

Plaintiff testified that Grembecka did not believe plaintiff's explanations on previous occasions, including when a cell line had gone missing. Plaintiff wrote to HR that Grembecka was paranoid and testified that even Cierpicki thought that Grembecka was paranoid. Plaintiff testified that after discovering the changed labels, Grembecka immediately accused plaintiff of falsifying data and immediately told plaintiff that plaintiff had changed the labels to indicate duplicates for which plaintiff had not actually tested. Thus, plaintiff's own testimony suggests that Grembecka honestly believed the data was falsified.

Plaintiff also argues that Grembecka's ill will establishes actual malice.[1] Plaintiff testified that Grembecka did not like her, had told her she would not work with U of M again, and had threatened to ruin her reputation. Although a plaintiff can prove actual malice with circumstantial evidence of a defendant's state of mind and motives, "courts must be careful not to place too much reliance on such factors." *Smith*, 487 Mich at 116 (internal quotations and citations omitted). "[I]ll will, spite or even hatred, standing alone, do not amount to actual

[1] Defendants urge us to disregard plaintiff's affidavit as contradictory to her deposition testimony. We disagree. Although plaintiff testified at her deposition that "I think they were upset that I was still in the lab and they wanted to destroy me," plaintiff was never asked whether Grembecka had stated that she wanted to destroy plaintiff, and was not asked about any circumstances that led to plaintiff's belief that Grembecka wanted to destroy her. Additionally, although plaintiff could not remember Grembecka's exact words, plaintiff's testimony is consistent with the statement in her affidavit that Grembecka told plaintiff she would not work at U of M again. We find no inconsistency, and the affidavit is properly considered.

malice." *Ireland*, 230 Mich App at 622 (internal quotations omitted). Accordingly, although we consider plaintiff's assertions of ill will, they are also not determinative.

Finally, the evidence that Grembecka investigated the allegations before publishing the defamatory statement weighs against concluding that Grembecka acted with actual malice. Whether a party investigated the accuracy of a communication before publishing is relevant to whether a defendant recklessly disregarded the truth. *Smith*, 487 Mich at 117. Grembecka attested that before publishing the termination letter, she and Cierpicki examined the readings from plaintiff's samples. Grembecka concluded "from the readings [plaintiff] gave us that there were too many discrepancies between her relabeled plate layout and the data she presented to us for the results to be true and accurate." The termination letter indicates that the "final results of the luciferase assay you provided me included duplicates which were not set up in the experiment." It is readily apparent that Grembecka may not have conducted her review with an entirely open and unbiased mind, but it is clear that she made a subjectively good-faith effort to confirm her beliefs.

When viewing the record evidence as a whole and in a light most favorable to plaintiff, it does not allow a rational fact finder to find by clear and convincing evidence that Grembecka acted with actual malice. Therefore, the existence of a genuine question of fact as to the falsity element of defamation is irrelevant. The trial court appropriately granted summary disposition on plaintiff's defamation claim.

Plaintiff argues that the trial court erred by granting summary disposition on her tortuous-interference claim because she established that Grembecka intentionally interfered with her business relationship with U of M. We disagree.

As put forth in *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996):

> 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 resultant damage to the plaintiff.

Even assuming that plaintiff was able to show intentional interference, plaintiff has not shown that it was this interference that resulted in a different U of M professor not hiring plaintiff. Defendants offered evidence that U of M would have placed a "Do Not Hire" designation on plaintiff's file if she was terminated for any reason during her probationary period. Defendants also provided Markovitz's emails, which indicated that he "contacted [his] administrator, and she told [him] that [plaintiff was] listed as a Probationary Period Discharge, which results in an automatic Do Not Hire status," and that "under the current situation" he could not hire plaintiff.

Accordingly, the burden was on plaintiff to provide evidence of the existence of resultant damages. MCR 2.116(G)(4). Plaintiff did not present any evidence that an automatic "Do Not Hire" status was not a part of U of M's policy, that it was placed on plaintiff's file because of the

termination letter, or that the termination letter was distributed to anyone else with whom plaintiff would have had a business expectancy. Therefore, trial court properly granted summary disposition because plaintiff had not shown any resultant damage, even if defendants acted improperly.

Finally, plaintiff asserts that governmental immunity is not a defense to intentional torts. Because this issue was not contained within plaintiff's statement of questions presented, we need not decide it. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). However, we note that Michigan law "clearly provides governmental employees qualified immunity from intentional-tort liability at common law." *Odom v Wayne Co*, 482 Mich 459, 473; 760 NW2d 217 (2008).

The trial court's grant of summary disposition in favor of defendants and the protective order, which was not cross-appealed by defendant-appellee, are both affirmed.

/s/ Amy Ronayne Krause
/s/ Stephen L. Borrello
/s/ Michael J. Riordan