STATE OF MICHIGAN

COURT OF APPEALS

UKPAI I. UKPAI,

Plaintiff-Appellant,

v

CONTINENTAL AUTOMOTIVE SYSTEMS, INC. and LEON KOUA,

Defendants-Appellees.

UNPUBLISHED
December 22, 2020

No. 350294
Oakland Circuit Court
LC No. 2019-173527-CZ

Before: SWARTZLE, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

According to plaintiff, what you don't say can hurt you. Plaintiff, Ukpai I. Ukpai, appeals as of right the trial court's order granting summary disposition in favor of his former employer, defendant Continental Automotive Systems, Inc., and his former manager, defendant Leon Koua. Plaintiff maintains that after he was let go at Continental, defendants intentionally interfered with his efforts to gain employment at IAV Automotive Engineering, Inc. (IAV). Specifically, he claims Koua's "continual refusals" to provide an employment reference to IAV maliciously, and in bad faith, communicated a false and negative communication about his job performance, which constituted unlawful "defamation by conduct" that intentionally interfered with his expectancy of obtaining a position with IAV. Because the trial court did not err in concluding that plaintiff failed to provide sufficient proof to create a genuine issue of material fact with respect to two[1] of the elements necessary to establish his claim of tortious interference with business expectancy against defendants, we affirm.

I. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 88; 706

[1] The trial court did not address the other elements, nor does plaintiff on appeal. Thus, we limit our analysis to the issues raised by plaintiff.

NW2d 843 (2005). Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). Because the trial court considered evidence beyond the pleadings, we treat the motion as one decided under Subrule (C)(10). See *Auto-Owners Ins Co v Campbell-Durocher Group Painting and Gen Contracting*, LLC, 322 Mich App 218, 224; 911 NW2d 493 (2017).

A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Health Call of Detroit*, 268 Mich App at 88. In ruling on a (C)(10) motion, the trial court must view the pleadings, affidavits, and other documentary evidence in a light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is appropriate under MCR 2.116(C)(10) if the evidence shows "that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.* "A 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." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admission or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Quinto*, 451 Mich at 362-363 (citations omitted).]

"Speculation and conjecture are insufficient to create an issue of material fact." *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 464-465; 708 NW2d 448 (2005). Conclusory allegations are also insufficient. *Quinto*, 451 Mich at 371-372.

II. ANALYSIS

Plaintiff contends the trial court erred in summarily dismissing his tortious interference with a business expectancy claim. The elements of tortious interference with a business relationship or expectancy 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." *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc Architects & Planners, Inc*, 492 Mich 40, 45; 821 NW2d 1 (2012) (citations and quotation marks omitted). The trial court focused on plaintiff's failure to create a genuine issue of material fact with respect to the first and third elements, as does plaintiff on appeal.

A. VALID BUSINESS EXPECTANCY

In order to establish the existence of a valid business expectancy, "[t]he expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *Id.* (citation and quotation marks omitted). We conclude that the evidence presented was insufficient to establish that

plaintiff, a mere interviewee, without more, had a reasonable or probable expectation of gaining employment with IAV, beyond wishful thinking, and thus he failed to establish a valid business expectancy as a matter of law.

At best, the evidence shows that plaintiff was one of several candidates being considered for an open position[2] with IAV, and that IAV considered moving forward with his candidacy on the basis of his professional background, experience, and qualifications, and availability to support the customer project for which the position was intended. Chi Binh La, a business unit director for IAV, interviewed plaintiff. Although La's impressions of plaintiff were not entirely positive from his interview, he asked Kimberly Frederick, IAV's Human Resources representative, to set up another interview with plaintiff and attempted to contact defendant Koua to obtain a reference. However, aside from mere interest in pursuing plaintiff's candidacy further, there was simply no evidence that La, Frederick, or anyone else from IAV ever clearly implied that an offer of employment was forthcoming, or expressed that he was the leading candidate for the open position. Although plaintiff averred in his affidavit that, toward the end of the interview, La "expressed satisfaction that he could see me as a Senior Engineer or Technical Specialist in his organization," and that La requested a contact from Continental, this does not equate to an intent to offer him employment, conditioned or not on obtaining a reference from Continental. Moreover, after plaintiff's single interview with IAV, Frederick informed plaintiff the next day, "At this time we are still evaluating candidates for the position and have not made a final determination on who will move forward to the next stage of the interview process," evidencing that plaintiff's status was nothing more than that of a candidate being considered for an open position, as opposed to a probable or reasonably likely employee. Compare *Cedroni*, 492 Mich at 48-49 (the plaintiff's understanding that it might not be awarded the contract, despite being the lowest bidder, was relevant in determining that the plaintiff did not have a reasonable expectancy of obtaining the contract, as was the defendant's never having communicated an intent to accept the plaintiff's bid).

In short, plaintiff improperly equates La's initial interest in pursuing his candidacy with an expectation of employment. But an employer's decision whether to hire an employee is highly discretionary.[3] Plaintiff's single interview engendering some interest in pursuing his candidacy further was not enough to create the existence of a valid business expectancy of obtaining employment with IAV. There was no evidence that IAV made any promises or conditional offers of employment, and IAV informed plaintiff that other candidates were being considered for the position and they had not yet decided who would move forward in the interview process.

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[2] The undisputed evidence shows that IAV never filled the position plaintiff sought because the customer project the position was intended to support did not come to fruition. The trial court held that this fact was fatal to plaintiff's claim of a valid business expectancy. At oral argument, plaintiff essentially concedes that the trial was right, so we need not address it any further. But we will, for the sake of completeness, address plaintiff's other issues on appeal.

[3] Generally, in the absence of unlawful discrimination, we would not question the "soundness of business judgment" of employers regarding employment decisions. See generally *Meagher v Wayne State Univ*, 222 Mich App 700, 715; 565 NW2d 401 (1997).

Plaintiff's apparent subjective belief in the strength of his candidacy is nothing more than the sort of "wishful thinking" that is not sufficient to establish a business expectancy. See *Cedroni*, 492 Mich at 45; *Ghaffari*, 268 Mich App at 464 (mere conjecture or speculation is not enough to create an issue of fact to survive summary disposition).[4]

For these reasons, we hold that plaintiff's mere candidacy for the open position with IAV, without more indications of actual job expectancy, was not sufficient to establish a reasonable or probable expectation that he would obtain employment with IAV.

B. INTENTIONAL INTERFERENCE

Plaintiff also claims he created a genuine issue of material fact as to the third element, that defendants intentionally interfered with his employment opportunity with IAV. To prove the element of intentional interference, a plaintiff "must establish that the interference was improper." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003), aff'd 472 Mich 91 (2005). "In other words, the intentional act that defendants committed must lack justification and purposely interfere with plaintiff['s] . . . business relationship or expectancy." *Advocacy Org*, 257 Mich App at 383. "The 'improper' interference can be shown either by proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading [plaintiff's] business relationship." *Id.* "To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference." *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003) (quotation marks and citation omitted). "Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *BPS Clinical Laboratories v Blue Cross & Blue Shield*, 217 Mich App 687, 699; 552 NW2d 919 (1995). Plaintiff "must allege that the interferer did something illegal, unethical or fraudulent." *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 324; 788 NW2d 679 (2010) (quotation marks and citation omitted).

To support the assertion that defendants committed a wrongful act per se, plaintiff claims that Koua's "continual refusals" to give La an employment reference effectively communicated a negative reference of his job performance, amounting to unlawful defamation, i.e., "defamation

[4] Although plaintiff argued at the motion hearing that La "already decided, based on the interview record, that I was the candidate to go to and recommend," that "La already decided to hire me for that job and just wanted the interview as a formality because he's the business unit director," and that "he looked at my background to satisfy himself that . . . reservations about his work history are of no consequence," there was no support for these assertions in evidence. To the contrary, the evidence indicated that La had not reached a decision to hire plaintiff, about whom La had reservations that were not entirely alleviated during the interview.

by conduct."[5] This Court has recognized that "tortious interference with business relations may be caused by defamatory statements." *Lakeshore Community Hosp v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). Thus, if plaintiff can prove that Koua's conduct was defamatory and purposely interfered with his expectancy of employment, he could potentially establish a wrongful act to support a claim for tortious interference. But, "[a]s with defamation actions, where the conduct allegedly causing the business interference is a defendant's utterance of negative statements concerning a plaintiff, privileged speech is a defense." *Id.* at 401-402. Pertinent here, "an employer has a qualified privilege to divulge information regarding a former employee to a prospective employer." *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 79; 480 NW2d 297 (1991). A "[p]laintiff may overcome this qualified privilege only by showing that the statement was made with actual malice, that is, with knowledge of its falsity or reckless disregard of the truth." *Id.* See also MCL 423.452.[6]

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[5] "A communication is defamatory if, under all of the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or it deters others from associating or dealing with the individual." *Mino*, 255 Mich App at 72 (quotation marks and citation omitted).

> In order to establish a claim of defamation, a plaintiff must show: (1) a false or defamatory statement concerning the plaintiff; (2) 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 statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication (defamation per quod). [*Id.* at 72.]

[6] MCL 423.452 provides as follows:

> An employer may disclose to an employee or that individual's prospective employer information relating to the individual's job performance that is documented in the individual's personnel file upon the request of the individual or his or her prospective employer. An employer who discloses information under this section in good faith is immune from civil liability for the disclosure. An employer is presumed to be acting in good faith at the time of a disclosure under this section unless a preponderance of the evidence establishes 1 or more of the following:
>
> (a) That the employer knew the information disclosed was false or misleading.
>
> (b) That the employer disclosed the information with a reckless disregard for the truth.
>
> (c) That the disclosure was specifically prohibited by a state or federal statute.

Initially, although plaintiff implores this Court to recognize that Koua's nonverbal conduct in "repeatedly refusing" to give an employment reference to IAV is sufficient to establish a false and negative reference constituting unlawful "defamation by conduct," it is not necessary for us to decide the unpreserved issue whether nonverbal conduct alone can constitute defamation, because we can properly resolve this case on other grounds.[7]

Here, the record is devoid of any evidence, beyond plaintiff's mere speculation, that defendant Koua was not acting in good faith, or without justification, in failing to give IAV an employment reference, or to support his assertion that Koua maliciously withheld information about plaintiff from IAV in order thereby to communicate that plaintiff's job performance at Continental was poor in order to purposely interfere with his expectancy of employment at IAV. See *Advocacy Org*, 257 Mich App at 383. There is no evidence of any personal animus or improper motive at all. And, the uncontradicted evidence shows, at best, that Koua was simply unavailable to discuss plaintiff at the time La called. According to the evidence, on the first occasion La called, Koua indicated that he was going into a meeting and did not have time to talk and asked La to call him back; after failing to reach Koua on his second attempt La did not make any further attempts to contact Koua, but did continue to pursue other candidates for the open position. There is nothing in the record indicating that La ever left his phone number or a message asking Koua to contact him further. In fact, Koua did not even recall being asked to provide a reference regarding a prior employee, with the exception of a colleague other than plaintiff several years earlier. Contrary to plaintiff's argument, these circumstances do not reasonably suggest that Koua intentionally or maliciously failed to return La's calls or continually refused to provide a reference in order to interfere with his employment opportunity at IAV. We further note that an employer has no obligation to provide an employee reference, and thus that Koua's failure to do so, in and of itself, was not wrongful. See MCL 423.452.

Further, even if Koua's failure to provide an employment reference constituted a negative communication about plaintiff's job performance amounting to defamatory conduct, plaintiff cannot overcome the qualified privilege shielding an employer who divulges information about a former employee's job performance to a prospective employer. *Lakeshore*, 212 Mich App at 401-402; *Gonyea*, 192 Mich App at 79; MCL 423.452. Plaintiff adduced no evidence that Koua acted with knowledge of the falsity of any such negative reference, or with reckless disregard for the

[7] "[T]his Court need not review issues raised for the first time on appeal[.]" *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). An issue is preserved for appellate review if it was raised before and decided by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Before the trial court, plaintiff maintained that defendants intentionally interfered with his employment opportunity at IAV by making malicious, false, and negative (defamatory) disclosures about his previous job performance. The trial court held that plaintiff could not meet his burden to demonstrate wrongful conduct based on the alleged defamatory comments because the evidence did not establish that defendant Koua made a false statement, or any statement at all, much less with malice or with reckless disregard for the truth. Plaintiff concedes that his appellate claim that Koua's repeated refusals to provide an employment reference to IAV constituted unlawful "defamation by conduct" is not preserved.

truth, and plaintiff's general allegations of malice are insufficient to establish a genuine issue of material fact regarding applicability of the privilege. See *Gonyea*, 192 Mich App at 79-80. To the contrary, the evidence demonstrates that Koua was aware that plaintiff had job performance issues, including those reflected in his annual reviews while working for Continental, including most recently at Continental's customer's plant resulting in the filing of UAW grievances and plaintiff's termination from Continental. Koua thus had no reason to entertain serious doubts about the truth of any negativity implied by his silence. See *Mino*, 255 Mich App at 75-76 ("reckless disregard is measured by whether the publisher entertained serious doubts concerning the truth of the statements published").[8] This evidence suggests that any alleged negative reference in the form of Koua's conduct in failing to give a reference was offered in good faith, and not with knowledge of its falsity or a reckless disregard for the truth. See *Gonyea*, 192 Mich at 79; MCL 423.452. In the absence of any evidence of malice on the part of defendants, plaintiff cannot overcome Continental's qualified privilege to divulge information regarding its former employee's job performance to a prospective employer. We therefore conclude that Koua's allegedly unlawful defamatory conduct cannot form a basis for satisfying the wrongful conduct element of intentional interference. *Id*. See also *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 33; 627 NW2d 5 (2001) ("substantial truth is an absolute defense to a defamation claim").

Although improper interference can be shown by proving "the intentional doing of a lawful act with malice and unjustified in law," *Advocacy Org*, 257 Mich App at 383, proof that a lawful act was done maliciously requires a showing of specific "affirmative acts by the defendant that corroborate the improper motive of the interference." *Mino*, 255 Mich App at 78 (quotation marks and citation omitted). Here, plaintiff has not shown that Koua, in failing to provide an employment reference, was motivated by anything other than his lack of availability to discuss plaintiff at the times La attempted to contact him. Again, contrary to plaintiff's argument, there was no evidence that Koua acted affirmatively by "continually refusing" to provide a reference for plaintiff in order to interfere with his employment opportunity that might give rise to the reasonable inference that Koua acted with malice, or without justification. See *Mino*, 255 Mich App at 78. In short, there was no evidence of an improper motive.

When viewed in the light most favorable to plaintiff, the evidence was insufficient to establish that defendants intentionally interfered with plaintiff's alleged expectancy of employment at IAV. As noted by defendants, the worst that can be said about Koua is that he

[8] Although plaintiff maintains that his performance was always "satisfactory" or "more than satisfactory," his managers noted issues with his communication and interpersonal skills, his ability to understand and follow stakeholder direction, to focus on customer needs, and to maintain project scope and timing goals." Plaintiff was rated at the lowest of three levels of performance in some areas, and his overall ranking was "meets expectations," which was the second-to-lowest category. Further, while plaintiff denied responsibility for the issues in the customer's plant, the evidence indicated that defendant Koua was aware that plaintiff was accused of not following union rules during vehicle inspections, which resulted in UAW grievances that temporarily halted Continental's operations in the plant, jeopardized Continental's relationship with the customer, and led the customer to insist that Continental replace him.

failed to provide a positive reference for plaintiff, which he had no legal obligation to provide. Accordingly, summary disposition in defendants' favor was proper under MCR 2.116(C)(10).

Affirmed.

/s/ Brock A. Swartzle
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher