[Cite as *Miller v. J.B. Hunt Transport, Inc.*, 2013-Ohio-3892.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jack Miller,	:	
Plaintiff-Appellant,	:	
		No. 13AP-162
v.	:	(C.P.C. No. 11CV-6472)
J.B. Hunt Transport, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 10, 2013

Rosenberg & Ball Co., LPA, and *Eric Rosenberg*, for appellant.

Dinsmore & Shohl, LLP, and *Jan E. Hensel*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

T. BRYANT, J.

{¶ 1} Plaintiff-appellant, Jack Miller, appeals a summary judgment entered by the Franklin County Court of Common Pleas in favor of defendant-appellee, J.B. Hunt Transport, Inc. ("J.B. Hunt"), on appellant's claim of tortious interference with a business relationship.[1] Because we find that the trial court committed no reversible error in so holding, we affirm the judgment.

I. BACKGROUND

{¶ 2} J.B. Hunt is a multi-model containerized transport company serving the United States, Canada, and Mexico. As a commercial motor carrier, J.B. Hunt is regulated by the United States Department of Transportation. "In an effort to promote

1 Appellant also named J.B. Hunt Transportation, Inc. as a defendant in his complaint, but only appellee entered an appearance in the trial court and in this appeal.

greater safety in the operation of large trucks on the Nation's highways, in 1970 the United States Department of Transportation promulgated the Federal Motor Carrier Safety Regulations ("FMCSR") establishing minimum qualifications for commercial motor vehicle drivers and requiring employers to investigate the driving record and employment history of prospective employees being hired to drive large trucks." *See Cassara v. DAC Servs., Inc.*, 276 F.3d 1210, 1213 (10th Cir.2002), citing 49 C.F.R. 390.1-390.37, 391.1-391.69. These regulations, however, do not prohibit an employer "from requiring and enforcing more stringent requirements relating to safety of operation and employee safety and health." 49 C.F.R. 390.3(d). And, under the regulations, prospective motor carrier employers must investigate certain information of previous employers of driver applicants, including "minor accident information" provided "pursuant to the employer's internal policies." 49 C.F.R. 391.23(d)(2)(ii).

{¶ 3} The FMCSR require "previous motor carrier employers" to respond to requests for drivers' driving histories, including their safety performance. *See Baumgartner v. AIM Leasing*, 11th Dist. No. 2012-T-0070, 2013-Ohio-883, ¶ 28 ("Pursuant to 49 CFR 391.23, previous motor carrier employers must respond to requests from potential future employers by providing data related to a previous employee's accidents."). J.B. Hunt uses USIS, which is also known as "DAC" and "HireRight," to comply with its duty to respond to inquiries regarding former employees' driving histories. (R. 36, exhibit No. 1, Griffin Affidavit, at ¶ 14, hereinafter "Griffin Affidavit, at ___.".) USIS specializes in investigation and security services and compiles and disseminates truck-driver employment histories. J.B. Hunt retains and reports information regarding all accidents in which its drivers are involved, including those that do not meet the regulatory definition of accident in 49 C.F.R. 390.5.

{¶ 4} It is J.B. Hunt's policy to investigate all collisions, no matter how minor, in which one of its drivers is involved to determine whether the accident is preventable or non-preventable. As part of its efforts to promote high standards of safety among professional drivers, J.B. Hunt investigates the preventability of all accidents and reports all preventable collisions, including its preventability determination, for inclusion on a Driver Work History Report sent to USIS.

{¶ 5} Upon receiving a report of a collision, J.B. Hunt makes an initial determination of preventability within 24 hours. This determination is made upon a review of all information available at the time, including the driver's initial statement and the statements of others involved. During this preliminary evaluation, if there is any doubt, the accident is deemed to be preventable. This practice is used to encourage the driver's manager to discuss the accident details with the driver and to review with the driver any supplemental information, including any police report. If the driver believes that the preventability determination should be changed from preventable to non-preventable, the driver must request that the manager submit a Safety Event Change Request, and the manager decides whether to submit the request.

{¶ 6} To make the preventability determination, the J.B. Hunt safety professional must review all available information, weigh it against relevant guidelines, and arrive at an adequately supported decision that will be accepted by the driver and can deter similar accidents by J.B. Hunt drivers in the future. According to J.B. Hunt Senior Claims Advisor David Dunn, preventability determinations are, by their nature, judgment calls. If there is a potential for litigation from the accident, J.B. Hunt will send an insurance claims adjuster to investigate the accident to determine who was at fault for the accident for liability purposes, but the investigation is different from the preventability determination.

{¶ 7} J.B. Hunt has issued guidelines for determining the preventability of accidents, which were derived from guidelines issued by the American Trucking Association. Under its guidelines, J.B. Hunt holds its drivers to a higher standard of performance than the average motorist, even requiring them to be alert to the actions of a driver who may not stop at a stop sign or red light at an upcoming intersection:

> The concept of preventability is based on the premise that the professional driver is expected to meet a higher standard of performance than the average motorist. It is self-evident that the professional driver should be able to observe and assess the behavior of pedestrians and other drivers and recognize those actions which may create hazardous conditions and take every reasonable measure to avoid involvement in an accident.

> For example, the professional driver must react appropriately to change in the flow of traffic and take prompt action to avoid an emergency situation. Even though on a through highway, the professional must be alert to the actions of a driver who may not stop at the stop sign or red light at an upcoming intersection.
>
> The professional driver must take every reasonable measure to deal safely with the illegal or unsafe acts of other drivers and pedestrians.

(Griffin Affidavit, exhibit B.)

{¶ 8} J.B. Hunt's guidelines further provide that, to determine preventability, all available information should be reviewed including, but not limited to: (1) the driver's initial report of the accident; (2) the police report; (3) the report to the insurance carrier and the adjuster's report; and (4) the findings of the fleet's internal investigation. Under the guidelines, "[t]he decision that an accident is preventable should always be made in the light of recommendations for actions that the fleet driver could reasonably have been expected to take to avoid its occurrence," and "[i]f such reasonable recommendations cannot be made in good faith, consideration should be given to making a determination that it was non-preventable giving the driver the benefit of the doubt." (Emphasis sic.) (Griffin Affidavit, exhibit B.)

{¶ 9} Appellant was employed by J.B. Hunt as a commercial tractor-trailer driver from December 2002 to December 2007 and from January 2008 to August 2010. While working for J.B. Hunt, appellant signed J.B. Hunt's "Dedicated Contract Services Preventable Collision Policy," affirming that he read and understood it. (Griffin Affidavit, at ¶ 8.) The policy specified that "[a]ll collisions regardless of the damage or severity will be subject to a collision review" and that "[t]he outcome of the review will result in rating the collision as preventable or non-preventable; recommendations for training and/or disciplinary action." (Griffin Affidavit, exhibit A.)

{¶ 10} J.B. Hunt provided information on its drivers to USIS for inclusion on USIS work history reports for truck drivers. J.B. Hunt reports all preventable collisions, including its determination of preventability, for inclusion on the USIS report. Once this information is included on the USIS driver work history report, J.B. Hunt does not

remove it. J.B. Hunt listed four preventable accidents on appellant's work history report: (1) a December 8, 2005 accident in Jackson Center, Ohio, in which appellant passed a car on a two-lane highway and purportedly side-swiped the car when merging back into the lane; (2) a February 15, 2008 accident in Pittsburgh, Pennsylvania, in which appellant hit a sign on a building in an alley opposite a loading dock as he attempted to make a delivery; (3) an August 28, 2009 accident in Columbus, Ohio, in which appellant forgot to unhook his air hose before trying to get a trailer out of the mud, resulting in the air hose disconnecting, striking, and cracking the rear window of the truck; and (4) a July 30, 2010 accident in Delaware, Ohio, in which appellant collided with a smaller truck while he was making a left-hand turn and the truck was approaching from the intersection from the right, resulting in the smaller truck bouncing off of appellant's truck and ending up in a nearby bean field. Of these four preventable accidents, J.B. Hunt received a Safety Event Change Report requesting a change in the designation from "preventable" to "non-preventable" for only the December 8, 2005 lane-change side-swipe. After all relevant information was reviewed, J.B. Hunt denied the request.

{¶ 11} For the intersection collision, appellant provided a statement in which he claimed that he had a green light for his left-hand turn, that he saw the smaller truck approaching the intersection about 300 yards away from the right before he made the turn, but he never checked his right side again, instead focusing his attention on the vehicles stopped to his left to assure that he had the room to make the turn onto the state route. J.B. Hunt determined that because appellant proceeded into the intersection without making sure that the smaller truck was stopping, he did not take every reasonable measure to avoid the accident, and it deemed the accident preventable. After this latest preventable accident, J.B. Hunt terminated appellant's employment because of that incident "and a history of negative observations, complaints, preventable incidents, and preventable collisions." (Griffin Affidavit, at ¶ 13.)

{¶ 12} Appellant first saw J.B. Hunt's USIS report on his driving history in September 2010 when his subsequent employer, Putnam Truckload Direct, presented it to him. After being fired by J.B. Hunt, appellant unsuccessfully applied for available truck driver positions with comparable compensation and benefits. As an independent truck driver, appellant has had to drive considerably more miles.

{¶ 13} On May 25, 2011, appellant, represented by counsel, filed a complaint in the Franklin County Court of Common Pleas alleging that J.B. Hunt intentionally interfered with his ability to contract.[2] In his complaint, appellant claimed that J.B. Hunt was aware of its interference with his ability to enter into trucking contracts and that this resulted in his inability to become gainfully employed with comparable trucking companies. More specifically, appellant alleged that J.B. Hunt had prepared and filed a report with USIS indicating that he had been discharged for an "at fault accident" even though a state commission had determined that he was not involved in such an accident, and that J.B. Hunt refused to change the erroneous report:

> The Defendants have prepared and filed a Report with the USIS Commercial Services, Inc. formerly known as HireRight indicating that the Plaintiff was discharged for an "at fault accident".
>
> The Defendants were notified that its decision to report the Plaintiff's discharge was due to an at fault accident is not support[ed] by the determination rendered by the State of Ohio Review Commission which determined that the Plaintiff was not involved in "not a fault accident".
>
> The Defendants have failed, neglected and refused to change its Report despite the written notice of the wrongfulness of their reporting.

(R. 3, at ¶ 12-14.)

{¶ 14} J.B. Hunt filed an answer denying the allegations of appellant's tortious-interference claim, claiming several defenses, including privilege. In February 2012, J.B. Hunt filed a motion for summary judgment. Attached to its motion was an affidavit of its Litigation Director, Wesley Griffin, in which J.B. Hunt rebutted the allegations of appellant's complaint that it had reported that he had been involved in an "at fault" accident:

> J.B. Hunt reported to DAC that Mr. Miller had been involved in a "preventable accident", not an "at fault" accident. A copy

[2] Appellant also raised a wrongful-termination claim in his complaint, which the trial court ultimately denied in the same summary judgment entry that denied his tortious-interference claim, but he does not claim any error regarding the trial court's disposition of that claim in this appeal.

> of that report is attached hereto as Exhibit D and incorporated herein by reference.
>
> An accident that has been deemed preventable has no bearing on whether the driver was "at fault".

(Griffin Affidavit, at ¶ 15-16.)

{¶ 15} In March 2012, the Supreme Court of Ohio suspended appellant's initial counsel from the practice of law in the state for two years with conditional reinstatement for disciplinary violations. *Columbus Bar Assn. v. King*, 132 Ohio St.3d 501, 2012-Ohio-873. Counsel filed a notice of disqualification. In July 2012, appellant's current counsel filed a notice of substitution of counsel.

{¶ 16} In November 2012, J.B. Hunt filed a motion to supplement its motion for summary judgment instanter to claim the privileges specified in R.C. 4113.71 and 29 C.F.R. 391.23. Later that same month, appellant filed a memorandum in opposition to J.B. Hunt's motion for summary judgment and, if necessary, motion for leave to amend his complaint. Appellant attached affidavits and exhibits to his memorandum in opposition. In his affidavit, appellant claimed that three of the four accidents listed on the USIS report by J.B. Hunt were non-preventable and that he gave information to Hunt for those three accidents that he acted in accordance with the company's guidelines. In December 2012, J.B. Hunt filed a reply memorandum in support of its motion for summary judgment, including additional affidavits and exhibits.

{¶ 17} On January 31, 2013, the trial court issued a decision granting J.B. Hunt's motion for summary judgment and denying appellant's motion for leave to amend his complaint as moot. Appellant filed a motion for reconsideration and several other motions, including a motion to compel discovery and a motion requesting rulings on outstanding motions. On February 5, 2013, the trial court filed a judgment entry granting summary judgment in favor of J.B. Hunt.

II. ASSIGNMENTS OF ERROR

{¶ 18} This appeal ensued, and appellant assigns the following errors:

> [1.] The trial court erred in granting Defendant/Appellee J.B. Hunt Transport Inc. (and) J.B. Hunt Transportation Inc.'s (collectively referred to as "Hunt") Motion for Summary

> Judgment ("Hunt's MSJ") because Plaintiff/Appellant Jack Miller ("Miller") established a tortious interference claim.
>
> [2.] Hunt's violation of discovery rules mandate a reversal of the trial court's granting of Hunt's MSJ.

III. DISCUSSION

{¶ 19} In his first assignment of error, appellant asserts that the trial court erred in granting summary judgment on his tortious-interference claim.

{¶ 20} Appellate review of summary judgment motions is de novo, which requires an independent review of the record without deference to the trial court's decision. *See New Destiny Treatment Ctr., Inc., v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, ¶ 24 ("Our review of cases decided on summary judgment is de novo, governed by the standard set forth in Civ.R. 56"); *Bank of New York Mellon v. Rankin*, 10th Dist. No. 12AP-808, 2013-Ohio-2774, ¶ 20. Summary judgment is proper when the party moving for summary judgment demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion is made. Civ.R. 56(C); *New Destiny* at ¶ 24; *Stevens v. Ohio Dept. of Mental Health*, 10th Dist. No. 12AP-1015, 2013-Ohio-3014, ¶ 11. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Id.* at ¶ 10.

{¶ 21} Appellant claims that the trial court erred when it granted summary judgment on his claim for tortious interference with a business relationship. "The tort of interference with a business relationship occurs when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relationship with another." *Geo-Pro Servs., Inc. v. Solar Testing Laboratories, Inc.*, 145 Ohio App.3d 514, 525 (10th Dist.2001); *Walter v. ADT Security Sys., Inc.*, 10th Dist. No. 06AP-115, 2007-Ohio-3324, ¶ 32. The preeminent difference between tortious interference with a business relationship and tortious interference with a contractual relationship is that interference with a business relationship covers intentional interference with prospective contractual relations not yet reduced to contract. *Bansal v. Mt. Carmel Health Sys.*, 10th Dist. No. 10AP-1207, 2011-Ohio-3827, ¶ 30. This claim

would thus include any interference with appellant's ability to contract with prospective trucking companies.

{¶ 22} "The elements of tortious interference with a business relationship are: (1) a business relationship; (2) the wrongdoer's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom." *Blackburn v. Am. Dental Ctrs.*, 10th Dist. No. 10AP-958, 2011-Ohio-5971, ¶ 34, citing *Geo-Pro Servs.* at 525. On appeal, J.B. Hunt agrees that for summary judgment purposes, appellant submitted sufficient evidence to establish these elements:

> Although Appellant argues, at length, that he established the first, second and fourth elements of his tortious interference claim, and that the third element can be satisfied by evidence that J.B. Hunt's conduct interfered with a prospective business relationship as compared to an existing contract, J.B. Hunt did not contest these issues for purposes of summary judgment and will not do so herein.

(Appellee's brief, at 10, fn. 5.)

{¶ 23} Nevertheless, just as it argued in the proceedings before the common pleas court, J.B. Hunt asserts that summary judgment was appropriate because its reporting to USIS of appellant's driving record of four preventable accidents was privileged under the common law, R.C. 4113.71, and 49 C.F.R. 391.23. "The applicability of a qualified privilege has been recognized by Ohio courts in both defamation and tortious interference cases." *Smith v. Ameriflora 1992, Inc.*, 96 Ohio App.3d 179, 187 (10th Dist.1994). To overcome the defense of qualified privilege, appellant must demonstrate that J.B. Hunt acted with actual malice. *Id.*

{¶ 24} Similarly, "[i]n addition to the common law protection of qualified privilege, Ohio law also provides statutory protection for employers." *LaBarge v. Werner Enterprises*, S.D.Ohio No. 2:07-cv-177, 2008 WL 2740831 (Jul. 10, 2008). "In 1996, the Ohio legislature codified the common law qualified privilege for employers in connection with job performance information provided to prospective employers of current or former employees." Siegel and Stephen, *Baldwin's Ohio Handbook Series Ohio Employment Practices Law*, Section 17:21 (2013). Under R.C. 4113.71(B):

> An employer who is requested by an employee or a prospective employer of an employee to disclose to a prospective employer of that employee information pertaining to the job performance of that employee for the employer and who discloses the requested information to the prospective employer is not liable in damages in a civil action to that employee, the prospective employer, or any other person for any harm sustained as a proximate result of making the disclosure or of any information disclosed, unless the plaintiff in a civil action establishes * * * [either that]:
>
> (1) By a preponderance of the evidence that the employer disclosed particular information with the knowledge that it was false, with the deliberate intent to mislead the prospective employer or another person, in bad faith, or with malicious purpose; [or]
>
> (2) [T]hat the disclosure of particular information by the employer constitutes an unlawful discriminatory practice described in section 4112.02, 4112.021, or 4112.022 of the Revised Code.

LaBarge (no evidence that "malicious purpose" as used in R.C. 4113.71(B) means anything other than "actual malice" as defined in qualified-privilege cases); *see also* R.C. 4113.71(D)(2), providing that the statute does not affect immunities or defenses "available at common law to which an employer may be entitled under circumstances not covered by this section."

{¶ 25} Lastly, 49 C.F.R. 391.23(l)(1) provides that "[n]o action or proceeding for defamation, invasion of privacy, or interference with a contract that is based on the furnishing or use of information in accordance with this section may be brought against * * * (ii) [a] person who has provided such information," unless the person knowingly furnished false information or did not comply with the procedures specified for the investigation. This latter privilege appears inapplicable because appellant's claim is for tortious interference with a business relationship rather than tortious interference with a contract. *Bansal* at ¶ 30.

{¶ 26} Appellant does not deny that J.B. Hunt is entitled to at least one of these privileges absent a showing of actual malice. Instead, he claims that the summary judgment evidence was sufficient to raise a genuine issue of material fact as to whether

J.B. Hunt acted with actual malice by providing information to USIS on appellant's preventable accidents.

{¶ 27} Actual malice is defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity. *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 11-12 (1995); *McNett v. Worthington*, 3d Dist. No. 15-11-05, 2011-Ohio-5225, ¶ 21. Reckless disregard is shown by presenting sufficient evidence to permit a finding that the defendant had "serious doubts" about the truth of the published information. *Parker v. Rice*, 6th Dist. No. L-08-1168, 2009-Ohio-388, ¶ 23, citing *A & B-Abell Elevator* at 12. Reckless disregard also exists when a defendant fabricates a story, it is the product of the defendant's imagination, or it is based wholly on an unverified anonymous telephone source. *A & B-Abell Elevator* at 13; *see also Spignola v. Stonewall Columbus, Inc.*, 10th Dist. No. 06AP-403, 2007-Ohio-381, ¶ 12; *Byvank v. Fidelity Orthopedic, Inc.*, 2d Dist. No. 17465 (May 28, 1999). The failure to investigate before publication or mere negligence is insufficient. *A & B-Abell Elevator* at 12-13; *Mills Van Lines, Inc. v. Prudential Real Estate & Relocation Servs.*, 8th Dist. No. 95582, 2011-Ohio-3833, ¶ 19 ("Reckless disregard for the truth is more than mere negligence.").

{¶ 28} Appellant argues that his affidavit, attached to his memorandum in opposition to J.B. Hunt's motion for summary judgment, included sufficient evidence indicating that three of the four accidents listed as non-preventable by J.B. Hunt and delivered to USIS for inclusion on appellant's work history report were false and that, because he provided the information to J.B. Hunt, it either "knew" its USIS report statements were false or had "obvious reasons" to doubt their accuracy. (Appellant's brief, at 15.) For the following reasons, appellant's argument lacks merit.

{¶ 29} First, there is no evidence that J.B. Hunt knew or had serious doubts of the truth of its determination that appellant had been involved in four non-preventable accidents during his employment. Appellant's information that he provided to J.B. Hunt merely represented his version of the facts of three of the four accidents. His affidavit did not challenge the veracity of J.B. Hunt's determination that the August 28, 2009 accident in Columbus, Ohio, in which he forgot to unhook an air hose before he attempted to get

his trailer out of the mud, causing the air hose to disconnect, strike, and crack the rear window of his truck, was preventable.

{¶ 30} For the remaining three preventable accidents, appellant relies on his provision to J.B. Hunt of his version of what transpired and emphasizes the portion of J.B. Hunt's guidelines for determining preventability of accidents that says, "If such reasonable recommendations cannot be made in good faith, consideration should be given to making a determination that it was non-preventable giving the driver the benefit of the doubt." (Emphasis sic.; Griffin Affidavit, exhibit B.) This purported duty to give J.B. Hunt drivers the benefit of a doubt is premised, however, on the word "should" in the phrase "consideration should be given." In general, the use of this term imposes no duty, but merely requires the use of discretion and judgment. *See generally State ex rel. Law Office of the Montgomery Cty. Public Defender v. Rosencrans*, 111 Ohio St.3d 338, 2006-Ohio-5793, ¶ 31, and cases cited therein.

{¶ 31} Moreover, for the preventable accident involving the intersection collision in Delaware, Ohio, on July 30, 2010, even assuming the truth of appellant's claim the truck that collided with his tractor trailer ran a red light, that potential fact did not bar J.B. Hunt from determining that the accident was preventable. In fact, J.B. Hunt's guidelines specify that "the professional [driver] must be alert to the actions of a driver who may not stop at the stop sign or red light at an upcoming intersection," and "must take every reasonable measure to deal safely with the illegal or unsafe acts of other drivers and pedestrians." (Griffin Affidavit, exhibit B.) As J.B. Hunt's litigation director noted in his affidavit filed in support of its motion for summary judgment, appellant's own statement regarding the accident indicated that he proceeded into the intersection without checking his right to make sure that the truck he had previously seen approaching had stopped. Under these circumstances, J.B. Hunt could reasonably conclude that appellant failed to take every reasonable measure to avoid a collision with the other truck driver.

{¶ 32} For the remaining accidents, appellant's information provided to J.B. Hunt does not indicate that the company either knew that its preventability determinations for the December 8, 2005 lane-change, side-swipe accident in Jackson Center, Ohio, and the

February 15, 2008, sign-collision accident in Pittsburgh, Pennsylvania were false or had serious doubts about the truth of these determinations.

{¶ 33} At best, appellant's evidence raised an issue concerning whether J.B. Hunt's investigation was sufficiently thorough or whether its investigation, preparation and filing of the report to USIS were negligent. But the failure to investigate or mere negligence is insufficient to establish the actual malice required to overcome the qualified privilege available to J.B. Hunt under common law and R.C. 4113.71(B). *A & B-Abell Elevator* at 12-13; *See Black v. Usher Transport*, S.D.Ohio No. 2:10-cv-0003, 2011 WL 1238338 (Mar. 29, 2011) (court granted summary judgment in favor of truck company in defamation action brought by former driver for providing false information to prospective employer because former driver failed to present sufficient evidence to raise genuine issue of material fact of actual malice so as to prevent the application of qualified privilege under R.C. 4113.71).

{¶ 34} Second, the summary judgment evidence is devoid of any indication that J.B. Hunt either fabricated the information concerning appellant's four preventable accidents or that it was a product of its imagination.

{¶ 35} Third, appellant's claim that J.B. Hunt's violations of Civ.R. 26(B) irreparably prejudiced his ability to defend against its summary judgment motion lacks merit. Appellant argues that had he been afforded more time, he could have successfully defended against J.B. Hunt's motion with three pieces of evidence—a conclusion by appellant's manager at J.B. Hunt that appellant followed all safe-driving techniques in the lane-change, side-swipe accident, log entries for the intersection-collision accident in which an insurance adjustor questioned the driver of the other truck's story that he honked his horn and stating that the truck driver refused to allow his oral responses to be audiotaped, and a document including appellant's statement to J.B. Hunt's safety department that for the sign-collision accident, he should not have even been there because the alley was only 20 feet long.

{¶ 36} But appellant did not file a motion to compel discovery until after the trial court issued its initial decision granting summary judgment. More importantly, a consideration of this evidence does not warrant a different conclusion on the applicability of the qualified privilege defeating his tortious-interference claim. None of this evidence

is sufficient to raise an inference that J.B. Hunt either knew its preventability determinations concerning appellant's four accidents were false or had serious doubts as to their veracity. And, an insurance determination of potential liability is different from a determination under J.B. Hunt's guidelines whether an accident is preventable.

{¶ 37} Fourth, appellant's claim that false statements in J.B. Hunt's 2012 USIS work history report for appellant evidenced ill-will, spite, and hatred sufficient to overcome any qualified privilege also lacks merit. Appellant contends that J.B. Hunt's USIS reports from 2009 never reference his three preventable accidents before that time (the December 8, 2005 lane-change, side-swipe accident, the February 15, 2008 sign-collision accident, and the August 28, 2009 air-hose accident) that J.B. Hunt subsequently reported for the USIS 2012 report. But as J.B. Hunt persuasively notes, the 2009 MVR report cited by appellant is dissimilar from the 2012 work-history report that is the subject of this case. The reports do not contain comparable information, so the exclusion of the preventable accidents from the earlier report does not indicate any nefarious fabrication of false information for the later report. Appellant's additional contention that J.B. Hunt was under no duty to report these preventable accidents to USIS also does not warrant a different conclusion concerning the absence of evidence supporting actual malice or anything to overcome J.B. Hunt's qualified privilege in reporting them. J.B. Hunt was free to require more stringent safety requirements for its drivers than the department of transportation does under its FMCSR and could report any accidents pursuant to its internal policies to retain more detailed minor accident information. 49 C.F.R. 390.3(d) and 391.23(d)(ii).

{¶ 38} Finally, for comparable reasons, the parties' summary judgment evidence did not indicate any evidence that J.B. Hunt disclosed appellant's history of preventable accidents to USIS with "deliberate intent to mislead" prospective employers or others or in "bad faith." *See* R.C. 4113.71(B)(1).

{¶ 39} Therefore, the trial court did not err in determining that appellant did not present sufficient evidence to raise a genuine issue of material fact concerning actual malice, malicious purpose, deliberate intent to mislead, or bad faith sufficient to overcome J.B. Hunt's qualified privilege under the common law and R.C. 4113.71. Under an independent review of the record without deference to the trial court's decision,

summary judgment was properly entered on appellant's claim for tortious interference with a business relationship. Accordingly, appellant's first assignment of error is overruled.

{¶ 40} In his second assignment of error, appellant asserts that J.B. Hunt's violation of discovery rules in submitting an affidavit of its Senior Claims Advisor, David Dunn, with its December 2012 reply memorandum in support of its motion for summary judgment requires a reversal of the summary judgment entered in its favor because this evidence was prejudicial and should have been stricken. J.B. Hunt did not disclose Dunn as a potential witness until after it filed his affidavit with its memorandum replying to appellant's memorandum in opposition to its motion for summary judgment.

{¶ 41} The trial court did not expressly rule on appellant's motion to strike Dunn's affidavit, so it is presumed that the court denied it. *State ex rel. Forsyth v. Brigner*, 86 Ohio St.3d 299, 300 (1999) ("it is evident here that even assuming no express ruling on the pretrial motion, the trial court overruled" it); *Huntington Natl. Bank v. Bywood, Inc.*, 10th Dist. No. 12AP-994, 2013-Ohio-2780, ¶ 5 ("Generally, when a trial court enters judgment without expressly ruling on a pending motion, it is presumed that the court overruled the motion."). In assessing the propriety of the trial court's denial of appellant's motion to strike, "[o]rdinarily, a discovery dispute is reviewed under an abuse-of-discretion standard." *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, ¶ 13; *Bellamy v. Montgomery*, 10th Dist. No. 11AP-1059, 2012-Ohio-4304, ¶ 7 ("A trial court has broad discretion when ruling upon a motion for sanctions pursuant to Civ.R. 37(B)" and "[a]bsent an abuse of discretion, an appellate court will not reverse a discovery sanction."). An abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable. *State ex rel. Nese v. State Teachers Retirement Bd. of Ohio*, 136 Ohio St.3d 103, 2013-Ohio-1777, ¶ 25.

{¶ 42} The trial court did not act unreasonably, arbitrarily, or unconscionably in refusing to strike Dunn's affidavit. First, in the absence of an amendment to appellant's complaint, J.B. Hunt could have reasonably determined that appellant's tortious-interference claim was limited to a report of an "at fault" report to USIS on the intersection accident, as alleged in appellant's complaint, until appellant submitted evidence and argument that it was contesting the propriety of J.B. Hunt's preventability

determinations in four accidents that it reported to USIS. Second, appellant did not request an extension to conduct additional discovery concerning the matters raised in the Dunn affidavit in his motion; instead, he sought only the harshest sanction of striking the affidavit. Finally, even assuming that J.B. Hunt, through contact with appellant's counsel and discovery, was on notice that appellant would be challenging the four preventability determinations months before he filed his memorandum and evidence in opposition to its motion for summary judgment, the trial court could have determined that no sanction was warranted because appellant was not prejudiced. *See State ex rel. Ohio Atty. Gen. v. Tabacalera Nacional, S.A.A.*, 10th Dist. No. 12AP-606, 2013-Ohio-2070, ¶ 45 ("Taking into account the background of the noncompliance, the trial court must balance the severity of the violation against the degree of possible sanctions and select the sanction that is most appropriate."). Even without the Dunn affidavit, our independent de novo review establishes that summary judgment was properly entered in favor of J.B. Hunt because appellant did not submit sufficient evidence to overcome the truck company's qualified privilege to report the information concerning his history of preventable accidents to USIS.

{¶ 43} Therefore, appellant's second assignment of error is overruled.

IV. CONCLUSION

{¶ 44} Having overruled appellant's two assignments of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT, P.J., and BROWN, J., concur.

T. BRYANT, J., retired, formerly of the Third Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).
