STATE OF MICHIGAN

COURT OF APPEALS

CHARLES M. JEMISON,

Plaintiff-Appellee,

v

JOAN YUKINS,

Defendant-Appellant,

.

UNPUBLISHED
October 22, 2002

No. 225441
Wayne Circuit Court
LC No. 96-690273-CL

Before: Whitbeck, C.J., and Markey and Kelly, JJ.

PER CURIAM.

In this case alleging tortious interference with an advantageous business relationship, defendant appeals by right the trial court's order of judgment awarding plaintiff $65,000, inclusive of interest, fees, and costs, following a jury trial. We affirm.

Defendant argues that the trial court erred in denying her pretrial motion for summary disposition brought pursuant to MCR 2.116(C)(8) and (10). We review de novo the trial court's grant or denial of a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Regarding defendant's MCR 2.116(C)(8) motion, we conclude that the trial court did not err in denying the motion. Summary disposition against a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8); *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). All factual allegations in support of the claim and any reasonable inferences or conclusions which can be drawn from the facts, are accepted as true and construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden*, *supra*.

In the instant case, plaintiff's allegations stated a prima facie claim of tortious interference with a business relationship such that summary disposition was inappropriate under

MCR 2.116(C)(8). The basic elements of a claim for tortious interference with a business relationship are: (1) the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Winiemko v Valenti*, 203 Mich App 411, 416; 513 NW2d 181 (1994). Not all interferences, however, give rise to a claim for relief; the interference must be "improper." *Id*. at 417. To this end, "improper interference requires both the absence of justification and the purpose of interfering with plaintiff's contractual rights or plaintiff's business relationship or expectancy." *Id*. at 418, n 3 (citation omitted); see, also, *BPS Labs v Blue Cross and Blue Shield of Mich (On Remand)*, 217 Mich App 687, 699; 552 NW2d 919 (1996). This can be shown either by proving "the intentional doing of a per se wrongful act or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiff's contractual rights or business relationship." *Feldman v Green*, 138 Mich App 360, 369; 360 NW2d 881 (1984).[1] Where the actions complained of are not unlawful per se, the plaintiff has the burden of demonstrating, "with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference." *BPS Labs (On Remand), supra*. Moreover, to be actionable, the business "expectancy" must be a "reasonable likelihood or probability, not mere wishful thinking." *First Public Corp v Parfet*, 246 Mich App 182, 199; 631 NW2d 785 (2001).[2]

In his pleadings, plaintiff alleged that he had an advantageous business relationship with Montcalm Community College, that defendant, as warden of the prison, knew of this relationship, that defendant deliberately interfered with this relationship by both issuing the stop order and by keeping it in effect with no basis, and that plaintiff suffered damages as a result. Because plaintiff essentially abandoned his earliest arguments that defendant's actions were "per

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[1] In this context "malice" appears to be defined as "for the indirect purpose of injuring the plaintiff or *benefiting the defendant at the expense of the plaintiff*." *Tata Consultancy Services v Systems International, Inc*, 31 F3d 416, 423 (CA 6, 1994), quoting *Morgan v Andrews*, 107 Mich 33, 39; 64 NW 869 (1895) (emphasis in original); see, also, *Wilkinson v Powe*, 300 Mich 275, 282; 1 NW2d 539 (1942).

[2] We note that defendant purports to support her arguments in part by quoting this Court's statement in *BPS Labs* that "[w]here the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *BPS Labs (On Remand), supra* at 699, citing *Michigan Podiatric Medical Ass'n v Nat'l Foot Care Program, Inc*, 175 Mich App 723, 736; 438 NW2d 349 (1989). However, as noted in *Prysak v R.L. Polk Co*, 193 Mich App 1, 13, 483 NW2d 629 (1992), in *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 96-97; 443 NW2d 451 (1989), a subsequent panel of this Court declined to hold that a defendant who is motivated by legitimate business interests is therefore free from liability. The *Prysak* panel declined to address any potential conflict between these cases, instead holding it appropriate to decide the issue under the standards outlined above as developed in *Feldman v Green* and its progeny. *Prysak, supra* at 13. Thus, pursuant to MCR 7.215(I)(1), we will follow the lead of *Prysak*, the first published case after November 1990 that we could locate on the subject, and analyze this issue under the standard provided in *Feldman*. In addition, we fail to see how defendant's actions after the initial issuance of the stop order were motivated by legitimate business reasons.

se" unlawful, the issue is whether defendant's actions were taken without justification and with malice. Thus, in order to support his claim, plaintiff was required to allege facts that, if proven, would establish "affirmative acts by the defendant that corroborate the improper motive purpose of the interference." *BPS Labs (On Remand), supra* at 699.

Accepting as true the factual allegations that defendant's initial decision to issue the stop order was done maliciously and that defendant's subsequent actions of not investigating the charges against plaintiff and of continuing the order even though the police informed defendant of the investigation's outcome were malicious and interfered with plaintiff's relationship with the college, we conclude that plaintiff's claim was not so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden, supra.* Although defendant claims that her subsequent decisions after issuing the stop order could not give rise to a cause of action, we conclude otherwise. "[U]nreasonable delay" can constitute an affirmative act so as to fall within the prohibited conduct. *Detroit Bd of Ed v Clarke*, 89 Mich App 504, 509; 280 NW2d 574 (1979). The trial court did not err in denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(8). *Winemko, supra* at 416.

We also conclude that defendant's claim under MCR 2.116(C)(10) fails. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Spiek, supra* at 337. When deciding the motion, the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley,* 461 Mich 73, 76; 597 NW2d 517 (1999). The moving party must specifically identify the matters that have no disputed factual issues, MCR 2.116(G)(4), *Maiden, supra* at 120, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, *Smith, supra*, and the disputed factual issue must be material to the dispositive legal claims, *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1991). A mere promise to offer factual support at trial is insufficient. In addition, speculation and conjecture are insufficient. *Maiden, supra* at 121; *Detroit v GMC,* 233 Mich App 132, 139; 592 NW2d 732 (1998).

In reviewing the evidence presented, this Court is liberal in finding a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group,* 227 Mich App 309, 320; 575 NW2d 324 (1998). To that end, summary disposition is rarely appropriate in cases involving questions of credibility, intent, or state of mind, *Michigan National Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988), and the trial court may not make findings of fact or weigh credibility in deciding a summary disposition motion, *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

In the instant case, defendant argues that the documents and supporting deposition testimony plaintiff offered before the trial court's decision were insufficient to create a question of fact regarding whether defendant acted maliciously when she issued the stop order or in her further actions toward plaintiff. We disagree. As previously discussed, in order to support his claim for tortious interference, plaintiff was required to show that defendant's interference with plaintiff's business relationship was intentional and was done without justification and with malice for the purpose of invading plaintiff's business relationship. *Feldman, supra* at 369. To

show malice, plaintiff was then required to show "with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference." *BPS Labs (On Remand), supra* at 699. As previously stated, we conclude that defendant's issuance of the stop order, failure to investigate, and continuance of the stop order could constitute those "affirmative acts."

Therefore, under the case law referenced above, in order to survive defendant's motion for summary disposition, plaintiff was required to submit evidence creating a question of fact that: (1) plaintiff had a legitimate business expectancy in his continued employment as a teacher at the prison for Montcalm Community College; (2) that defendant knew of this relationship; (3) that defendant interfered with this relationship deliberately, without justification, and with malice; and (4) that plaintiff suffered damage as a result. *Winiemko, supra*. On his behalf, plaintiff presented evidence indicating that he did, in fact, have at least a legitimate relationship with the college as a teacher at the prison. Defendant admitted that she knew of this relationship before the issuance of the stop order. Plaintiff also presented evidence in the form of an affidavit and other documentary evidence that he was harmed as a result of the issuance of the stop order and its continuance by his discharge from the college faculty.

After reviewing the evidence presented by plaintiff, we agree with the trial court that plaintiff established a question of fact regarding whether defendant's specific acts of issuing the stop order in conjunction with the ongoing delay in not removing the stop order and the refusal to either investigate the claims against plaintiff or seek further clarification from the Michigan State Police were without justification and with malice. This case involved questions of intent, credibility, or state of mind and summary disposition is rarely appropriate in such cases. *Michigan National Bank, supra.* Malice is generally a question for the jury, and, because of the difficulty of proving its existence, may be proven inferentially using circumstantial evidence. See *Steadman v Lapensohn*, 408 Mich 50, 55; 288 NW2d 580 (1980); *Sullivan v The Thomas Organization, P C*, 88 Mich App 77, 86; 276 NW2d 522 (1979). Moreover, "[b]ecause of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." See *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

In the instant case, plaintiff's proofs were sufficient to support an inference of malice on the part of defendant. In her deposition, defendant admitted that she knew that there was no continuing investigation against plaintiff and yet did not revisit the stop order. She also admitted that she knew that Neal had requested plaintiff's claims of sexual misconduct. This was corroborated by plaintiff's presentation of the portion of the report by Sergeant Mainstone, which refers to the closing of the investigation, apparently referencing the closing of the investigation with respect to plaintiff as well as Officer Portman in 1994.[3] However, although defendant admitted that she knew of this report and the fact that the investigation against plaintiff was

[3] We note that defendant argues that the report did not refer to plaintiff but only to Officer Portman and claimed that the police began a separate investigation involving plaintiff. However, throughout these proceedings, defendant never produced any evidence of this "separate" investigation. For this reason, we conclude that the trial court did not err in finding that the report presented referred to the closing of an investigation against plaintiff. See *Grossheim v Associated Truck Lines, Inc*, 181 Mich App 712, 715; 450 NW2d 40 (1989) ("an adverse inference may be drawn against a party who fails to produce evidence within its control").

closed, she continued to maintain the stop order and failed even to notify plaintiff of the status of the investigation. Moreover, she was aware that plaintiff could not continue to teach, thus deliberately interfering with plaintiff's business relationship with the college. This evidence raises at least a factual question of malice; therefore, we agree with the trial court's decision that the jury decide this disputed issue. The trial court did not err in denying defendant's pretrial motion for summary disposition pursuant to MCR 2.116(C)(10).

Next, defendant argues that the trial court erred in refusing to grant defendant's motion for a directed verdict at the close of plaintiff's proofs. With the exception of defendant's assertion that Michigan State Police Trooper Mark Thompson told her that the report purporting to reference the closing of the investigation against plaintiff was actually a report concerning Neal's allegation against Corrections Officer Thomas Portman,[4] defendant's arguments concerning this issue mirror her previous arguments in support of her summary disposition claims. We conclude that the trial court did not err in denying defendant's motion for a directed verdict following the close of plaintiff's proofs. Also, the trial court did not err in denying defendant's motion for a judgment notwithstanding the verdict (JNOV). [5]

Review of the grant or denial of a directed verdict is de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). In reviewing the trial court's decision, this Court determines whether a question of fact existed by examining all the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting him every reasonable inference and resolving any conflict in the evidence in his favor. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998); *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). Additionally, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the factfinder's responsibility to determine the credibility and weight of the testimony. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). Thus, if reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury. *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996). In general, directed verdicts are viewed with disfavor. *Berryman v K Mart Corp*, 193 Mich App 88, 91; 483 NW2d 642 (1992).

The evidence plaintiff presented about his employment history, no contact from defendant or her employees regarding the continued enforcement of the stop order, and the investigation report provided to the jury concerning the close of the investigation against him in October 1994, cumulatively considered, created a factual question regarding whether defendant continued the stop order with a "malicious" purpose. Although defendant appears to argue on appeal that plaintiff needed a "smoking gun" in order to show "malice" and that "malice" is a somewhat stricter standard than that traditionally used in this context, because of the difficulty of

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[4] Viewing the report in the light most favorable to plaintiff, a rational trier of fact could reasonably read it as referring to the close of the investigation against him as well as Officer Portman. Defendant has not presented documentary evidence to suggest otherwise.

[5] Although the parties reference this motion as one for a directed verdict, the timing of the motion and the trial court's decision cause this Court to consider the motion as one for JNOV.

proving an actor's state of mind, minimal circumstantial evidence on this point should be sufficient. *McRunels, supra* at 181. Moreover, defining "malice" in the context of "benefiting defendant at the expense of plaintiff," see *Morgan v Andrews*, 107 Mich 33, 39; 64 NW 869 (1895); *Tata Consultancy Services v Systems International, Inc*, 31 F3d 416, 423 (CA 6, 1994), the facts of the case as presented by plaintiff certainly appear to present a question of fact where, as noted by the trial court, defendant may have simply deliberately continued the stop order to rid herself of a problem at plaintiff's expense. Thus, plaintiff also established a question of fact at trial concerning defendant's motive in continuing the stop order against defendant with the knowledge that this would result in plaintiff being unable to teach at the prison, thus adversely affecting his business relationship with Montcalm College.

Defendant's JNOV motion also fails. A trial court's decision on a motion for JNOV is reviewed de novo. *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). A JNOV motion should be granted only when there was insufficient evidence presented to create an issue for the jury. *Pontiac School Dist v Miller Canfield Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997). When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. If the evidence is such that reasonable people could differ, the question is for the jury and JNOV is improper. *Id*.

As discussed above, plaintiff's proofs established a question of fact for the jury. After reviewing the evidence presented by defendant, particularly her own testimony, we find no reason to alter that conclusion. Defendant's testimony clearly indicates that she continued the stop order, even when she was aware that the police were not investigating plaintiff further. Even a cold review of defendant's testimony allows an inference that defendant deliberately ignored the evidence of plaintiff's innocence and damaged plaintiff's relationship with the college with little justification. Defendant's testimony, when added to the evidence presented by plaintiff, supports the jury's decision that defendant acted without justification and with malice in deliberately continuing the stop order against plaintiff.

We affirm.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly