STATE OF MICHIGAN

COURT OF APPEALS

GUY M. BOIKE, M.D.,

Plaintiff-Appellant,

v

MCLAREN HEALTH CARE CORPORATION, SUKAMAL SAHA, and TREVOR SINGH,

Defendants-Appellees.

UNPUBLISHED
July 3, 2007

No. 270045
Genesee Circuit Court
LC No. 00-068995-CZ

GUY M. BOIKE, M.D.,

Plaintiff-Appellant,

v

MCLAREN HEALTH CARE CORPORATION and SUKAMAL SAHA,

Defendants,

and

TREVOR SINGH,

Defendant-Appellee.

No. 272162
Genesee Circuit Court
LC No. 00-068995-CZ

Before: Cooper, P.J., Whitbeck, C.J., and Murphy, J.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right the trial court order granting summary disposition in favor of defendants McLaren Health Care Corporation (McLaren), Dr.

Sukamal Saha (Saha), and Dr. Trevor Singh (Singh), in this action involving claims of tortious interference with a business relationship[1] and civil conspiracy arising after plaintiff was granted privileges at McLaren. In docket number 270045, plaintiff contends that the trial court erred by summarily dismissing the tortious interference and civil conspiracy counts, arguing that the claims were sufficiently pled, that factual issues existed, and that the doctrines of res judicata and collateral estoppel were inapplicable. Plaintiff also maintains that the trial court erred in denying his motion to amend the complaint. In docket number 272162, plaintiff challenges the trial court's award of sanctions in favor of Singh, which award was based on a finding of frivolousness, arguing that he presented valid legal arguments and sufficient supporting evidence. Additionally, plaintiff asserts that the order granting sanctions should be vacated because the trial court had a conflict of interest. We affirm.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). The trial court's ruling on a motion to amend the pleadings is reviewed for an abuse of discretion. *Doyle v Hutzel Hosp*, 241 Mich App 206, 211-212; 615 NW2d 759 (2000). An award of sanctions based on a frivolous complaint is reviewed under a clearly erroneous standard. *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 532; 644 NW2d 765 (2002).

Plaintiff first argues that the trial court erred in granting summary disposition on the basis of res judicata and collateral estoppel arising out of a previously dismissed federal lawsuit involving the parties. We find it unnecessary to determine whether the trial court erred in this manner because we find no error in the court's ruling that plaintiff failed to present sufficient documentary evidence necessary to create an issue of fact with regard to the viability of the tortious interference and civil conspiracy claims, even as to McLaren on tortious interference, although not originally pled.

In *Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), this Court, addressing the tort of tortious interference with a business relationship, stated:

> "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. 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. Where the defendant's actions were motivated by

[1] The parties also refer to this cause of action by various, alternative names, such as tortious interference with an advantageous relationship, tortious interference with a business expectancy, or tortious interference with an advantageous business relationship. For purposes of consistency in this opinion and given the title typically used in the case law, we shall label the claim as one of tortious interference with a business relationship, understanding that plaintiff's current argument is framed in the nature of interference with a business expectancy.

> legitimate business reasons, its actions would not constitute improper motive or interference." [Citations omitted; see also *Badiee v Brighton Area Schools*, 265 Mich App 343, 365-366; 695 NW2d 521 (2005).]

"The expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984). "One who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual or business relationship of another." *Badiee, supra* at 367 (internal quotation marks omitted), quoting *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002), quoting *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). A per se wrongful act is an act that is inherently wrongful or an act that can never be justified under any circumstances. *Badiee, supra* at 367. When a defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference. *Id.*

Plaintiff presents a lengthy discussion regarding the nature of his expectancy, arguing that while the complaint set forth the wrong legal theory, i.e., that the expectancy arose out of a business or advantageous relationship with McLaren producing an expectancy of referrals, the alleged facts were sufficient to infer that there was also an expectancy to treat gynecologic malignancies in general.[2] Plaintiff maintains that defendants would not be prejudiced by this change in legal theory as the facts alleged in the complaint and the discovery process sufficiently provided notice that plaintiff had an expectancy to treat gynecologic cancer patients. Plaintiff contends that defendants tortiously interfered with and conspired against this expectancy by requiring and forcing primary care physicians employed by or affiliated with McLaren to not refer patients to plaintiff, a gynecologic oncologist who performs surgeries, and by mandating that patient referrals be directed instead to Saha, a general surgeon with a focus in surgical oncology, or Singh, a medical oncologist.

Even if we accept plaintiff's premise that the business expectancy was to treat gynecologic malignancies, plaintiff's case still falls short of surviving summary disposition. The evidence would support a finding that plaintiff had a reasonable and valid business expectancy, in general, to treat gynecologic cancers, considering plaintiff's medical education and training and his work in the Flint area in this field. Moreover, all defendants would certainly be aware of this general expectancy.[3] However, plaintiff's case still fails because of a lack of proofs with respect to showing that there was intentional interference with plaintiff's expectancy induced by defendants that caused or resulted in damages to plaintiff, nor was a civil conspiracy shown. Moreover, assuming interference, we cannot help but question whether the alleged interference

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[2] Because plaintiff has abandoned his original theory, and because the trial court correctly assessed the shortcomings of the theory and properly dismissed the action within the framework of that theory, no further discussion by us is necessary.

[3] The full extent of the expectancy with regard to the number of patients plaintiff expected to treat, however, is debatable.

constituted a wrongful or unlawful act or a lawful act undertaken with malice and unjustified in law, as opposed to being pursued for legitimate business reasons.

We have carefully scrutinized and examined the mountainous documentary evidence to which plaintiff and defendants have directed our attention, including the testimony, affidavits, and other materials relative to referrals, experiences of doctors and medical personnel concerning referrals, plaintiff's application for privileges, the annual cancer reports, Saha's qualifications, and additional incidents and matters. We conclude that plaintiff's case fails as a matter of law.

While there may have been evidentiary examples of incidents in which McLaren interfered with primary care physicians relative to referrals and acts of retribution against certain doctors that apparently resulted in decreased referrals, these incidents and acts did not entail or involve plaintiff and some were remote in time, occurring years before plaintiff was granted privileges at McLaren. There was vague testimony about a referral list, although the list was never produced, but there was no testimony regarding whether or not plaintiff's name was on the list. With respect to Singh and Saha, there was no evidence that they personally exercised control over or participated in the referral decision-making process engaged in by primary care physicians who were employed by or affiliated with McLaren, let alone any evidence of their involvement in potential referrals associated with plaintiff.[4]

There was deposition testimony by plaintiff referencing a conversation with Dr. Rogers-Gray, who supposedly told plaintiff that referrals to him were not forthcoming because "her hands were tied and that it was political." This brief, vague statement, even forgetting the hearsay problem,[5] cannot form the basis to reverse the trial court's ruling. Dr. Graham testified

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[4] Plaintiff's former partner, Dr. James Graham, who is also a gynecologic oncologist, did testify about Singh taking over patients, for purposes of administering chemotherapy, that had been operated on by Graham, despite Graham's readiness and expectation to administer the chemotherapy himself. This, however, was not a matter of referrals, nor did the situation involve plaintiff.

[5] As we surmised when reading the documentary evidence, hearsay, hearsay within hearsay, and even beyond, along with other evidentiary problems, often formed the responses to questioning by counsel. Individuals, several times not identified and sometimes two, three, or more times removed from deponents, had statements attributed to them. A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Plaintiff cites MRE 801(d)(2)(D) to argue that he was not relying on inadmissible hearsay. A statement is not hearsay if it is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]" MRE 801(d)(2)(D). Plaintiff maintains that the statements of all the McLaren affiliated or employed doctors, McLaren executives, and other McLaren personnel, fit this category. While they might fit, plaintiff never built the foundation to establish satisfaction of the parameters found in MRE 801(d)(2)(D), and he did not with Rogers-Gray. Further, the alleged statements attributed to Rogers-Gray were necessarily the result of communications to her by someone from McLaren, but no one is identified. Also, McLaren doctors, for the most part, are not agents or servants of Saha and Singh. For purposes of this
(continued…)

that Dr. Ravinder Samra told him that someone from McLaren told Samra he could not refer cases to plaintiff and Graham. Again, there is a multi-level hearsay problem and a failure to identify the source who spoke to Samra. Moreover, Samra himself testified that he was never told by McLaren to not refer patients to plaintiff and Graham, nor was he ever directed to refer patients to Saha. With regard to the patient who saw Dr. Saed Sahouri and was told in 1998 that there were no gynecologic oncologists in Flint, with a referral then being made to Saha, Sahouri testified that he did not know of plaintiff and Graham at the time, and there is no indication that Sahouri was acting on the behest of defendants.

Aside from the lack of relevant evidence showing plaintiff's involvement in the various incidents of referral tampering, there is essentially a complete lack of evidence showing that primary care physicians would have referred cases to plaintiff but for defendants' actions, assuming that McLaren specifically forbade doctors from referring cases to plaintiff and required referrals instead to be made to Saha and Singh. This reflects an insurmountable causation problem. Plaintiff's testimony about Rogers-Gray's statements at a birthday party does not suffice for the reasons stated above, and the testimony by Drs. Heslinger and Fellenbaum that they now refer cases to plaintiff and Graham since leaving the Wilson-Metz practice group does not establish that they unsuccessfully tried or sought to do so when they were still employed at Wilson-Metz. Although there was a decline in plaintiff's referrals, and speculatively defendants may have brought on this decline, plaintiff does not cite any evidence in which a doctor expressly and clearly stated that he or she wished to refer a patient to plaintiff, but one or more of the defendants would not allow it, and that the doctor was then forced to refer the case to Singh or Saha. Most of the testimony from doctors showed either that an issue regarding referrals to plaintiff never arose, that Saha was skilled and the choice to refer to him was voluntary, that personal preferences resulted in not referring cases to plaintiff, or that plaintiff stole patients and would thus not be referred to in the future.

With respect to the whole issue of challenges to plaintiff's application for privileges and plaintiff's qualifications to administer chemotherapy, there was no evidence that Saha or McLaren were involved in these matters. Singh did oppose the application on grounds that could be deemed questionable relative to plaintiff's chemotherapy qualifications. Assuming that he was acting with the requisite malice and in a manner unjustified in law, the fact that plaintiff was indeed granted privileges negates any claim for damages caused by Singh's statements and actions. Singh voiced his concerns about the application in relation to chemotherapy, the application for privileges was granted, and plaintiff moved on. The record does not reflect that Singh's objection to the application for privileges, in and of itself, interfered with plaintiff's expectation to treat gynecologic malignancies and resulted in damages. Moreover, in the context of the claim for fraudulent misrepresentation, the dismissal of which has not been appealed, there was a complete lack of evidence to support the elements of the cause of action as discussed in our analysis of the sanctions issue.

With respect to the whole issue of the annual cancer reports and the principles and goals of the cancer program as reflected therein, including protocols and clinical trials, we find

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opinion, we have essentially overlooked many of the evidentiary problems and accepted the testimony and averments relied on by plaintiff, but the case fails nonetheless.

absolutely no basis to conclude that a claim for tortious interference arose because, as argued by plaintiff, the goals and principles were subverted by having patients directed to Saha and Singh instead of plaintiff. First, there was a lack of testimony specifying the names of doctors who received the annual cancer reports, let alone evidence of a referring doctor, or patient, relying on the information contained in the reports. There was no testimony whatsoever that a primary care physician or a patient read the reports and then decided to use Saha or Singh based on the information contained in the reports, to the exclusion of plaintiff. Also, the fact that Saha might not be able to fulfill the mission statement does not create a basis for a tortious interference or civil conspiracy claim. Assuming deception in the reports as to goals and principles, plaintiff has not connected the deception to damages. Moreover, it appears that, outside the context of Saha's qualifications, the annual cancer reports relate mostly to the claim of fraudulent misrepresentation, which was frivolous as discussed infra.

With respect to Saha's qualifications, the argument is that by improperly holding Saha out as having expertise in gynecologic oncology, defendants engaged in a civil conspiracy, committed fraudulent misrepresentation, and tortiously interfered with plaintiff's expectation to treat gynecologic malignancies, resulting in damages.

There is no evidence that this issue reflects illegal or unlawful activity. There is no evidence that Saha cannot legally perform gynecologic oncology surgery. There was evidence that a surgical oncologist can competently perform many surgeries related to gynecologic cancers. And the testimony indicated, for the most part, that Saha was a good doctor. The annual cancer reports up to the time that plaintiff was granted privileges in 1997 are irrelevant to his claim for damages, and the 1997 report only stated that Saha was a board-certified surgeon, which was accurate. Later reports indicated that Saha had expertise in gynecologic oncology, but they did not claim that he was board-certified in gynecologic oncology. There is conflicting evidence regarding whether Saha could be held out as having "expertise" in gynecologic oncology in the context of medical ethics. There is no evidence that doing so was illegal or violated the law. The general American Medical Association provision cited by plaintiff speaks in vague, cursory terms of requiring a doctor to be honest in dealing with patients and colleagues. While there arguably might be a claim for an ethics violation, the evidence did not rise to the level of supporting any of the claims brought by plaintiff. There was simply no evidence that defendants were proceeding with malice for the purpose of interfering with plaintiff's reasonable business expectancy to treat gynecologic malignancies. Moreover, even if defendants were proceeding with such intent, plaintiff failed to show that he, or even other doctors, were not referred patients or lost potential patients because of any literature or communications that Saha had expertise in gynecologic oncology. No patient or primary care physician testified that he or she went or referred to Saha instead of plaintiff because of any claim that Saha had expertise in gynecologic oncology.

In regard to the civil conspiracy claim, the essential elements of a cause of action are: (1) a concerted action (2) by a combination of two or more persons (3) to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). In order to support a claim of civil conspiracy, it is necessary for the plaintiff to prove a separate, actionable tort. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384;

670 NW2d 569 (2003), aff'd 472 Mich 91 (2005); *Early Detection Ctr, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

The civil conspiracy claim is entangled with the arguments and allegations made in relation to the tortious interference claim, including the allegedly improper referrals to Saha and Singh instead of plaintiff. Therefore, for the reasons stated above with regard to why the tortious interference claim fails, the civil conspiracy claim likewise fails. Moreover, there was a lack of evidence showing any "concerted action" between defendants to do anything. Plaintiff has also failed to show any criminal activity or unlawfulness, nor did he submit evidence sufficient to create a genuine issue of fact that a separate, actionable tort was committed, with damages flowing therefrom.

Plaintiff next argues that allowing him to amend the complaint to add a tortious interference claim against McClaren and to make other modifications would not prejudice defendants, would not be barred by the statute of limitations, and would not be futile. Moreover, according to plaintiff, he did not act in bad faith. He claims that amending the complaint would not be futile because the proposed amended complaint facially states causes of action and there was documentary evidence to support the claims.

Because plaintiff sought to amend his complaint long after the commencement of the suit against defendants, amendment was only permissible by leave of the court or by written consent of the adverse party. MCR 2.118(A). "Leave shall be freely given when justice so requires." MCR 2.118(A)(2). "Leave to amend should be denied only in the face of undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). "An amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded." *Id.* at 76.

Seeking amendment five years into the litigation, under the circumstances presented, constituted undue delay in our opinion. The requested amendment does not reflect the discovery of new and unknown evidence through the discovery process; rather, it reflects a change in legal strategy on belief that existing strategy was failing. For the most part, the requested amendment is merely a restatement or slight elaboration on allegations already pleaded. Moreover, we fully agree with the trial court that any amendment would be futile and unjustified in light of the evidence. For the reasons stated above in support of rejecting the argument that the trial court erred in dismissing the case under MCR 2.116(C)(10), there is simply a lack of evidentiary support sufficient to create a factual dispute showing that McLaren, Singh, and Saha engaged in a civil conspiracy, tortious interference with a business relationship or expectancy, or fraudulent misrepresentation, even under the proposed amended complaint. Accordingly, the trial court did not err in denying plaintiff's motion for leave to file an amended complaint.

Plaintiff next argues that the imposition of sanctions against him and in favor of Singh based on frivolousness was clearly erroneous on both the facts and the applicable law.

The trial court's award was predicated on a finding of frivolousness and improper conduct, implicating MCR 2.114, MCR 2.625, and MCL 600.2591. MCR 2.114(D) and (E) provide for sanctions where court documents are executed and filed contrary to various

certifications set forth in the court rule, including certifications that a document is well grounded in fact, warranted by law or a good faith extension of the law, and not interposed for an improper purpose. MCR 2.625(A)(2) provides that "[i]n an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

On the basis of the arguments presented, we find no error in the trial court's award of sanctions. The case against Singh encompassed his actions relative to objecting to plaintiff's application for privileges and the accompanying chemotherapy matter, his position as a cancer committee chairman as it related to the drafting of the annual cancer reports, and his involvement in the referral process.

As analyzed above, the entire matter regarding the granting of privileges was irrelevant because privileges were granted, and no damages were caused by Singh's actions. With respect to the annual cancer reports, there was no evidence cited by plaintiff that Singh played a role in defining Saha's qualifications and in drafting the goals and principles of the cancer center. Regardless, there was no evidence tying the annual cancer reports to actual damages incurred by plaintiff. With regard to referrals, there was a complete lack of evidence showing that Singh had any control over or direct participation in the referrals made by primary care physicians or the referral system at large. There was a lack of evidence supporting a tortious interference claim against Singh, nor any proof that he was involved in a civil conspiracy regarding referrals. Moreover, plaintiff failed to submit any evidence of causation, linking a referral scheme or tampering to actual lost referrals. We conclude that the case against Singh was devoid of arguable legal merit and had no basis in fact.

We also note that, with respect to fraudulent misrepresentation, the elements are (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999). In regard to the annual cancer reports, there is no evidence that Singh himself made any representations, let alone evidence that he, Saha, or McLaren made knowingly false representations with the intent that a third party would rely on them and that a third party did in fact rely, causing damages to plaintiff. Additionally, any report provisions addressing the goals of the cancer program would not give rise to the misrepresentation of *past or existing* facts. See *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). In regard to the objection to the granting of privileges, there was simply no proof that McLaren relied on the objection to plaintiff's detriment. There was no factual support for a claim of fraudulent misrepresentation.

Finally, plaintiff presents an argument that the trial judge who ruled on the motions for summary disposition and sanctions should have recused himself sua sponte because his personal physician was drawn into the case. Therefore, plaintiff maintains that the order for sanctions, and implicitly the order granting summary disposition, should be vacated. This argument is entirely devoid of merit. The trial judge expressly noted the possible conflict, indicating a belief that he could still fairly hear the case and that his doctor was just a small part of the case and one of numerous medical witnesses. The judge allowed the parties to confer with counsel outside the court's presence on whether they desired recusal. All of the parties and attorneys, including plaintiff, specifically stated on the record that there was no objection to the judge hearing the case. The issue was thus effectively waived by plaintiff. See *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000).

Affirmed.

/s/ Jessica R. Cooper
/s/ William C. Whitbeck
/s/ William B. Murphy