STATE OF MICHIGAN

COURT OF APPEALS

DAWN DUBUC,

Plaintiff-Appellant,

v

DR. ADEL ALI EL-MAGRABI and QUALIFIED MEDICAL EXAMINERS, INC.,

Defendants-Appellees.

UNPUBLISHED
September 14, 2010

No. 287756
Wayne Circuit Court
LC No. 07-727798-NO

Before: SAWYER, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's orders granting defendants summary disposition of plaintiff's tortious interference with a contract claim pursuant to MCR 2.116(C)(8), and summary disposition of plaintiff's defamation claim pursuant to MCR 2.116(C)(10). We affirm.

This action arises from plaintiff's termination of employment at Ford Motor Company (Ford), and disqualification of disability and medical insurance benefits under Ford's disability plan for salaried employees, after an independent medical evaluation (IME) requested by Ford and conducted by defendant Dr. Adel Ali El-Magrabi[1] resulted in an unfavorable report, which stated that plaintiff lacked "creditability" and was uncooperative during the IME.

The submitted evidence discloses that plaintiff was injured in an automobile accident on September 3, 2003. She was approved for medical and disability benefits under Ford's Salaried Disability Plan and was determined to be disabled by the Social Security Administration. According to plaintiff's deposition testimony, she was diagnosed with a closed head injury and suffered from pain and cognitive difficulty, including short-term memory problems, after the accident. She worked for a while after the accident but discontinued working in May 2004 because of pain. At some point after that, Ford requested that plaintiff submit to an IME by defendant Dr. El-Magrabi. Plaintiff attended the evaluation on November 17, 2006,

[1] As used in this opinion, the singular term "defendant" shall refer to Dr. El-Magrabi only.

accompanied by her attorney, who planned to remain with plaintiff during the history portion of the evaluation. Plaintiff also recorded the conversation without defendant's knowledge.

The parties dispute what occurred during the evaluation. According to plaintiff, defendant repeatedly interrupted her and would not allow her to finish her answers to his questions. She claimed that after approximately 15 minutes, defendant "yelled" at her and asked, "Why don't you listen to me?" Her attorney responded, "She is, go ahead. Go ahead, Doctor. I won't say anymore." At that point, defendant ended the evaluation and refused to continue.

Defendant claimed in his deposition that he stopped the evaluation "because I was not getting comprehensive answers . . . that would make any sound evaluation." He admitted that there was no way for him to determine if plaintiff was being truthful and also stated that he could not determine whether plaintiff had real memory problems because "I don't evaluate these cases. I don't evaluate closed head injury, so I wouldn't be able to give a solid opinion related to that." Defendant also acknowledged that the only time plaintiff and her attorney answered questions at the same time was "near the end . . . when I terminated the exam."

In a report to UniCare, the company that handled Ford's disability claims, dated November 17, 2006, defendant stated that the IME "was terminated after several attempts to procure information from [plaintiff]." He further stated:

> [Plaintiff] elected to have the examination done with her lawyer present with her in the examination room. During the interviewing process, I was not able to secure any meaningful history from her. It was a distraction with her and her lawyer talking at the same time. I had advised her attorney that he could stay but that she would have to be the person who gave the history and answered the questions posed. During this time period Ms. Dubuc would not answer the questions with any creditability, she did direct her conversation to the attorney present in the examination room and I was unable to complete my history or physical examination. . . .
>
> After several attempts to get a history and repeated attempts to have her answer my questions without the help of her attorney, I terminated the evaluation.

On May 8, 2007, Ford sent plaintiff a letter advising her that her disability leave of absence was "not authorized" and that she would be terminated if she did not report for work with clearance from her physician within five days. The letter further stated that plaintiff's disability compensation had been discontinued and, if she did not return to work, her employment would be retroactively terminated to December 16, 2006, the last approved leave day, and she would be required to return any salary or disability benefits she had received for any disability leave that was not justified.

On June 15, 2007, the UniCare disability claims examiner sent a determinations letter to plaintiff's attorney, which stated, in pertinent part:

> On November 17, 2006, your client was required, as a condition of continued eligibility, to provide appropriate medical certification of her claim condition and to submit to an examination by a physician designated by it for the

> purpose of determining whether to continue payment of Disability Benefits. On November 17, 2006, Ms. Dubuc physically attended her scheduled exam, and was represented by council [sic]. While Ms. Dubuc and council [sic] were present for the exam as scheduled, UniCare's Independent Medical Examiner (Dr. El-Magrabi) was not allowed to procure medical information relative to Ms. Dubuc's condition.
>
> UniCare was not allowed to obtain appropriate medical certification of her claim condition, thus the eligibility requirements of the Salaried Disability Plan have not been met.. . . .

Because UniCare believed that plaintiff had not cooperated with the IME, her benefits were terminated effective November 17, 2006, and she was required to repay benefits she had received after that date.

Plaintiff thereafter filed this action against defendant and Qualified Medical Examiners, Inc. (QME), alleging causes of action for "tortious interference with contract/fraud," "libel/slander," and "negligence." The trial court granted defendants summary disposition of the tortious interference claim pursuant to MCR 2.116(C)(8), but allowed plaintiff to conduct discovery on her defamation claim. Following discovery, the court granted defendants summary disposition of the defamation claim pursuant to MCR 2.116(C)(10). Plaintiff now challenges the trial court's dismissal of both of these claims.

I. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(8) "tests the legal sufficiency of the complaint," "allows consideration of only the pleadings," and "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 to recovery." *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

A motion brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Singerman v Muni Service Bureau*, 455 Mich 135, 139; 565 NW2d 383 (1997). The court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden*, 461 Mich at 119-120; *Singerman*, 455 Mich at 139. "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Universal Underwriters Group v Allstate Ins* Co, 246 Mich App 713, 720; 635 NW2d 52 (2001).

II. TORTIOUS INTERFERENCE WITH A CONTRACT

"The elements of tortious interference with a contract are: (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *Health Call v Atrium Home & Health Care Services*, 268 Mich App 83, 89-90; 706 NW2d 843

(2005). "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 plaintiffs' contractual rights or business relationship." *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 interpreting the requirement that the defendant's wrongful conduct be for the purpose of invading the contractual rights or business relationship of another person, this Court has developed a rule that a defendant is not liable for tortious interference of contract where he is motivated by legitimate personal or business interests." *Wood v Herndon & Herndon Investigations, Inc*, 186 Mich App 495, 500; 465 NW2d 5 (1990).

The trial court did not err in dismissing plaintiff's tortious interference claim under MCR 2.116(C)(8). Although plaintiff's complaint alleges the existence of a contract between plaintiff and Ford regarding disability benefits, and a breach of that contract by Ford, her complaint does not set forth "an unjustified instigation of the breach by the defendant." *Health Call*, 268 Mich App at 89-90. The complaint alleges that Ford requested that plaintiff undergo an IME with defendant Dr. El-Magrabi, which was "arranged, scheduled and coordinated" by defendant QME, and that Ford "utilized" defendants "to determine whether Plaintiff Dawn DuBuc was disabled from her employment with Ford Motor Company." Even if Dr. El-Magrabi may have been negligent in his performance of the IME, and his communication to UniCare may have contained inaccuracies and misrepresentations, the conduct of both defendants was motivated by a legitimate business interest, which plaintiff's complaint acknowledges. Because defendants were motivated by a legitimate business interest, they cannot be held liable for tortious interference with plaintiff's contractual relationship with Ford, *Wood,* 186 Mich App at 500, and plaintiff's claim is "unenforceable as a matter of law." *MacDonald*, 464 Mich at 332.[2]

III. DEFAMATION

"The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005). "A communication is defamatory if, under all the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or deters others from associating or dealing with the individual." *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000); see also *Nuyen v Slater*, 372 Mich 654; 127 NW2d 369 (1964) (letter to state health department critical of actions of local health department employee, including allegations of prejudice, not defamatory in light of this definition). "If a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment" as

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[2] As defendants acknowledge on appeal, the circuit court engaged in some impermissible fact-finding in granting summary disposition under MCR 2.116(C)(8) on this claim. Nonetheless, the court did not err in finding that the claim alleged was unenforceable as a matter of law, and this Court will not reverse a trial court's decision where the right result is reached. *Zdrojewski v Murphy*, 254 Mich App 50, 70-71; 657 NW2d 721 (2002).

an expression of opinion. *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998). The "court may decide as a matter of law whether a statement is actually capable of defamatory meaning." *Id.* at 619. While there are serious questions posed in this case regarding whether defendant's statements constitute statements of fact or opinion and whether defendant's statements are protected by a privilege, and whether such privilege would be absolute or qualified, we need not reach those questions. Rather, we are satisfied that, as a matter of law, the statements cannot be given a defamatory meaning.

In determining whether a statement is capable of defamatory meaning, it is appropriate to look to the circumstances under which the statement is made. See *Sawabini v Desenberg*, 143 Mich App 373, 380; 372 NW2d 559 (1985). In *Sawabini*, the Court concluded that the communication, a letter, when read as a whole, in light of the circumstances in which it was written, the purpose of the communication and the intended audience, was not defamatory because it did not reflect upon the plaintiff's reputation. *Id.*

The communication in the case at bar was intended for a very narrow audience and a very specific purpose, whether defendant could medically substantiate plaintiff's disability claim. It was not intended to, nor did it, reflect upon plaintiff's reputation. While an inaccurate communication from defendant to plaintiff's employer may have given rise to inappropriate action by the employer and liability because of that, it does not constitute defamation. In other words, plaintiff may have a remedy, it just is not in the way of a defamation claim against defendants.

Affirmed. Defendants may tax costs.

/s/ David H. Sawyer
/s/ Henry William Saad

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SHAPIRO, J (*dissenting*).

Because I conclude that both the tortious interference and defamation (libel) claims should survive summary disposition and that there is a question of fact as to the existence of a qualified privilege, I respectfully dissent.

I. BACKGROUND

In September 2003, plaintiff, a manager at Ford Motor Company, was in an automobile accident in which she suffered a closed head injury as well as orthopedic injuries.[1] She was certified as disabled by her physicians. Consistent with her contract of employment with Ford, she was placed on disability leave and received disability benefits through Unicare, Ford's insurer. The Unicare plan provided that recipients of such benefits "submit to examinations by a physician designated by it for the purpose of determining whether to continue payment of Disability Benefits." Unicare requested that plaintiff submit to such an examination by defendant Dr. Adel Ali El-Magrabi. Dr. El-Magrabi was an agent of defendant Qualified Medical Examiners (QME), a company that brokers physician services for such examinations and the examination took place at their offices rather than the private office of Dr. El-Magrabi.[2]

[1] Plaintiff had a B.S. in mechanical engineering and an M.B.A., both from the University of Michigan.

[2] Although there are two defendants, all references to defendant in the singular are to Dr. El-Magrabi.

Unbeknownst to defendants, plaintiff tape-recorded the evaluation. A copy of that recording was provided to the trial court and to this Court. The ultimate determination as to what was said during the evaluation process, and the meaning of those words given the speakers' tones and the context in which they were spoken, is for the fact finder. At the summary disposition stage, this Court is required to consider the recorded material and all inferences therefrom in the light most favorable to plaintiff, as the non-moving party. MCR 2.116(G)(5); *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 427; 633 NW2d 408 (2001). "'All factual disputes for the purpose of deciding the motion are resolved in the plaintiff's (nonmovant's) favor.'" *Vargas v Hong Jin Crown Corp*, 247 Mich App 278, 282; 636 NW2d 291 (2001), quoting *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995). There being no agreed upon transcript of the recording, this Court must do so based upon its hearing of the entire recording.

The recording reveals plaintiff came to the scheduled examination and asked the QME receptionist if her attorney, who had accompanied her, could remain in the examination room. The receptionist, who remained in the examining room, advised her that the attorney could come in and stay. Plaintiff and the receiptionist had a conversation in which plaintiff appears to have been forthcoming. When Dr. El-Magrabi entered the room, plaintiff's attorney had not yet entered. Dr. El-Magrabi asked plaintiff her name, which she provided. Plaintiff asked defendant if her attorney knew that the examination was beginning, presumably so he could come into the room, but he ignored her question. Her attorney did come in the room and defendant asked plaintiff for the date of the injury, which she provided. At that point, he accused her of "reading something," which she explained she was not. Over the course of the next 15 minutes, during which he asked plaintiff questions about her injuries and treatment, defendant repeatedly interrupted plaintiff with other questions and talked over her as she attempted to answer his questions, even though her answers were prompt and responsive. While, as noted above, ultimately this is a question for the finder of fact, I conclude after hearing the tape that plaintiff was forthcoming with her answers and cooperative while defendant was impatient and discourteous. Although he later testified in deposition that two to three hours had been scheduled for his examination of the patient, his tone throughout was that of a doctor who had many more important places to be and could hardly tolerate taking a few minutes out to evaluate this patient as he was being paid to do. After defendant barely allowed plaintiff to get answers out for about 15 minutes, plaintiff's counsel, who had not been instructed to remain silent, asked defendant, in a respectful tone, to give plaintiff more time to answer the questions. At that point, defendant got up and began to leave the room. Plaintiff's attorney stated that he "won't say another word," but defendant left the room and refused to return to continue the exam even after plaintiff's attorney volunteered to leave the examination room altogether.

According to the receptionist, who went out to speak with him, defendant said he "was done" and that plaintiff should get dressed and leave. Plaintiff was concerned that she had not been examined and asked the receptionist why the doctor left. The receptionist stated that she did not know why. Plaintiff asked the receptionist if she had been answering defendant's questions and the receptionist said that she had been answering them. Plaintiff expressed concern that she had not had a chance to give full answers because defendant kept cutting her off and because defendant had left without finishing the exam.

On or about November 17, 2006, QME sent a letter, written and signed by defendant, to Unicare. The letter contained several statements that are wholly inconsistent with the recording of the actual interaction. The letter stated in pertinent part:

> During the interviewing process, I was not able to secure any meaningful history from her. It was a distraction with her and her lawyer talking at the same time. I had advised her attorney that he could stay but that she would have to be the person who gave the history and answered the questions posed. During this time period Ms. Dubuc would not answer the questions with any creditability, she did direct her conversation to the attorney present in the examination room and I was unable to complete my history or physical examination . . . . After several attempts to get a history and repeated attempts to have her answer my questions without the help of her attorney, I terminated the evaluation.

Although a fact finder may hear the tape differently, after hearing the tape I have no difficulty concluding that each of these statements is, at best, incomplete and misleading, and that a factfinder, after hearing the recording, could reasonably conclude that the statements are knowing falsehoods rather than expressions of opinion. Indeed, several of the statements are, on their face, assertions of objective facts.

Defendant stated in the report that he was "unable" to complete physical examination, but the recording indicates that he never attempted any sort of physical examination of plaintiff. Defendant also stated in his report that plaintiff and her attorney were talking at the same time, but this factual statement is not supported by the audio recording and defendant acknowledged in his deposition that the only time plaintiff and her attorney answered questions at the same time was "near the end . . . when I terminated the exam." Further, there is no indication in the recording that plaintiff directly spoke to her attorney while defendant was still in the examination room. With regard to defendant's statement in his report that plaintiff would not answer any questions with "creditability," defendant explained in his deposition that he meant "the information she gave me could not balance each other. . . . I didn't feel comfortable with the imbalance and that presentation. . . . I was just saying all the information I was getting could not be used to render an opinion that is credible." In his written report, however, defendant merely stated that plaintiff's answers to his questions lacked creditability, not that he was unable to write a credible report. Of course, had he actually conducted a physical examination, he may very well have been able to prepare a credible report.

On June 15, 2007, Unicare's Senior Disability Claims Examiner sent a letter to plaintiff's counsel informing him that plaintiff's disability benefits were terminated as of the date of defendant's examination. The sole reason cited in the letter for the termination was that "UniCare's Independent Medical Examiner (Dr. El-Magrabi) was not allowed to procure medical information relative to Ms. Dubuc's condition" and that as a result "UniCare was not allowed to obtain appropriate medical certification of her claim [sic] condition." In sum, UniCare took the position that plaintiff could not qualify as disabled under the contract because plaintiff refused to provide information to defendant or prevented him from examining her.

On June 27, 2007, after receipt of the letter from Unicare terminating plaintiff's benefits, plaintiff's counsel sent a letter to defendant and to QME stating in pertinent part:

> You made false statements in your report to Unicare concerning Ms. DuBuc. First, you stated that during the interview process you were not able to secure any meaningful history from her. You also stated in the report that you made several attempts to get a history and repeated attempts too have her answer your questions without the help of her attorney and then terminated the evaluation. Based on your statements, Unicare has terminated Ms. DuBuc's disability benefits. . . . The basis for the termination of benefits . . . is due to your allegation that you were unable to procure medical information relative to Ms. DuBuc's condition. Your conduct has caused significant harm to Ms. DuBuc. In most situations, it would be your word against her word and her attorney. There is a taped recording of the evaluation which confirms that you have falsified information in your letter dated November 17, 2006. We are asking that you retract your statements immediately. Please [send the retraction letter to Unicare] within two weeks. Without your retraction letter, Ms. DuBuc will continue to suffer harm from your conduct. Ms. Dubuc's damages include . . . loss of income, medical insurance and emotional harm related to your conduct.

No retraction letter was sent. Plaintiff then filed the instant three count complaint. Count I alleged "tortuous interference with contract/fraud" and Count II alleged "libel/slander." The gravaman of both counts was that defendant's letter to Unicare contained "false and untrue statements" that led to the loss of her disability benefits and termination of her employment. Count III alleged that Dr. El-Magrabi was negligent. Defendants promptly filed a motion to dismiss plaintiff's complaint under MCR 2.116(C)(8). The trial court granted the motion as to Counts I and III. The trial court then heard defendant's motion to dismiss the libel count under both (C)(8) and (C)(10). The court stated at the hearing that the statements made by defendant were statements of opinion and that defendant's opinion that plaintiff did not answer his questions with credibility in his letter could not be considered defamatory even if false.

Plaintiff appeals as of right the dismissal of Count I, tortious interference, and Count II, libel.

II. TORTIOUS INTERFERENCE WITH A CONTRACT

Tortious interference with a contractual relationship requires three elements: "(1) a contract, (2) a breach, and (3) instigation of the breach without justification by the defendant." *Wood v Herndon*, 186 Mich App 495, 499; 465 NW2d 5 (1990) (quotations and citation omitted). In order to prove such a claim, plaintiff must show "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 rights or business relationship of another." *Id.* Certainly, knowingly making false statements to a contracting party about the other contracting party, where the statements bear directly on the contract, is sufficient to show malice, or at least a lack of justification.

A claim may fail if the defendant's actions were taken for a legitimate personal or business interest. *Id.* at 500. However, it is difficult to conceive what *legitimate* business or personal interest could account for making false statements in a medical report. Even if this Court were able to conceive of such a legitimate reason,[3] it would not justify summary disposition, as there would still be a question of fact as to whether that hypothetical legitimate interest was the reason for defendant's statements or, as evidenced by the tape recording of the events, his statements were based on pique or anger.

Nevertheless, the majority, relying on *Wood*, concludes that although defendant "may have been negligent in his performance of the IME," his conduct was motivated by a legitimate business interest and, therefore, defendants cannot be liable. *Wood* does not support this proposition and, in fact, supports plaintiff's position in this case.

In *Wood*, the defendant was a private investigation business that provided insurance companies with a weekly listing of vehicle fires obtained from public information in the hope that the insurance company would hire it to perform an investigation on any claims the insurance company subsequently elected to investigate. *Id.* at 496-497. The plaintiff claimed that the defendant's submission of the weekly report to the plaintiff's insurer, which included the plaintiff's vehicle, constituted tortious interference with the insurance contract because, based on the defendant's investigation, the claim was denied based on a theory that the plaintiffs had arranged the theft and arson of the vehicle. *Id.* at 497-499. This Court noted that there were two cases concerning whether legitimate personal and business interests were sufficient to overcome a tortious interference claim:

> In interpreting the requirement that the defendant's wrongful conduct be for the purpose of invading the contractual rights or business relationship of another person, this Court has developed a rule that a defendant is not liable for tortious interference of contract where he is motivated by legitimate personal or business interests. In *Christner v Anderson, Nietzke & Co, PC*, 156 Mich App 330, 348-349; 401 NW2d 641 (1986), this Court held that a defendant's legitimate motivation per se shields it from liability in a tortious interference action. In *Jim-Bob* [*v Mehling*, 178 Mich App 71, 95-96; 443 NW2d 451 (1989)], however, this Court declined to adopt such a rule, indicating instead that the defendant's motivation is but one of several factors to be weighed in assessing the propriety of the defendant's actions with other factors, including (1) the nature of the defendant's conduct, (2) the nature of plaintiff's contractual interest, (3) the social utility of the parties' respective interests, and (4) the proximity of the defendant's conduct to the interference. *Jim-Bob, supra* at 96-97. [*Id.* at 500.]

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[3] The majority suggests that the "legitimate interest" was the desire to conduct the medical evaluation that defendants were retained to perform. However, I do not see how being hired to conduct an exam can be construed as a legitimate reason for refusing to conduct the exam and to knowingly report falsehoods about the examinee.

Thus, although a legitimate personal or business interest *may* preclude liability, it is not an absolute defense, and other facts must be taken into consideration. In *Wood*, this Court found no interference because "[t]here is no evidence to suggest that defendants manufactured evidence to falsely create a potential defense" and that the information submitted to the insurance company "was not only accurate, but was derived from public information." *Id.* at 502.

The same cannot be said of defendant's actions in this case. The representations made by defendant were clearly inaccurate based on the audio recording. Furthermore, the *Wood* Court indicated that "[h]ad there been some showing that defendants manufactured evidence or maliciously or falsely represented to AAA that the fire was attributable to arson or that plaintiffs had arranged for the theft of the automobile, then perhaps it could be said that there was a tortious interference with contract." *Id.* at 503. In my view, this is precisely what happened here. Defendant either manufactured or maliciously and falsely represented that plaintiff was lying about her claims and that she refused to give a proper medical history. Under the circumstances, I think there is sufficient evidence for this to be a jury question and, therefore, would conclude that summary disposition was inappropriate. See also *Hall v Claya*, unpublished opinion per curiam of the Court of Appeals, issued July 17, 1008 (Docket No. 277202) (concluding that the plaintiff had provided sufficient evidence of both tortious interference with a contract and defamation when an employee of the plaintiff's employer falsely reported to the plaintiff's private disability insurer that the plaintiff was working full-time while collecting disability; "From the evidence that the information that defendant volunteered was false, however, a reasonable jury could conclude that defendant acted with malice or reckless disregard of the truth. The evidence showed that the inaccurate information conveyed by defendant caused plaintiff's insurer to cease paying benefits and demand a refund of benefits previously paid.").

III. LIBEL

An action for libel has four elements. *Hawkins v Mercy Health Servs, Inc*, 230 Mich App 315, 325; 583 NW2d 725 (1998). In order to prevail, plaintiff must show:

> (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication 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 or the existence of special harm caused by the publication. [*Id*.]

At the summary disposition stage, plaintiff is not required to prove each element by a preponderance of the evidence, but instead simply demonstrate that a question of material fact exists as to each. *Id.* at 336. Although the "court may decide as a matter of law whether a statement is actually capable of defamatory meaning," *Ireland v Edwards*, 230 Mich App 607, 619; 584 NW2d 632 (1998), our Supreme Court has "consistently viewed the determination of truth or falsity as a purely factual question which should generally be left to the jury". *Locricchio v Evening News Ass'n*, 438 Mich 84, 137; 476 NW2d 112 (1991) (CAVANAGH, J., concurring).

The trial court did not make clear as to which element(s) it concluded plaintiff had failed to create a question of fact, but the trial court appears to have been primarily concerned with whether the statements made by defendant were false and defamatory. The majority concludes

that the statements were not capable of defamatory meaning because the statements made by defendant in his letter, even if false, "w[ere] not intended to, nor did it, reflect upon plaintiff's reputation." The majority does not explain how it reaches the conclusion that the statements did not "reflect upon plaintiff's reputation" other than to cite *Sawabini v Desenberg*, 143 Mich App 373; 372 NW2d 559 (1985). However, that case is plainly distinguishable and, in my view, suggests that summary disposition is improper here.

The plaintiff, Sawabini, was a physician who had been sued in an underlying medical malpractice case alleging that he had improperly prescribed drugs to an addict who subsequently died. *Id.* at 376. Sawabini's malpractice insurer retained the defendant, Desenberg, to represent Sawabini. *Id.* During that litigation, Desenberg became aware, through an unrelated but similar case, of a credible expert who had testified that it is within the standard of care for a physician to medically maintain a drug abuser on limited quantities of the drugs if efforts at detoxification and withdrawal fail, or are not indicated. *Id.* Desenberg wrote a letter to the claims adjustor for Sawabini's malpractice insurer, which was copied to the attorneys for Sawabini's co-defendants. *Id.* at 376-377. The letter reviewed the testimony from the other case of this potential expert and stated:

> "If an expert such as [he] is going to be helpful in these cases, the Defendant physicians are going to have to take the position that they knew or strongly suspected that the patients were long-time drug abusers who could not be successfully cured and, therefore, needed to be controlled as well as practicable. Based on our conversations with at least our insureds and the contents of their records, that might be a very legitimate position." [*Id.* at 376 n 1.]

Sawabini's personal counsel then sent a letter to Desenberg directing him to retract the letter he had sent and to withdraw from the case. *Id.* at 377. Desenberg did withdraw from the case, but did not retract his letter. *Id.* Sawabini sued Desenberg for, *inter alia*, libel and defamation of character on the grounds that the letter contained "'false and defamatory statements and innuendos intended to mean that plaintiff was guilty of professional malpractice, impropriety and/or criminal behavior which recipients of said letter understood them to have this meaning.'" *Id.* at 378.

I agree with the majority that *Sawabini* directs us to consider the purpose of the communication and its intended audience in determining whether the statements are capable of defamatory meaning. However, the purpose of the communication and the intended audience in the instant case could not be more different than that in *Sawabini*. In *Sawabini*, the letter was a business-like exploration of litigation strategies among aligned parties and it merely alludes to the *possibility* that the plaintiff's testimony would be such that the proposed defense could be offered. It makes no specific references to anything Sawabini had said or done and it is clear from the letter that it is the writer's position, as well as that of a well-credentialed expert, that prescribing drugs in such fashion is medically proper in some cases. *Id.* Additionally, Sawabini contained no claim of a specific harm caused by the letter. Rather, there are only undefined and non-specific injuries to reputation despite the fact that there was no assertion of defamation per

se. By contrast, in this case, defendant's letter (1) was sent to a party with interests directly contrary to those of plaintiff; (2) attributed statements and actions directly to plaintiff; (3) attributed statements and actions to plaintiff that were grounds for discontinuation of her long term disability benefits; and (4) had a tone that was dismissive and negative.[4]

In the present case, whether plaintiff directed her answers to her attorney during the examination, and whether plaintiff's attorney and plaintiff answered questions at the same time throughout the examination, were matters of fact, capable of being proven true or false, and clearly caused harm because they resulted in plaintiff's benefits being denied. Defendant's statements imply that plaintiff is lying, covering up, or, at the very least, not worthy of belief. There is nothing hyperbolic about the statements; they were "reasonably understood as stating actual facts about plaintiff." See *Ireland*, 230 Mich App at 618-619. Furthermore, even if defendant's statements were true, if the implications the statements created were false, the question of whether the statements were defamatory must be left up to the jury. *Hawkins*, 230 Mich App at 327-328. Thus, under the circumstances, defendant's statements are potentially actionable, and plaintiff's libel claim should go to the jury.[5]

III. PRIVILEGE

Defendants argue that El-Magrabi's communication to UniCare was privileged. Defendants claim a privilege for internal communications between a client and consultant because "it is inconceivable that their potential to injure a plaintiff outweighs the public good of professional analysis and consultation." Defendants cite no authority to establish their claimed privilege. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Moreover, defendants fail to distinguish between an absolute privilege and a qualified privilege and do not indicate which they assert applies. It is clear that an absolute privilege

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[4] Even if Dr. El-Magrabi's statements were viewed as "opinions," this would not justify summary disposition. Although a statement is not defamatory if it "could not be reasonably understood as stating actual facts about plaintiff," or if it is clearly rhetorical or hyperbole, *Ireland*, 230 Mich App at 618-619, "a statement of 'opinion' is not automatically shielded from an action for defamation because 'expressions of "opinion" may often imply an assertion of objective fact.'" *Smith v Anonymous Joint Enterprise*, ___ Mich ___; ___ NW2d ___ (2010) (July 30, 2010) slip op at 25, quoting *Milkovich v Lorain Journal Co*, 497 US 1, 18; 110 S Ct 2695; 11 L Ed 2d 1 (1990). "[A] statement of opinion that can be proven false may be defamatory because it may harm or deter others from associating with the subject." *Id.*

[5] I also conclude that plaintiff has established that defendant's statements were defamatory per se because she produced factual support for her claims that defendant's report was false, that it was written with knowledge that it was false, and that is was injurious to her employment and livelihood. *Glazer v Lamkin*, 201 Mich App 432, 438; 506 NW2d 570 (1993).

cannot apply here, as such a privilege only arises in the context of matters of public concern. *Bolton v Walker*, 197 Mich 699, 706-707; 164 NW 420 (1917). Qualified privilege, "relates more particularly to private interests, where the occasion casts upon the defendant a duty, or right, to communicate to another in regard to some matter of special concern to one or both or to others for the protection or society, or some interest he represents, and the courts sometimes hold such privilege a complete defense to otherwise actionable utterances, as a matter of law, when satisfied no malice is affirmatively shown." *Id.* Very few Michigan cases have discussed the scope of the qualified privilege and those few that have, have offered only limited general guidance. See *Dadd v Mount Hope Church*, 486 Mich 857; 780 NW2d 763 (2010).

Regardless of the limited caselaw regarding the extent of the qualified privilege, it is clear that, even if the communication falls within it, the privilege may be overcome by proof that the defendant made the statement knowing it was false or in reckless disregard of whether it was true. *Id.*; *Fortney v Stephan*, 237 Mich 603, 610; 213 NW 172 (1927); *Mino v Clio School Dist*, 255 Mich App 60, 73; 661 NW2d 586 (2003).

Because El-Magrabi was present during the interview upon which he reported, he knew, or should have known, whether his statements concerning plaintiff were false. Moreover, although he stated in his deposition that he did not initially intend to write a report and that he could not write a credible report based on the information obtained during the IME, he did dictate a report, which he did not read over afterward, and allowed defendant QME to electronically attach his signature. These circumstances clearly create a question of fact whether defendant acted in bad faith or with malice, and so summary disposition based upon a qualified privilege would not be proper.

IV. CONCLUSION

Because I find fact questions that must be resolved by a jury exist as to both the tortious interference and defamation claims and that defendants' claim of qualified privilege does not bar the claim as a matter of law, I conclude that the trial court erred in granting summary disposition and would reverse and remand for discovery and trial.

/s/ Douglas B. Shapiro