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STATE OF MICHIGAN
COURT OF APPEALS

LANA SINCLAIR, Personal Representative of the
ESTATE OF RICHARD SINCLAIR, and LANA
SINCLAIR,

UNPUBLISHED
June 20, 2024

Plaintiffs-Appellees,

v

JOSEPH BURKHARDT, D.O., and EXAMWORKS,
LLC,

No. 363118
Oakland Circuit Court
LC No. 2021-185669-NI

Defendants-Appellants.

Before: BOONSTRA, P.J., and CAVANAGH and PATEL, JJ.

PER CURIAM.

Defendants, Joseph Burkhardt, D.O., and ExamWorks, LLC, appeal by leave granted the trial court’s opinion and order denying in part defendants’ motions for summary disposition under MCR 2.116(C)(8) and (10).¹ For the reasons set forth in this opinion, we reverse and remand to the trial court for entry of an order granting defendants’ motions for summary disposition.

I. BACKGROUND

This case arises out of an underlying no-fault case for medical benefits. Richard Sinclair suffered severe back injuries in an automobile accident in 2011. Richard had two surgeries, but still suffered from pain. In 2013, Michigan Insurance Company (MIC) notified Richard that it was terminating all personal injury protection (PIP) benefits under Richard’s claim for injuries related to the accident. MIC explained that it could not substantiate Richard’s subjective injury complaints or relate the complaints to Richard’s accident. As a result of this letter, Richard and Munson

¹ *Estate of Richard Sinclair v Dr Joseph Burkhardt DO*, unpublished order of the Court of Appeals, entered March 9, 2023 (Docket No. 363118).

Medical Center filed a lawsuit against MIC in Grand Traverse Circuit Court for PIP benefits. The parties settled the case and the trial court entered a stipulated order of dismissal in 2014.

After the lawsuit, MIC continued to deny Richard's medical claims, although Richard continued to suffer from severe back pain. Several years later, Richard was diagnosed with a titanium allergy and was advised by at least one doctor to have the titanium rods removed from his spine and replaced with an artificial disc. Richard sought preapproval for the surgery, but MIC refused approval. Richard filed suit against MIC in 2017 seeking coverage for the surgery. During the litigation, MIC contracted with ExamWorks for Burkhardt to perform an independent medical evaluation (IME)² on Richard to evaluate his alleged injuries and symptoms. Burkhardt did not find any evidence of a titanium allergy at the site of the lumbar fusion and submitted an IME report opining that no further treatment was necessary. Eight months later, Richard committed suicide. MIC settled the underlying lawsuit with Lana Sinclair, Richard's mother and personal representative of his estate, and the case was dismissed.

Subsequently, Lana filed this suit against Burkhardt and ExamWorks on behalf of herself and Richard's estate alleging claims of negligence and wrongful death, defamation, fraudulent misrepresentation, tortious interference with a contract, civil conspiracy, and negligent infliction of emotional distress. The trial court granted defendants' motions for summary disposition in part, dismissing plaintiffs' claims of negligence and wrongful death, defamation, fraudulent misrepresentation, and negligent infliction of emotional distress, and denied defendants' motions as to the tortious interference with a contract and civil conspiracy claims. This appeal followed.

II. STANDARD OF REVIEW

"We review de novo a trial court's decision on a motion for summary disposition." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint." *Id.* (emphasis omitted). "When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone." *Id.* at 160. "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.*

Summary disposition under MCR 2.116(C)(10) is warranted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion for summary disposition under MCR 2.116(C)(10), we must consider the evidence submitted by the parties in the light most favorable to the nonmoving party. *El-Khalil*, 504 Mich at 160. Summary disposition under MCR 2.116(C)(10) is proper when, after considering all evidence in the light most favorable to the nonmoving party, the court determines there is no

² This Court has acknowledged that the commonly used phrase "independent medical examination" is a "euphemistic term of art." *Micheli v Mich Auto Ins Placement Facility*, 340 Mich App 360, 374 n 4; 986 NW2d 451 (2022). "An IME involves obtaining a second opinion from a doctor who is entirely selected and paid for by an insurance company, rendering the 'independence' of the examination somewhat questionable." *Id.*

genuine issue of material fact. *Id.* at 160. “A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.” *Id.* (cleaned up).

III. BURKHARDT’S LIABILITY AS AN IME EXAMINER

Burkhardt argues that the trial court should have dismissed plaintiffs’ claim against him because, as an IME examiner, he was not liable to an examinee for damages resulting from the conclusions he reached or reported. We agree.

In *Dyer v Trachtman*, 470 Mich 45; 679 NW2d 311 (2004), our Supreme Court explained that “[t]he IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports.” *Id.* at 50. Instead, the IME physician’s duty is limited to conducting the examination in such a way as not to cause physical harm. *Id.* at 50, 52. To the extent an IME physician breaches that duty of care, and his breach of that duty raises questions of medical judgment, any liability would arise from medical malpractice rather than ordinary negligence. *Id.* at 53-54.

In this case, the trial court and plaintiffs relied on this Court’s holding in *Granados-Moreno v Facca*, unpublished per curiam opinion of the Court of Appeals, issued March 3, 2020 (Docket No. 346598), in which this Court held that the plaintiff could pursue her tortious interference with a contract claim against an IME examiner. The *Granados-Moreno* Court found that our Supreme Court’s analysis in *Dyer* was inapplicable to a tortious interference claim because the issue in *Dyer* was what duty an IME examiner owed the examinee, not whether all plaintiffs were barred from bringing claims against an IME examiner as a result of their conclusions and opinions. *Id.* at 2. Therefore, this Court determined that the statement regarding an examiner not being liable for its conclusions was dicta. *Id.* at 3.

We find the citation to *Granados-Moreno* unconvincing. Initially, the opinion is unpublished and it does not bind this Court. MCR 7.215(C)(1). Moreover, we disagree that the Supreme Court’s statement in *Dyer* that “[t]he IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports” is nonbinding dictum because the statement was germane to the Court’s holding that an IME physician could be held liable for causing physical harm to an examinee during an examination. See *Carr v City of Lansing*, 259 Mich App 376, 384; 674 NW2d 168 (2003) (holding “when a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision.”) (cleaned up). Further, this statement from *Dyer* has been cited and relied upon by this Court in *Sabbagh v Hamilton Psychological Svcs PLC*, 329 Mich App 324, 340; 941 NW2d 685 (2019).

The duties imposed upon Burkhardt and the relationship between Burkhardt and Richard are the same regardless whether the claim is for negligence, medical malpractice, or tortious interference. Burkhardt is not liable for the conclusions that he reached after the IME and reported to MIC. Accordingly, the trial court erred by denying Burkhardt’s motion for summary disposition.

IV. TORTIOUS INTERFERENCE WITH A CONTRACT

ExamWorks³ argues that the trial court erred by denying its motion for summary disposition on plaintiffs' claim of tortious interference with a contract because plaintiffs failed to establish the elements of such a claim. We agree.

"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." *Knight Enterprises v RPF Oil Co*, 299 Mich App 275, 280; 829 NW2d 345 (2013) (cleaned up). In order to establish a breach, a plaintiff must prove that "the defendant induced or otherwise caused nonperformance of the contract." *Int'l Outdoor, Inc v SS Mitx, LLC*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 359811), slip op at 11 (cleaned up). Tortious interference with a contract is an intentional tort. *Id.* at ___; slip op at 11. Therefore, a plaintiff "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 purposes of invading the contractual rights or business relationship of another." *Id.* at ___; slip op at 11 (cleaned up). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Badiee v Brighton Area Sch*, 265 Mich App 343, 367; 695 NW2d 521 (2005). "If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *CMI Int'l, Inc v Internet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002). "Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *Hope Network Rehab Servs v Mich Catastrophic Claims Ass'n*, 342 Mich App 236, 246; 994 NW2d 873 (2022) (cleaned up). "Thus, if a defendant's actions were motivated by a legitimate business reason, those actions do not constitute improper motive or interference, and they cannot be wrongful per se." *Id.* at 246-247 (citation omitted).

ExamWorks correctly contends that plaintiffs were required to attach a contract to their complaint because their tortious interference with a contract claim was "based on a written instrument." MCR 2.113(C)(1).⁴ But this omission, alone, does not require reversal. If summary disposition were to be granted based solely on this omission, MCR 2.116(I)(5) dictates that plaintiffs be afforded an opportunity to amend their pleadings as provided by MCR 2.118.

³ Burkhardt also raises this argument, but because we conclude that he cannot be held liable, it is unnecessary for us to address his remaining issues on appeal.

⁴ ExamWorks failed to argue below that plaintiffs failed to produce a copy of the MIC contract, and therefore, failed to preserve an issue for appeal. *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 359090); slip op at 2. "However, this Court may overlook preservation requirements if the issue involves a question of law and facts necessary for its resolution have been presented," as is the case here. *Id.* at ___; slip op at 3 (cleaned up).

However, we conclude that plaintiffs failed to present any evidence to establish a breach of the contract or “nonperformance of the contract” between Richard and MIC. *Int’l Outdoor, Inc.*, ___ Mich App at ___; slip op at 11 (cleaned up). In their response to defendants’ motions, plaintiffs stated, “It is undisputed that . . . there was a breach of that contract when [MIC] denied no-fault benefits.” Both Burkhardt and ExamWorks disputed that there had been a breach of contract between MIC and Richard following the IME. Plaintiffs cite the trial court’s conclusion that “the alleged breach was MIC’s failure to pay no fault benefits following the October 2018 IME.” But defendants asserted that there was no evidence of a breach or that MIC refused to pay PIP benefits because plaintiffs settled the case with MIC and the settlement contained standard nonadmission of liability clauses.

On April 26, 2013, MIC informed Richard that it was terminating any PIP benefits under Richard’s claim for injuries related to his accident. Thereafter, Richard filed suit against MIC seeking payment of PIP benefits. That lawsuit was settled and a stipulated order of dismissal was entered in 2014. Richard filed the underlying action in 2017 seeking coverage for the removal of the hardware in his spine after MIC refused to grant preapproval for the surgery. During the litigation, MIC contracted with ExamWorks for Burkhardt to perform an IME on Richard to evaluate his alleged injuries and symptoms, and a report was issued after the examination. There was no evidence of any type of statement from MIC that it decided to deny further benefits after the report was issued.

Lana testified that at the time Richard filed the underlying lawsuit, MIC was not paying any benefits to Richard and had not paid any benefits for a number of years. Neither Lana nor Richard had direct contact with MIC about Richard’s request for another surgery. Lana did not know whether anyone from MIC communicated with her or Richard that MIC was waiting for Burkhardt’s IME report before deciding whether MIC would pay for the surgery. Lana testified that it was her understanding that MIC relied on Burkhardt’s report to deny payment of medical bills, because MIC had been notified of Richard’s need for surgery and MIC did not provide benefits for it. When Lana called MIC to inquire, no one would speak to her. Despite Lana’s testimony that MIC denied payment, the lawsuit continued after the IME with discovery and mediation. The case was ultimately settled in 2020, after Richard’s death. Because plaintiffs failed to present any evidence that MIC denied Richard benefits as a result of the IME, plaintiffs failed to establish a breach of contract, which is an essential element of their claim for tortious interference with a contract. Accordingly, the trial court erred by denying ExamWorks’ motion for summary disposition under MCR 2.116(C)(10).

On appeal, plaintiffs cite MCL 500.3142(2)⁵ as support for their allegation that MIC breached the contract arguing that Richard presented reasonable proof for another surgery. This

⁵ MCL 500.3142(2) provides:

(2) Subject to subsection (3), personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. Subject to subsection (3), if reasonable proof is not supplied as to the entire claim, the

argument has no merit. MCL 500.3142(2) provides for payment for overdue benefits when a claimant has provided all of the evidence for payment. *Moore v Secura Ins*, 482 Mich 506, 517; 759 NW2d 833 (2008). But there were no overdue payments because Richard did not have the surgery and thus no allowable expenses were incurred. See *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 50; 457 NW2d 637 (1990) (holding that three requirements must be met for an allowable expense to be compensable: (1) the charge must be reasonable, (2) the expense must be reasonably necessary, and (3) the expense must be incurred.)

V. CIVIL CONSPIRACY

ExamWorks further argues that plaintiffs' civil conspiracy must be dismissed because plaintiffs failed to prove a separate, actionable tort as the basis of the conspiracy. We agree.

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Green v Pontiac Pub Library*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 363459); slip op at 9 (cleaned up). To support a claim of civil conspiracy, a plaintiff must prove a separate, actionable tort as the basis of the conspiracy. *Id.* at ___; slip op at 9-10. Our Supreme Court has defined a "tort" as "an act that has long been understood as a civil wrong that arises from the breach of a legal duty other than the breach of a contractual duty." *In re Bradley Estate*, 494 Mich 367, 381; 835 NW2d 545 (2013).

ExamWorks argues that the trial court should have dismissed plaintiffs' civil conspiracy claim because plaintiffs failed to establish a genuine issue of material fact regarding their tortious interference claim, which was the separate actionable tort that served as the basis of the civil conspiracy claim. As discussed above, the trial court should have dismissed plaintiffs' claim of tortious interference with a contract. "A claim of civil conspiracy does not exist in the air; rather, the plaintiff must prove a separate actionable tort." *Mercurio v Huntington Nat'l Bank*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 361855); slip op at 14 (citations omitted). Because plaintiff failed to support a separate actionable tort, we reverse the trial court's denial of ExamWorks' motion for summary disposition as to civil conspiracy.

amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Subject to subsection (3), any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment must be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

Having reached these conclusions, it is unnecessary for us to address appellants' remaining issues.

We reverse and remand to the trial court for entry of an order granting defendants' motions for summary disposition. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Sima G. Patel