**TO:** Members of the Troy City Council
**FROM:** Lori Grigg Bluhm, City Attorney
Allan T. Motzny, Assistant City Attorney
**DATE:** May 13, 2010
**SUBJECT:** Kocenda v. Troy et. al.

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In August 2007, David Kocenda filed a lawsuit against the City of Troy and some of its police officers alleging defamation and intentional infliction of emotional distress. His claim was based on information provided by Troy police officers to the Palm Beach Gardens Police Department, which was doing a background investigation to determine whether to employ Kocenda as a police officer. The Troy defendants filed a motion for summary disposition, on the basis that the complaint failed to state a valid claim, and that the defamation claim was barred by the statute of limitation, and also on the basis that all the claims were barred by governmental immunity. After receiving Troy's motion for dismissal, Kocenda filed a motion to amend his complaint to add an additional claim based on an alleged tortious interference with a business relationship.

On February 13, 2008, Oakland County Circuit Court Judge Fred Mester granted summary disposition to the City and its police officers, and denied Kocenda's motion to amend the complaint. Kocenda then filed a motion for reconsideration, which was denied by Judge Mester on May 19, 2008. Thereafter, Kocenda filed an untimely appeal of right with the Michigan Court of Appeals. The Court of Appeals dismissed the claim of appeal on August 27, 2008, and ordered Kocenda to reimburse the City for its costs incurred in filing a motion to dismiss the untimely appeal. Kocenda then filed a Motion for Relief from Order in the Oakland County Circuit Court, alleging the case should be re-opened on the basis of "newly discovered evidence." That motion was also denied in November 2008 by Judge Mester. Kocenda then filed a delayed application for leave to appeal. On May 21, 2009, the Court of Appeals granted the delayed application for leave to appeal, but limited the appeal to whether or not Judge Mester abused his discretion in denying Kocenda's motion to amend his complaint to allege a claim for tortious interference with a business relationship.

On May 4, 2010, oral argument was held on the appeal. On May 11, 2010, the Michigan Court of Appeals issued its opinion ruling in favor of the Troy defendants and affirming the decision of Judge Mester. The Court specifically held that based on the record, Kocenda was unable to demonstrate the requisite malice and causation to prove that the Troy defendants committed tortious interference with a business relationship. A copy of the Court of Appeals opinion is attached.

Please let us know if you should have any questions regarding this case.

# STATE OF MICHIGAN

# COURT OF APPEALS

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DAVID KOCENDA,

Plaintiff-Appellant,

v

CITY OF TROY, CHARLES CRAFT, EDWARD MURPHY, RICHARD HAY, COLLEEN MOTT, CHARLES PAPPAS, and RICHARD ROSSMAN,

Defendants-Appellees,

and

ELLEN LOVEJOY,

Defendant.

UNPUBLISHED
May 11, 2010

No. 290346
Oakland Circuit Court
LC No. 2007-085524-CZ

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Before: CAVANAGH, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Plaintiff appeals by leave granted[1] an order denying his motion to amend his complaint against defendants-appellees.[2] We affirm.

Initially, we note that the only issue that plaintiff raises in his question presented is whether the trial court should have permitted him to "amend his Complaint to include a claim of tortious interference with prospective contractual relations." However, this Court granted plaintiff leave to appeal "limited to the issues concerning the circuit court's denial of plaintiff's motion to amend his complaint to allege a claim for tortious interference with a business relationship." Accordingly, we are not required to consider plaintiff's claim on appeal because we did not grant plaintiff leave to address whether the trial court should have permitted him to

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[1] *Kocenda v City of Troy*, unpublished order of the Court of Appeals, entered May 21, 2009 (Docket No. 290346).

[2] We will refer to defendants-appellees simply as "defendants" for the balance of this opinion.

amend his complaint to include a claim of tortious interference with prospective contractual relations. Further, because plaintiff failed to mention the issue for which he was granted leave to appeal in his statement of questions presented, as required by MCR 7.212(C)(5), we are not compelled to review the question whether the trial court should have permitted plaintiff to amend his complaint to include a claim of toritous interference with a business relationship. *Joerger v Gordon Food Service*, 224 Mich App 167, 172; 568 NW2d 365 (1997).

Regardless, we will briefly address on the merits the only issue for which leave to appeal has been granted, namely, whether the trial court erred in refusing to grant plaintiff leave to amend his complaint to add a claim for tortious interference with a business relationship. A trial court's decision regarding a party's motion to amend his pleadings is reviewed for an abuse of discretion. *Wormsbacher v Phillip R Seaver Title Co, Inc*, 284 Mich App 1, 8; 772 NW2d 827 (2009). "[W]e defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion." *Id.*

Leave to amend pleadings should be freely given when justice so requires. MCR 2.118(A)(2); *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007) (quotations omitted). Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or futility. MCR 2.118(A)(2); *Miller*, 477 Mich at 105. "The trial court must specify its reasons for denying the motion; failure to do so requires reversal unless the amendment would be futile." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). "A determination of futility must be based on the legal insufficiency of the claim on its face." *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 139; 676 NW2d 633 (2003). "An amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded." *Dowerk*, 233 Mich App at 76. In at least one case, this Court went beyond the face of the complaint to uphold a trial court's denial of a motion to amend the complaint on the basis of futility, considering deposition testimony when determining that a proposed amendment to a complaint would be futile. *Boyle v Odette*, 168 Mich App 737, 745; 425 NW2d 472 (1988). Also, this Court has found that a denial of a request to amend a complaint after granting summary disposition pursuant to MCR 2.116(C)(8) was proper when "the record indicates that any amendment would have been futile." *Allegheny Ludlum Corp v Dep't of Treasury*, 207 Mich App 604, 605; 525 NW2d 512 (1994).

Tortious interference with a business relationship is the "'intentional invasion of, or interference with, property rights causing injury without just cause or excuse.'" *Laurence G Wolf Capital Mgt Trust v City of Ferndale*, 269 Mich App 265, 272; 713 NW2d 274 (2005), quoting 45 Am Jur 2d, Interference, § 1, p 273. "'The elements of tortious interference with a business relationship are [1] the existence of a valid business relationship or expectancy, [2] knowledge of the relationship or expectancy on the part of the defendant, [3] an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and [4] resultant damage to the plaintiff.'" *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Mich*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). A plaintiff must show that the defendant intentionally committed a per se wrongful act or committed a lawful act "'with malice and unjustified in law for the purpose of invading the contractual rights or business relationship

of another.'" *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). "'Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.'" *Mino*, 255 Mich App at 78, quoting *BPS Clinical Laboratories*, 217 Mich App at 698-699. Expressions of opinion—those statements that cannot reasonably be interpreted as stating actual facts—are protected from defamation and interference with business claims, regardless of the plaintiff's status as a public or private figure. *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 402; 538 NW2d 24 (1995).

We conclude that plaintiff's motion to amend his complaint to add a claim of tortious interference with a business relationship would be futile. On the face of the complaint plaintiff has stated a valid claim for tortious interference with a business relationship. Plaintiff alleged in the proposed amended complaint that he received a job offer from the city of Palm Beach Gardens. Defendants were aware of the business relationship because Ellen Lovejoy of the Palm Beach Gardens Police Department called defendants as part of the background check. Plaintiff alleged that defendants acted with malice, intending to punish him for making other officers look bad. Plaintiff further alleged that as a result of defendants' actions, his offer of employment was rescinded and he suffered damages. Therefore, on the face of the proposed amended complaint, plaintiff's claim for tortious interference with a business relationship was legally sufficient.

However, the record demonstrates that the trial court did not abuse its discretion in finding that such a claim would be futile. Based on the record before us and before the trial court, plaintiff was unable to demonstrate the requisite malice and causation to prove that defendants committed tortious interference with a business relationship. The statements that defendants made to Lovejoy were opinions, not facts. In addition, plaintiff failed to show that defendants acted with any malice. Moreover, plaintiff could not prove that the statements and disclosures by defendants caused the rescission of plaintiff's offer of employment given that the city of Palm Beach Gardens indicated that rescission occurred as a result of plaintiff's own misrepresentations.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder