Circuit Court for Baltimore County
Case No. C-03-CV-19-000810

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1257

September Term, 2020

Michelle Shapiro

v.

Hyperheal Hyperbarics, Inc.

Graeff,
Reed,
Ripken,

JJ.

Opinion by Reed, J.

Filed: July 18, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case comes as an appeal from the denial of Dr. Michelle Shapiro's ("Appellant") tortious interference claim against Hyperheal Hyperbarics, Inc. ("Appellee"). Appellant filed the claim in the Circuit Court for Baltimore County alleging that Appellee had interfered with her employment at Austin Pharmaceuticals ("Employer") because Appellant's husband ("Mr. Shapiro") was in ongoing federal litigation with Appellee, one of Employer's business partners. Appellant asserts that Appellee pressured Employer to reduce her work hours and that she was forced to resign in response to her reduced hours. To show that Appellee had intentionally acted to interfere with Appellant's employment, Appellant's tortious interference claim primarily relied on two statements which Ms. Wolk – an employee of Employer – allegedly made to Appellant. In response, Appellee argued that those statements were inadmissible hearsay and moved for summary judgment on the grounds that Appellant failed to present sufficient evidence of tortious interference. The circuit court found that Ms. Wolk's alleged statements were inadmissible on hearsay grounds, and without those statements, Appellant did not present sufficient evidence to allege tortious interference as a matter of law. Appellant timely appealed the circuit court's ruling.

In bringing her appeal, Appellant presents two (2) questions for appellate review, which we have rephrased for clarity:[1]

[1] Appellant presented the following questions for appellate review:

I. Did the Circuit Court err in finding that, as a matter of law, there was no genuine issue of material fact?

I. Did the circuit court err in finding that there was no genuine dispute of material fact when the court granted summary judgment against Appellant?

II. Did the circuit court err in finding that both of Ms. Wolk's alleged statements to Appellant were inadmissible on hearsay grounds?

Finding no error, we affirm the decision of the circuit court on both issues.

FACTUAL & PROCEDURAL BACKGROUND

This appeal primarily concerns the admissibility of two statements that Ms. Wolk allegedly made to Appellant. The circuit court found that both statements were inadmissible hearsay on hearsay grounds.

First Statement

On March 27, Ms. Wolk called Appellant into her office to tell her that Employer needed to cut her hours and eliminate her employment benefits. On April 3, Appellant met with Ms. Wolk at Employer's Cockeysville office. Appellant informed Ms. Wolk that she would be forced to resign in response to the cuts to her hours and benefits. Appellant testified that the conversation went as follows:

> [Ms. Wolk] said, I understand, maybe this is a good thing. And [Appellant] said, I hate to do this, but we can't afford to pay our bills with me being a single – single income family. That [Appellee] has been interfering with our lives and they caused us to run up great legal bills, and that [Mr. Shapiro] could not find work because of them, and they were ruining our lives.
>
> And [Ms. Wolk] said, I know, I know. **[Appellee] called me and they said that your employment was detrimental to our business together**. And I told them that I hire and fire employees at my own discretion, and [Appellant]

II. Did the Circuit Court err when it held that, as a matter of law, statements made to Dr. Shapiro by her employer that it was reducing her hours and eliminating her benefits because HHI pressured it to do so, constituted inadmissible, backward-looking hearsay?

has nothing to do with the wound care department.

(Emphasis added)

During her deposition, Ms. Wolk was asked about her conversation with Appellant. Ms. Wolk denied ever stating that Appellee "called [her] and . . . said that [Appellant's] employment was detrimental to our business together." Ms. Wolk further testified that she told Appellant that she had to cut her hours and benefits because Appellee was having financial difficulties.

Second Statement

Appellant testified that she reached out to Ms. Wolk a few days later to ask Ms. Wolk to speak with Appellant's legal counsel. According to Appellant, Ms. Wolk responded that she did not want to get involved in the dispute between Appellant and Appellee and said, "I have protected you so many times, you don't even know." Ms. Wolk admitted to making this second statement. However, Ms. Wolk stated in her deposition that she was not referring to protecting Appellant from Appellee, but rather, she was referring to how she had protected Appellant from prior work-related performance issues. Moreover, Ms. Wolk asserts that she never said that she did not want to get involved in the dispute with Appellee. Instead, Ms. Wolk testified that she told Appellant that she did not want to get involved with "whatever was going on in [Appellant's] world."

Circuit Court Ruling

Appellee moved for summary judgment, claiming that Appellant had failed to allege sufficient evidence of tortious interference. Specifically, Appellee argued that the first statement – Ms. Wolk's statement that Appellee told her that Appellant's employment was

detrimental to Employer and Appellee's relationship – was inadmissible hearsay because Ms. Wolk testified that she never made that statement to Appellant. Moreover, Appellee argued that the second statement was also inadmissible hearsay because, if not offered for its truth, it was not relevant to the charge of tortious interference.

The circuit court granted summary judgment for Appellee. The circuit court explained as follows:

> Based on my reading of the Complaint, the second amended Complaint, the verified Complaint, the Plaintiff's memorandum in opposition to the Defendant's motion for summary judgment . . . **the purported statements by Ms. Wolk, the co-owner of Austin Pharmacy do form the basis for the [Appellant's] claim for tortious interference with her employment at Austin Pharmacy**. . . .
>
> **But the statements themselves are essential to the [Appellant's] claim**. . . . . the memo outlines those two statements. Number one, in response to [Appellant's] statement that she could not live without benefits because of her husband's employment with [Appellee], Ms. Wolk said, quote, I know, I know. They called me and they said that your employment was detrimental to our business together.
>
> And, two, when [Appellant] asked Ms. Wolk to speak with her attorney about [Appellee's] threats, Ms. Wolk's response was that she did not want to get involved followed by, ". . . I have protected you so much, you don't even know[.]"
>
> Looking at the second amended Complaint itself, paragraph 12, 13, 14 and 22, it's clear that these statements that are attributed to Ms. Wolk by [Appellant] are essential and a basis for the [Appellant's] Complaint.
>
> They're also in the verified Complaint filed by [Appellant]. **So because the statements attributed to Ms. Wolk are essential to the [Appellant's] case, they must be admissible in evidence to oppose the Defendant's Motion for Summary Judgment.**
>
> In her memorandum in opposition to the Defendant's Motion for Summary Judgment, the [Appellant] argues that Ms. Wolk's statements to [Appellant] are not hearsay because they are not offered to prove the truth of the matter.

Still on page 1 of the Plaintiff's memorandum, the Plaintiff argues that, "they show that [Appellee] made threats and why Austin Pharmacy took certain action[.]" Well, that is being offered for the truth of the matter as to what Ms. Wolk said to [Appellant].

While it may be arguable that [what Appellee] said to Ms. Wolk is offered to show that the statement was made, in other words, some threat to Ms. Wolk to pull business if [Appellant] remains employed. But what Ms. Wolk said to the [Appellant] is offered for the truth of the matter. That is, that Ms. Wolk told [Appellant] that someone at Hyperheal said to her that [Appellant's] employment was detrimental to their business relationship.

It is being offered to show that the content of what Ms. Wolk said to the Plaintiff is true, and that is hearsay. If it's not true, then [Appellant] has no evidence of any threat and has no case.

. . . .

[Appellant] argues that the testimony of [Appellant] as to what Ms. Wolk told her is admissible under the state of mind exception under Rule 5-803(B)(3). Maryland law is that even admitting the statement under Rule 5-803(B)(3) is only admissible to prove a declarant's future action or existing condition.

It is not admissible for "backward looking" reason unless it relates to testamentary intent. I'm citing some Maryland case law, Figgins versus Cochrane . . . decided in 2007 by the Court of Special Appeals.

. . . .

In the second amended Complaint it's clear that these statements were made after this demotion took place. I'm looking at the second amended Complaint, paragraph 11 and 12 where it's alleged that in March [Appellant] learned that she was being demoted and then paragraph 12 says, after learning of this demotion, [Appellant] met with Ms. Wolk and this detrimental statement was allegedly made.

And then the other statement about protected apparently occurred after that. So it is a backward looking statement which is not generally admissible under 5-803(B)(3).

[Appellant] in this same argument under 5-803(B)(3), [Appellant] argues that it's only offered to prove Ms. Wolk's existing state of mind and not for the truth of the statement. Well, again, as I've already stated I believe that it is

> being offered for the truth of the statement or the [Appellant] doesn't have a case.
>
> But even accepting the [Appellant's] argument that it's not being offered for the truth of the statement, well, if that's so [Appellant] still hasn't produced evidence . . . that [Appellee] threatened to sever it's business relationship with [Employer] unless [Employer] terminated the [Appellant]. [Appellant] still has to prove that Hyperheal made that threat to prove tortious interference.
> . . . .
>
> **To introduce into evidence this purported statement by [Appellee] to Ms. Wolk that the [Appellant's] employment was detrimental, Ms. Wolk would have to testify to it.** But in her deposition, Ms. Wolk testified she did not make that statement to Plaintiff. . . And Ms. Wolk also testified that a Hyperheal representative did not tell her that [Appellant's] employment was detrimental to [Employer's] business relationship with [Appellee].
> . . . .
>
> **So without evidence from the key witness who happens to be Ms. Wolk, the [Appellant] hasn't offered any admissible evidence to support her claim that the [Appellee] tortiously interfered with her employment relationship with [Employer]** and therefore the Defendant's Motion for Summary Judgment is granted.

(Emphasis added).

Thus, the circuit court held that Ms. Wolk's alleged statements were inadmissible hearsay, without which, Appellant did not have sufficient evidence to allege tortious interference as a matter of law. Appellant timely appealed the circuit court's ruling.

DISCUSSION

I. Summary Judgment

A. Parties' Contentions

Appellant first contends that, even assuming *arguendo* that the two statements were properly excluded, the circuit court erred in granting summary judgment against her

tortious interference claim because a genuine dispute existed as to whether HHI engaged in intentional acts to influence Appellant's employment with Employer. Appellant argues that "[i]f such acts are proven, the remaining elements [of tortious interference] fall into place." Appellant asserts that "there is copious evidence that [Appellee] was motivated to engage in such acts[,]" including the fact that "the timing of [Appellee]'s actions in the Federal IP Case [involving Mr. Shapiro] correlates perfectly with the acts alleged here." Finally, Appellant argues that "the facts contradict Ms. Wolk's explanations for what happened."

In response, Appellee notes that Appellant's argument relies on evidence which only speaks to the motive of HHI to tortiously interfere in Appellant's employment, not any action taken to that end. Moreover, Appellee contends that, apart from the excluded hearsay statements, Appellant has not identified a single fact in the record which indicates an intentional act by or on the part of Appellee. Accordingly, Appellee argues that summary judgment was appropriate because "Appellant failed to identify any admissible evidence upon which to support a dispute of fact."

B. Standard of Review

"Because the decision to grant summary judgment is purely legal, we review it *de novo*, determining for ourselves whether the record on summary judgment presented a genuine dispute of material fact, and if not, whether the moving party was entitled to summary judgment as a matter of law." *Dett v. State*, 161 Md. App. 429, 441 (2005), *aff'd*, 391 Md. 81 (2006) (citing *O'Connor v. Baltimore Co.*, 382 Md. 102, 110 (2004); *Hines v. French*, 157 Md. App. 536, 549–50 (2004)). To defeat a motion for summary judgment,

"the opposing party must show that there is a genuine dispute as to a material fact by proffering facts which would be admissible in evidence." *Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726, 737 (1993).

C. Analysis

Appellant notes that to establish her tortious interference claim, she needed to show: (1) intentional and willful act(s); (2) calculated to cause damage to her in her lawful business; (3) done with malice, i.e., without right or justifiable cause; and (4) damages. *See Kaser v. Fin. Prot. Mktg., Inc.*, 376 Md. 621, 628-29 (2003). Appellant contends that "[t]he dispute here is over the first element," and thus, "the issue boils down to what evidence exists of HHI's intentional acts." On this point, Appellant asserts that there is "ample evidence."

Appellant first relies on evidence which shows Appellee's motivation to tortiously interfere with Appellant's employment. Specifically, Appellant provided evidence of the tumultuous history between Mr. Shapiro and Appellee. Mr. Shapiro is the original founder of Appellee, Hyperheal Hyperbarics Inc., and the only remaining original shareholder. According to Appellant, Mr. Shapiro was forced out of his ownership and employment with Appellee, and Appellee subsequently initiated two lawsuits against Mr. Shapiro. Appellant argues that Appellee's ongoing disputes with Mr. Shapiro motivated Appellee to interfere with Appellant's employment with Employer. Appellant also adds that the timing of her demotion and loss of benefits coincides with Appellee's actions in Appellee's Intellectual Property case against Mr. Shapiro.

While we acknowledge that Appellant has set forth considerable evidence to

establish that Appellee had motive to interfere with Appellant's employment, such evidence does not establish any action taken by Appellee to that end. Although Appellant asserts that ample evidence exists as to Appellee's intentional acts, Appellant did not provide any evidence of an act on the part of Appellee to interfere in her employment. The only evidence of any connection between Appellant demotion and Appellees were the two alleged statements of Ms. Wolk. Appellant failed to provide admissible evidence that Appellee took any action to interfere with Appellant's employment. Thus, Appellant failed to generate a material dispute of fact.

Notwithstanding the absence of evidence of an intentional act, Appellant challenges the veracity of Ms. Wolk's testimony. Appellant argues that Ms. Wolk's explanation for her second statement (i.e., "I have protected you so many times . . . ") is baseless. Ms. Wolk testified that, when she made the "protected" statement, she was referring to protecting Appellant after Appellant had lost a prior client - Broadmeed. However, Appellant asserts that Ms. Wolk's stated reason for making the "protected" comment is baseless because Broadmeed never had any complaints about Appellant's handling of their account, and in fact, had only positive things to say about Appellant.

Even assuming this portion of Ms. Wolk's testimony is untrue, the inadmissible hearsay statements would not become admissible. Removing Ms. Wolk's testimony would leave Appellant in the same position, without any admissible evidence of an intentional act on the part of Appellee. Accordingly, absent the excluded hearsay statements, we hold that Appellant failed to generate a dispute of material fact, making summary judgment appropriate. We proceed to consider whether the two alleged statements by Ms. Wolk were

properly excluded.

II. Exclusion of Hearsay Statements

A. Parties' Contentions

Appellant contends that the circuit court erred in excluding Ms. Wolk's alleged statements: (1) that Appellant's employment was "detrimental" to the business relationship between Employer and Appellee; and (2) that Ms. Wolk had "protected" Appellant in the past. Appellant argues that neither statement was offered for the truth of the matter asserted. Appellant offers the first statement to help explain why Appellant called Ms. Wolk a few days later to ask if Ms. Wolk would speak to Appellant's attorney. Additionally, Appellant offers the first statement "to use Ms. Wolk's expression of her feelings to show why she felt she needed to take the adverse employment action against [Appellant]." As for the second statement, Appellant offers it "to show that, in Ms. Wolk's then-existing state of mind, she felt that she needed to do something to [Appellant] to appease [Appellee]."

Appellee responds that the "detrimental" statement is inadmissible hearsay because Ms. Wolk testified and denied ever making that statement to Appellant. Further Appellee notes that the detrimental statement presents a double hearsay problem because "it contains: (i) the statement of Ms. Wolk who is not a party and (ii) a statement attributed to an unidentified speaker on behalf of [Appellee]." Appellee argues that neither statement falls within an exception to the hearsay rule. Appellee also contends that "the 'protected' statement either must be offered for its truth, i.e., that Ms. Wolk had been protecting Appellant from Appellee, or it has no relevance to this case." Moreover, Appellee asserts that the "protected" statement is unrelated to Appellee.

B. Standard of Review

Generallly, "a trial court's rulings on the admissibility of evidence are reviewed for abuse of discretion." *Gordon v. State*, 431 Md. 527, 533 (2013) (citing *Hopkins v. State*, 352 Md. 146, 158 (1998)). A trial court's determination as to "[w]hether evidence is hearsay is an issue of law reviewed de novo." *Gordon*, 431 Md. at 533 (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)). The Court of Appeals outlined a two-dimensional approach for reviewing a trial court's decision to admit or deny hearsay evidence under a hearsay exception as follows:

> Under this two-dimensional approach, the trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed de novo, *see Bernadyn*, 390 Md. at 7–8, but the trial court's factual findings will not be disturbed absent clear error, *see State v. Suddith*, 379 Md. 425, 430–31 (2004) (and citations contained therein).

Gordon, 431 Md. at 538.

C. Analysis

Under the Maryland Rules of Evidence, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." See Rule 5-801(c). It is undisputed that both statements are hearsay. However, Appellant argues that each statement falls within an exception to the hearsay rule. We disagree.

The first statement allegedly made by Ms. Wolk – that Appellant's employment was "detrimental" to the business relationship between Employer and Appellee – was properly

excluded as hearsay. Ms. Wolk testified in this case and denied having ever made the statement. Appellant cannot offer this statement to show "why [Ms. Wolk] felt she needed to take the adverse employment action against [Appellant,]" where Ms. Wolk denies ever making the statement. Moreover, the statement cannot be offered to show Ms. Wolk's then existing state of mind. The state of mind exception for hearsay states as follows:

MD Rules, Rule 5-803

RULE 5-803. HEARSAY EXCEPTIONS: UNAVAILABILITY OF DECLARANT NOT REQUIRED

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . . .
>
> (3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Thus, Ms. Wolk's alleged "detrimental" statement could only be offered to prove Ms. Wolk's "then existing condition" or to explain her "future action," so long as the statement did not include "a statement of memory or belief to prove the fact remembered or believed." Notably, Ms. Wolk's alleged statement was made *after* adverse employment action has been taken against Appellant. Accordingly, the statement cannot be offered to explain why Ms. Wolk took *prior* action against Appellant. See *Conyers v. State*, 354 Md. 132, 160 (1999) ("Under the state of mind exception to the hearsay rule, 'a statement of the declarant's then existing state of mind is admissible to prove the truth of the matter asserted, except that it is generally inadmissible . . . to prove a fact [such as an action] which

purportedly happened before the statement was made.'") (internal citations omitted). Finally, if offered to show why Appellant wanted to have her attorney speak with Ms. Wolk, the statement would not be relevant to Appellant's claim of tortious interference because it would have no relation to any action on the part of Appellee. Thus, the circuit court correctly excluded the "detrimental" statement as hearsay.

Ms. Wolk's second statement – that Ms. Wolk had "protected" Appellant in the past – is also inadmissible hearsay. Appellant offers the "protected" statement "to show that, in Ms. Wolk's then-existing state of mind, she felt that she needed to do something to [Appellant] to appease [Appellee]." However, the relevance of this proffer rests on a number of assumptions. First, that Ms. Wolk had protected Appellant from *Appellee* in the past – which Ms. Wolk denies. Second, that Ms. Wolk was feeling pressured by Appellee to interfere with Appellant's employment. Third, that Appellee's actually pressured Ms. Wolk to interfere with Appellant's employment. These assumptions are not supported by Ms. Wolk's own testimony about the statement. Appellant again seeks to admit state of mind evidence to explain past behavior, i.e., the demotion of Appellant. The "protected" statement would only be relevant to the claim of tortious interference if offered for the truth of the matter – that Ms. Wolk had protected Appellant from Appellee in the past. Even then, the relevance of the evidence would depend upon the inference that Appellee had acted to interfere with Appellant's employment in this instance. These assumptions are not supported by the other evidence in this case. Accordingly, the circuit court properly excluded the "protected" statement.

CONCLUSION

The circuit court did not err in granting summary judgment for Appellee upon a finding that there was no material dispute of fact. Although Appellant presented evidence that Appellee had motive to interfere in Appellant's employment, Appellant did not present any admissible evidence of any action on the part of Appellee to interfere in her employment. Moreover, the circuit court correctly excluded Ms. Wolk's alleged statements to Appellant because they were both hearsay and did not fall within a relevant exception. Accordingly, we affirm the decision of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.