

2010 WL 8749160 (Mich.App.) (Appellate Brief)  
Court of Appeals of Michigan.

John NICKLAS, M.D., Plaintiff,

v.

GREEN, GREEN & ADAMS, P.C. A Michigan Professional Corporation,  
and, Philip Green, an Individual, Jointly and Severally, Defendants.

No. 299054.  
December 7, 2010.

Case No: 08-1168NH  
Hon: David W. Schwartz  
(Oral Argument Requested)

**Plaintiff John Nicklas, M.D.'s Appellant's Brief (with Appendix and Proof of Service)**

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**\*i STATEMENT OF QUESTIONS PRESENTED**

**QUESTION PRESENTED I: DID THE JUDGE ERR TO DISMISS THE ENTIRE CASE BY FINDING NO DEFAMATION WAS SHOWN AND, FOR THIS REASON ALONG, NO CLAIM INTENTIONAL INTERFERENCE WITH A BUSINESS EXPECTANCY COULD BE PROVEN? IS THIS ANALYSIS LEGALLY FLAWED? UNDER A PROPER LEGAL ANALYSIS, WERE FACTS KNOWN TO ATTORNEY GREEN SUFFICIENT TO PROVE DR. EAGLE AND DR. AARONSON DISPARAGED DR. NICKLAS' REPUTATION INTENDING TO DENY HIM AN ABILITY TO CONTINUE TO BE A STAFF PHYSICIAN AT MICHIGAN HOSPITAL? WAS THIS FALSE ACCUSATION MADE FOR AN IMPROPER PURPOSE - NAMELY, TO REMOVE NICKLAS HIM FROM HIS POSITION AS DIRECTOR OF THE CHF CLINIC? IS MAKING SUCH A SERIOUS FALSE ACCUSATION WITHOUT A BASIS IN FACT WRONGFUL CONDUCT?**

Plaintiff-Appellant, John Nicklas, M.D. Answers: "Yes."

Defendant-Appellee, Attorney Phil Green Answers: "No."

The Circuit Court Judge Answered This Question: "No."\*<sup>1</sup>

**QUESTION PRESENTED II: DID THE JUDGE ERR TO FIND NO DEFAMATORY SPEECH WAS UTTERED OR WRITTEN BY DR. EAGLE AND AARONSON IN 1997-1999? DID THE JUDGE FURTHER ERR TO FIND THE SPEECH WAS UTTERED ON A "PRIVILEGED OCCASION?" DOES THIS SPEECH ENJOY NO PRIVILEGE? WAS ANY CLAIM OF PRIVILEGE FORFEITED SINCE THE FACTS SHOW IT WAS ABUSED AND ANY QUALIFIED PRIVILEGE THAT APPLIED WAS LOST?**

Plaintiff-Appellant, John Nicklas, M.D. Answers: "Yes."

Defendant-Appellee, Attorney Phil Green Answers: "No."

The Circuit Court Judge Answered This Question: "No."

**\*ii STATEMENT OF QUESTIONS PRESENTED**

**QUESTION PRESENTED III: DID ATTORNEY PHIL GREEN FAIL TO TIMELY SUE TWO DEFENDANTS WHO DEFAMED HIS CLIENT, DR. NICKLAS, AND HE THEREBY COMMITTED MALPRACTICE PER SE WITH A VALID REASON?**

Plaintiff-Appellant, John Nicklas, M.D. Answers: "Yes."

Defendant-Appellee, Attorney Phil Green Answers: "No."

The Circuit Court Judge Answered This Question: “No.”

**QUESTION PRESENTED IV: DID THE TRIAL COURT ERR TO APPLY “ATTORNEY JUDGMENT” RULE AS DEFENSE TO MALPRACTICE? DOES MR. GREEN'S AMENDED COMPLAINT, AND WHAT HE TOLD HIS CLIENT, EQUITABLY ESTOP AND BAR HIM FROM RAISING THIS JUDGMENT DEFENSE? DO FACTS SHOW NO EXERCISE OF JUDGMENT? IF THE DEFENSE CAN BE RAISED, IS HIS JUDGMENT DEFENSE LEGALLY FRIVOLOUS SINCE HE HAD A DUTY TO TIMELY FILE TORT AND DEFAMATION CLAIMS AGAINST EAGLE AND AARONSON SINCE THE FACTS CLEARLY REVEALED EXISTENCE A VALID CLAIM?**

Plaintiff-Appellant, John Nicklas, M.D. Answers: “Yes.”

Defendant-Appellee, Attorney Phil Green Answers: “No.”

The Circuit Court Judge Answered This Question: “No.”

**\*iii STATEMENT OF QUESTIONS PRESENTED**

**QUESTION PRESENTED V. DID ATTORNEY GREEN BREACH A DUTY WHEN HE FAILED TO INFORM HIS CLIENT HE HAD NOT PLEAD ALL VALID CLAIMS AGAINST ALL DEFENDANTS? DID GREEN BREACH A DUTY TO DISCLOSE ERRORS AND SEEK TO HELP HIS CLIENT AVOID PREJUDICE THAT WOULD RESULT FROM THOSE ERRORS IF HE CONTINUED AS HIS CLIENT'S COUNSEL AND TRIED THE REMAINING CLAIMS AGAINST DR. EAGLE AND DR. KOELLING FOR POST-1999 CONDUCT? DID GREEN HAVE DUTY TO ADVISE CLIENT TO SEEK INDEPENDENT ADVICE FROM A DISINTERESTED ATTORNEY AT THAT POINT? DID GREEN'S BREACH OF DUTY CAUSE HARM TO HIS CLIENT BY TRYING AN UNWINNABLE CASE AGAINST COLLEAGUES AT THE HOSPITAL, THEREBY HARMING HIM IN HIS PROFESSION AND CAUSING THE UNIVERSITY TO SEEK TO PUNISH HIM, WITHOUT ANY BENEFIT? DID BREACH OF DUTY CAUSE CLIENT TO LOSE A CHANCE TO SETTLE?**

Plaintiff-Appellant, John Nicklas, M.D. Answers: “Yes.”

Defendant-Appellee, Attorney Phil Green Answers: “No.”

The Circuit Court Judge Answered This Question: “No.”

**\*vii STATEMENT OF JURISDICTION**

Defendant Phil Green filed a motion seeking summary disposition. Plaintiff Dr. John Nicklas responded to that motion. The Court heard oral arguments on April 28, 2010 on the motion and then entered an order granting summary disposition for the reasons stated on the record on the same day. Plaintiff filed a motion for rehearing within fourteen (14) days which Defendant Green answered. The Court then entered an order denying reconsideration. Plaintiff Nicklas timely filed a claim of appeal in this Court on July 6, 2010 (i.e. within twenty-one days), thereby vesting this Court with jurisdiction

**\*1 STATEMENTS OF FACTS**

**The Facts Available To Attorney Green Proved Tortious Interference And Defamation By Kim Eagle and Dr. Aaronson Against Dr. Nicklas From 1997 to 1998**

Dr. John Nicklas is an academic and clinical cardiologist.<sup>1</sup> He began at University of Michigan in 1982 where he developed the Congestive [Heart Failure](#) Program (“CHF” Program). (Supplemental Affidavit of John Nicklas). After tremendous success

in his research and clinical care in that program, he was abruptly removed as director in September of 1997 and subsequently separated from all clinical research at Michigan. *Id.*

Dr. Elizabeth (“Betsy”) Nabel removed Nicklas as Director of the CHF Program, a program had created.<sup>2</sup> In October of 1997, Dr. Nicklas sought out attorney Phil Green because he believed two of his peers from the U of M Medical Center, Dr. Keith Aaronson and Dr. Kim Eagle were defaming his professional reputation and caused these changes in his academic and clinical positions.<sup>3</sup> Dr. Nicklas consulted with Attorney Green but also worked on an exit strategy from an adverse situation.<sup>4</sup> Though not aware of the specifics of what Aaronson and \*2 Eagle were doing, Nicklas decided he should leave U of M and sought a new post at Allegheny General Hospital in Pittsburgh. Dr. Shannon had recruited him but declined to offer Nicklas a position, stating that:

“I believe some of the young faculty have been unduly influenced by (the negative campaign) conducted by some of your detractors at Michigan. While I fully and completely dismiss these concerns as political, I am sure you will understand the impact that they will have, particularly on some of our younger faculty.” (Exh.1, Plaintiff’s Response to Green’s Summary Disposition Motion) (hereinafter: “Plaintiff’s Response”)

After reading Shannon’s letter, Nicklas retained Mr. Green on 3-3-98 to sue Eagle and Aaronson.

By way of further background, Elizabeth “Betsy” Nabel replaced Dr. Izumo as Chief of Cardiology in mid 1997. She didn’t know Dr. Nicklas nor did she know much about his CHF Program. With a new chair unfamiliar with the facts, Aaronson and Eagle began to complain to an unsuspecting Nabel shortly after she was appointed. They submitted recommendations to revise of the CHF Program, parroting each other’s accusations of poor medical care by Nicklas.

Keith Aaronson, an intended target of Green’s Doe/Rose complaint, was new to the University of Michigan hospital cardiology staff, arriving in 1996, and hired to assist Dr. Nicklas in the expanding CHF program. In his initial weeks at the hospital, clinic nurses had discovered his incompetence in performing heart catherizations procedures. He was also known to be volatile when confronted with constructive criticism. Instead of accepting needed help and direction, Aaronson lashed out in blame at Dr. Nicklas, his supervising physician.

Kim Eagle, was also a cardiologist. He was not directly involved in the CHF program. Dr. Eagle had proposed Strategic reorganization of heart failure patient care and related research at the University Medical Center. Eagle’s plan included reorganizing and altering Nicklas’ creation, the CHF program. Eagle’s goal was to wrest control and be credited academically and professionally for the CHF program’s accomplishments.

According to Mr. Green’s time records, he met with Ginger Holloway, Nicklas’ secretary, \*3 on March 3, 1998. (Ex. 2 to “Plaintiff’s Response”). Holloway, who also provided secretarial assistance to Aaronson, provided Green with emails, correspondence, as well as her own notes showing how and when Aaronson and Eagle had falsely accused Nicklas of performing [so-called] “questionable” and “unnecessary” surgical procedures. Ms. Holloway gave Green proof Eagle was repeating Aaronson’s accusation despite the lack of any proof they were true. Although served with proof of libel by both Aaronson and Eagle, Green made no demand for a retraction. Instead, on March 16, 1997, Green filed the first of three complaints without naming Aaronson and Eagle in any suit until 2001(Exh. 3 to “Plaintiff’s Response”).

Holloway also provided documentation of false accusations by them that Nicklas was refusing to see hospital in-patients, claims made by them of global neglect by Nicklas of his patients and claims that Nicklas was derelict in his management of the Congestive Heart Failure (“CHF”) Program. These accusations of poor patient care were repeated throughout the cardiology department by Eagle and into the national medical community by Aaronson. (Ex. 2 to “Plaintiff’s Response”).

Green had sufficient facts to know he had to take these steps to preserve Nicklas' rights. For example, Holloway had given Mr. Green a copy of a Memorandum of Heather Wurster, Director of Patient Care Services, to Dr. Eagle, on October 20, 1997. (Ex. 23 to "Plaintiff's Response"). Wurster's Memo, like Holloway's documents, described a far different cause of serious problems in patient care. MPU and transplant nurses within the CHF program complained of Aaronson's incompetence and patient neglect, not Dr. Nicklas or any deficiency in his system to give care to patients suffering [congestive heart failure](#). *Id.*

Aaronson was hurting patients in the U of M Medical Procedures Unit. (Exh 23.) Many refused to see him as a result. Others complained he was late or missed clinic appointments. *Id.* Many seriously ill patients who had driven hundreds of miles were leaving the hospital without \*4 being seen at all. *Id.* Wurster described "communication issues" as being "unapproachable regarding suggestions for improvement related to patient care processes in the MPU." *Id.* When Aaronson had complications, which were frequent - "there is blaming frequently focused at nursing staff." *Id.* He would lose his temper in front of patients expressing his dissatisfaction with being asked to perform biopsies. *Id.* He "frequently arrives late for case" and failed to respond "to pages regarding patient care issues." *Id.* Wurster also stated: "Dr. Aaronson leaves the MPU procedure area during procedures and does not communicate his whereabouts. This practice causes delays in the schedule.

Holloway had also personally seen what was being done to Dr. Nicklas reputation and accumulated the paper trail that was being left behind in trash cans. (Ex. 20 to "Plaintiff's Response," and text of response and Green Deposition.) She handed Green evidence that Aaronson and Eagle had made false accusations about Nicklas' commitment to the quality of patient care. *Id.* Documents included Aaronson's accusations to Nabel about "poor continuity of care" of patients under Nicklas' control. *Id.* He insisted Nicklas' design was lacking structure so the sickest patients were not being seen. *Id.* He falsely told Nabel Nicklas wasn't seeing inpatients as required and abandoned their care to unqualified fellows. <sup>5</sup> *Id.*

Aaronson's attack was quickly followed by an email from Eagle on August 21, 2007 stating that Aaronson also "questioned the appropriateness of some of the right [heart catheterizations](#) and other tests" Nicklas was ordering for CHF patients. (Eagle Deposition.)

Todd Koelling, a new physician at the University as of September 9, 1997, had not even arrived at U of M when Eagle warned Nabel that "Putting Todd [Koelling] into this same rat race may be equally dysfunctional". 18 "to Plaintiffs Response").

Eagle followed Aaronson's accusation with an Aug. 22, 1997 letter to Dr. Nabel stating \*5 Nicklas' CHF Program has been in "survival mode" for 5 years:

"[T]he commitment to inpatient consultation on cardiac transplant patients and complicated inpatient [heart failure](#) patients was relegated to a secondary priority." "The [heart failure](#) and transplant clinic continues to be a source of concern for me." "...the clinic is held hostage to these other critical activities of the [heart failure](#) transplant service. During Dr. Nicklas's months of service, inpatient rounding is formally done only two days a week." (Ex. 19 to Plaintiff's Response")

Ms. Holloway provided Mr. Green with her notes of the events of August of 1997, copies of which are still buried in Mr. Green's original file. She memorialized a very different problem that had been ongoing within the CHF Program, caused by Keith Aaronson:

August 20, 1997 -Aaronson had called to cancel patient appointments in the clinic stating he had an "emergency in the MPU" The staff then had to contact several patients who'd traveled 3-4 hours to be seen in the CHF program. Ms. Holloway related in her notes that "frequent cancellations" were common with Dr. Aaronson. (Ex. 20 to Pl's Resp.).

August 21, 1997 -She was asked to prepare a list of patients in August and any other months rescheduled or cancelled by Aaronson at the request of a nursing supervisor. The list was to be given to Eagle on August 25th.

Within 24 hours of Koellings arrival as a new staff physician at Michigan hospital, Aaronson fired off another letter to Dr. Nabel and Dr. Eagle. (Ex. 21 to Pl's Resp.). He states he was writing to ask for immediate changes "to improve the quality of patient care." "Todd is interested in following transplant recipients, John has not been...." "John should take a proportionately increased share of the CHF outpatient volume". On a second page, he states:

"...I am very anxious to begin to see some of these changes initiated. I am quite secure in the belief that we share common goals, and I appreciate the difficulty of the situation. I will not presume to discuss Todd's concerns for him, but suffice to say it does not seem to have taken long for him to identify many of the problems. He has suggested that the two of us develop a joint plan and take it to John. Doing this would conflict with your request that I "lay low" so I am looking to you to take the lead."

"I remain hopeful that restructuring will allow me to focus a larger proportion of my time and energy on getting my academic career off the ground. In my annual review, you acknowledged the large amount of time I have spent on clinical care. While I appreciate this, as far as I can tell papers and grants remain the coin of the realm - I'd like to have the chance to earn my place in the kingdom! Thanks, in advance, for your help." Id.

\*6 Ms. Holloway gave Mr. Green a letter dated September 17, 1997, eight days after Todd Koelling arrived. It is an email from Eagle to Nabel echoing Aaronson's concerns about Nicklas:

"I met briefly with Todd Koelling to make sure he's getting settled. John asked him to take full responsibility for the service this week...John is available for backup. Suffice it to say that Todd is seeing our program up close and personal...and he's dumbstruck at a number of problems which we both see in full view." (Ex. 22 to Pl's Resp.).

Ms. Holloway had Eagle's (and Aaronson's) letter in response to Ms. Wurster (dated November 5th). (Ex.24 to Pl's Resp.). Eagle told Wurster that all of Aaronson's obvious incompetence was actually the fault of Nicklas' system through his dereliction as the Director of the CHF Program. Id. Eagle/Aronson stated that it was because of systemic problems that patients don't want to be seen by Aaronson after a botched and painful biopsy. Id. Aaronson's lack of communication and unapproachability were likewise also "system problems". Id. "System" was clearly synonymous with "Nicklas". Id. Eagle/Aaronson then repeated one of the most serious accusations about Nicklas stating:

"In terms of dissatisfaction with biopsies, I want to reiterate again that at the moment Dr. Aaronson is not doing biopsies with any regularity. However, his concerns about the appropriate use of testing and procedures in the MPU is justified. Based upon my initial review with two of our faculty, it appears that a number of these procedures are being done for questionable indications. These will be carefully examined as we restructure our services." Id.

Eagle was falsely accusing Dr. Nicklas of inappropriate medical practices while covering up Aaronson's actual incompetence.<sup>6</sup> Meanwhile, both were spreading their accusations widely through the Cardiology Department. At a meeting on October 30, 1997, Ms. Holloway memorialized in her notes that Dr. Koelling parroted that Dr. Nicklas was doing "too many RHC & V02 procedures."<sup>7</sup> (Ex. 25).

Although furnished with proof of tortious conduct by Aaronson and Eagle, Green filed \*7 suit instead against Dr. Elizabeth "Betsy" Nabels<sup>8</sup>, Dr. Todd Koelling<sup>9</sup> and Dan Cutler.<sup>10</sup> He named two defendants as "Doe" and "Roe," later claiming this referred to Eagle and Aaronson. (Ex. 3). Green never sent a demand for a retraction to Aaronson and Eagle at deposition. Mr. Green somehow convinced himself that naming Doe and Roe defendants tolled the statute of limitations allowing him to amend and add Aaronson and Eagle at some later date. He ignored making a retraction demand for libel and the one year time limit for bringing a defamation claim.

After Nicklas' removal from the CHF program Aaronson and Eagle returned to the systems put in place by Dr. Nicklas. Right [heart catheterizations](#) and biopsies continued as part of the care protocols. Ongoing research continued to demonstrate Nicklas' system reduced morbidity and mortality. There had never been systemic poor care nor had there been unnecessary heart catherizations; only demonstrably incompetent care by a junior faculty member (Aaronson).

### **Green Obtained Admissions and Proof of Actionable Defamation and Wrongful Conduct by Eagle and Aaronson in 1997-1999**

The first deposition taken by Green was of Dr. Aaronson on February 11, 1999. Aaronson admitted he was the source of accusations that Dr. Nicklas gave inadequate patient care. (Aaronson Dep. at pg. 14). He admitted frequently complaining “John wouldn't participate” in hospital rounds. (Aaronson Dep. at pg 14-15).

Aaronson then testified that he told Koelling and others at U of M that Dr. Nicklas “could take care of patients with [heart failure](#) without doing all the right heart catherizations that John did...” (*Id.* at pg. 56). He told Dr. Eagle that Nicklas was doing “unnecessary” right [heart catheterizations](#) on patients that “didn't require it,” and, worse yet, he was being forced to do them \*8 as well. (*Id.* at pg. 57). Green's careful questioning is consistent with his later attempts to amend his pleadings; Aaronson and Eagle were his true targets.

Mr. Green deposed Dr. Eagle next on March 4, 1999 questioning Eagle about Heather Wurster's letter of October 20, 1997 (Ex. 29, Eagle at pg. 56.) Green also asked Eagle to explain the meaning behind his accusations to Dr. Nabel that Dr. Nicklas provided “minimal coverage” to inpatients. Eagle testified that by minimal he meant “far below standard of care” (Eagle at pg. 17).

### **Mr. Green's File Shows He Knew of Cause of Action Existed Against Eagle and Aaronson for 1997-1999 Wrongful Conduct**

Green's file is a filled with documents, including Green's own handwritten notes, all pointing to his knowledge that Eagle and Aaronson were publishers of defamatory statements in 1997 (Exh. 4). For example, one of Green's notes says “Kim Eagle is the focal point” of the case. Green identifies a cause of action against Eagle as follows: “Litigate: Interference With Advantageous Business Relations.” This is the claim Green never filed until after the 3 year statute of limitations period had run. (Exh. 4.) Green's handwritten notes list another cause of action: “Defamation...Keith Aaronson, Kim Eagle, Betsy Nabel,” yet Green only sued Nabel on this claim. Green's notes ask: “Defamation...who suit vs[?]” and 5 or so pages in the notes later on, Green writes (in typewritten notes this time) as follows: “Change caption so that instead of John Doe and Richard Roe you list Kim Eagle and Keith Aaronson as defendants.” (Exh. 4.)

Green intended to file claims against Eagle and Aaronson in a dual pronged attack, alleging acts of tortious interference and defamatory statements in 1997. Green never presented this to a jury.

Attorney Phil Green also revealed, in his client file notes, his knowledge that Dr. Kim Eagle was aware “of Keith Aaronson's clinical incompetence and inefficiency [in clinical practice]” and that Dr. Eagle also had “knowledge of complaints about Aaronson by nurses, patients, and other \*9 physicians.” (Exh. 4.) Green's client notes also chronicle that “Heather Wurster” has “[k]nowledge of nursing complaints about Keith Aaronson.” (Exh. 4.)

Now, Green claims he lacked evidence to pursue Aaronson and Eagle, but that evidence is in his file and summarized by his own hand. His notes betray him. His claim cannot be he did not know to plead tortious interference or defamation against Eagle and Aaronson for their 1997 accusations made against Dr. Nicklas.

Mr. Green had a duty to send a retraction letter, to plead claims timely, and to gather proof (which existed) that Nicklas did not order unnecessary heart catherizations.

Dr. Nicklas had proof showing he had good patient outcomes. This cast a burden on Dr. Eagle and Dr. Aaronson to explain their recklessly false, wholly unsupported allegations. Dr. Aaronson and Dr. Eagle had done nothing to investigate the specific claims. Green further writes:

“Neither Dr. Eagle or Dr. Nabel ever personally evaluated the work product or efficiency of the system I created for the Congestive Heart Failure/Transplant Program. Neither attended a single clinic, a single procedure, a single work meeting, a single teaching session, or a single set of formal or informal inpatient rounds. Except for one rhetorical question by Dr. Eagle about the new patient clinic and an un-attributed comment by Dr. Nabel about the system's purported inefficiency, neither ever entered into a discussion of the rationale or merits of the system. I believe that the feedback from trainees (cardiology fellows and internal medicine residents) during all of my months of faculty supervision was positive. I never received a complaint or was told of a complaint by a third party. One of the Associate Chairs of Medicine told me of complaints from residents about Dr. Aaronson's months of supervision. There were numerous patient complaints about Dr. Aaronson \* \* \*” (Ex. 4.) Mr. Green understood that Aaronson and Eagle knew their accusations against Nicklas were

false. They made the accusations with malice and for an improper purpose (to obtain a self-benefit exclusively.)

Again, Attorney Green's file betrays him; it contains a hand scratched crossing out the names of John Doe, to replace it with “Kim Eagle,” and crossing out Richard Roe, to replace it with “Keith \*10 Aaronson.” (Ex. 4). Phil Green knew, when he filed the complaint, that he had no right to claim lack of knowledge of the Doe and Roe defendants. (Exh.5).

In discovery, Green used Holloway's documents to extract admissions at deposition from Eagle and Aaronson, while they were still “Doe” and “Roe” defendants.<sup>11</sup> In his September 27, 2000 letter, Green disclosed to Nicklas he had called a halt to his elaborate ruse by disclosing to Judge Swartz's law clerk that: “Lastly, I advised both he and the [judge's] clerk that we were now prepared to name the “John Doe's” and that Kim Eagle was one of them.”<sup>12</sup> Green cheerily told his client, Dr. Nicklas, “Let's have lunch so we can firm up our plans for discovery, etc.” [i.e. to prove Eagle defamed you and tortiously interfered with your business expectancy.]<sup>13</sup>

### **Green's Negligently Failed To File Suit Timely Alleging Defamation and Intentional Interference with a Business Expectancy Claims Against Aaronson and Eagle**

For two years beginning in 2000, Green casually and repeatedly promised the court, the client and opposing counsel that he would soon amend to name the true culprits, Eagle and Aaronson (Exh. 6 a-I). Finally, in 2002, Green prepared a proposed amended complaint identifying his real targets (Exh. 7). He asked the Defense to stipulate to the filing. (Ex. 6).<sup>14</sup> The defense refused. Green then filed a motion for leave to amend and the defense brief in response pointed out Green's blunder. He could not add the real defendants because naming Doe and Roe originally was not the same as suing them to begin with. This was the first time Green realized he had not surreptitiously filed a case against Eagle or Aaronson at all (Exh. 8 Green Dep at pg. 73-74). Green missed the statute of limitations for defamation and tortious interference with a business advantage against Aaronson and \*11 Eagle because he incorrectly thought “tolling” and the “relation back doctrine” would excuse and toll his duty to sue these defendants within the applicable statute of limitations period. But only amendments to claims or defenses already filed relate back –not amendments to add parties – and only if the statute of limitations has not run on those claims<sup>15</sup>

### **Green's Failure to Disclose His Mistakes and Attempts to Salvage Viable Defamation and Intentional Interference with Business Expectancy Claims**

In 2002, finally aware of his mistake, Green went into salvage mode. Green withdrew his request to add Aaronson without discussing why with Nicklas (Ex.8 Deposition of Green pg 73-74).

Mr. Green convinced the Trial Court to allow him to add Eagle to a sole count of tortious interference (Exh.9). However, this Court ruled that case would be limited to proof of tortious conduct and damages occurring no earlier than February 26, 1999 – three years prior to that amendment (Exh. 8 Green dep at pg.73-74). Consequently, the “smoking gun” evidence Green had against Eagle could not be used at trial to prove a case against Eagle (Exh. 10 -2006 Trial Jury Instruction limiting Nicklas' proofs). Aaronson was never sued because Nicklas' case against him was time barred by Green's mistakes. The claims Green had promised to file by amendment against the two people he felt committed tortious conduct and defamed Nicklas were time barred and lost.

Aware of his blunder, Green convinced Nicklas that “all was well”. Green told Nicklas that because of a change in the law while the case was pending, Aaronson couldn't be sued. He told his client that the case against Eagle was still completely intact as an action for tortious interference (Exh. 11 –transcript of Green/Nicklas telephone call. Pg 2, March 28, 2003.). Green never told Nicklas client of his error in not timely suing Eagle and Aaronson for defamation and intentional tortious conduct seeking to remove him from his clinic directorship when he initially filed suit.

Just prior to trial, Green filed his second amended complaint in 2006 finally spelling out with \*12 particularity the defamatory statements that were always at issue, drawn from Holloway's documents, Aaronson's deposition, and Green's own notes. (Ex. 12). Because he couldn't attribute those statements to Eagle or Aaronson because of the time bar, Green redirected his newly amended pleadings at Todd Koelling, a man who had only been at U of M for *nine days* when Nicklas was removed as director of the CHF program. Phil Green was unable to prove his original allegation that Dr. Koelling had defamed or injured Dr. Nicklas in regard to his efforts to gain employment at Allegheny Hospital.<sup>16</sup> The facts did not establish this allegation to be true. At trial, Mr. Green could not show Dr. Koelling sought to torpedo Dr. Nicklas' application for employment at Allegheny Hospital because no such facts existed, which Mr. Green knew.

Mr. Green now argues that he never intended to sue Aaronson or Eagle in 1997 because he contends those underlying 1997 defamatory statements – that Green recast in pleadings as statements made by Koelling – were in fact *not* defamatory. The Trial Court, however, ruled to the contrary in 2006, denying a defense motion for summary disposition as to Dr. Koelling on this very point. (Ex.13). The ruling was correct – the claims against Dr. Koelling hinged on proof of Eagle and Aaronson's statements and conduct, in 1997, which Koelling republished, that were outside the suit. Green's final complaint contained defamatory statements *but* related to the wrong time period (i.e. post-1998, which is after the statements were made) *and* he sued only one of two real tortfeasors (Eagle), losing the right to offer evidence of Eagle's tortious conduct and defamatory statements. Green took a winnable case he had broken, due to pleading errors, to trial, and he predictably lost.

### \*13 LEGAL ARGUMENTS

**I. LEGAL ARGUMENT I: THE JUDGE ERRED TO DISMISS THE ENTIRE CASE BASED ON A FINDING NO ACTIONABLE DEFACTION WAS SHOWN, SINCE STATEMENTS WERE PRIVILEGED AND, FOR THIS REASON ALONE, NO CLAIM INTENTIONAL INTERFERENCE WITH A BUSINESS EXPECTANCY COULD BE PROVEN THIS ANALYSIS IS LEGALLY FLAWED. UNDER A PROPER LEGAL ANALYSIS, AND GIVEN THE FACTS KNOWN TO ATTORNEY GREEN, THERE WAS A SUFFICIENT BASIS TO PROVE DR. EAGLE AND DR. AARONSON DISPARAGED DR. NICKLAS' REPUTATION TO DENY HIS EXPECTANCY. THEY MADE SERIOUS FALSE ACCUSATION FOR AN IMPROPER PURPOSE WITHOUT A BASIS IN FACT. THIS IS WRONGFUL CONDUCT. IT IS ACTIONABLE.**

**Standard of Review. De Novo.** This court reviews de novo whether a trial court's grant of summary disposition was proper. *Cendroni Associates, Inc. v. Tomblinson, Harburn Associates Architects & Planners, Inc.*, COA No. 287024, 2010 Mich App LEXIS 2151(11-16-10), citing *Allen v. Bloomfield Hills School Dist.*, 281 Mich App 49, 52, 760 NW2d 811 (2008); MCR 2.116 (C) (10).

If proofs show false accusations were made without valid justification to achieve an improper purpose (of disparaging the reputation of a professional) to gain an this raises questions for jurors to decide on whether a tort was committed. A judge may not dismiss a tortious interference claim if evidence allows a jury to find wrongful acts were taken with an improper purpose to gain a direct benefit. *Id.*, citing *First Public Corp. v. Parfet*, 246 Mich App 182,199; 631 NW2d 785 (2001), vacated in part on other grounds, 468 Mich 101, 658 NW2d 477 (2003); and *Trepel v. Pontiac Hosp.*, 135 Mich App 361, 377; 354 NW2d 341 (1984).

A false accusation may provide a basis to pursue a claim of tortious interference. *Id.* (finding valid basis for tort where it was “clearly allege[d] [in counter-claim that defendant accused plaintiff of] unethical conduct -- sending letters knowing them to contain false allegations”). On appeal, the court must review facts by drawing all reasonable inferences in favor of plaintiffs view to decide if genuine issues of material fact exist. *West v. GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

**Procedural History.** Defendant brought a *partial* motion for summary disposition, in substance, by arguing “Mr. Green's alleged negligence was not a proximate cause of any damage to the plaintiff because none of the alleged, underlying defamatory statements were actionable.”<sup>17</sup> Judge Swartz followed this lead and only gave a rationale to dismiss the defamation claims – finding there was no sufficient proof to create a genuine issue of fact on **abuse** of the qualifying privilege, and that \*14 defendant was protected under the Attorney Judgment Rule.<sup>18</sup> (Legal Arguments II, III challenge these two rulings.) Without addressing Plaintiff's main claim of intentional interference with a business advantage, Judge Swartz deemed the grant of partial dismissal a final order closing the case. Neither the Defendant nor the judge supplied reasons to dismiss the intentional interference tort.

**Applicable Law.** The essence of the tort of intentional interference with a business advantage is the use of “intentional or improper methods of diverting or taking business from another which are not within the privilege of fair competition.” Am Jur. 2, Interference, Sec. 31.74, p.9, note 2, citing, inter alia, *Wilkerson v. Carlo*, 101 Mich App 629, 632, 300 NW 2d 658 (1980); Sec. 31:79, p. 33, note 19 (collecting Michigan cases finding tortious interference with business expectancy to be proven).<sup>19</sup> And see *Restatement Torts, Second, Sec. 766B*. A claim of tortious interference with a business expectancy can be made if the proofs show (1) the existence of a valid business expectancy, (2) knowledge of the expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a termination of the expectancy, and (4) resultant damage to the plaintiff. *Cendroni Associates, Inc. v. Tomblinson, Harburn Associates Architects & Planners, Inc.*, COA No. 287024, 2010 Mich App LEXIS 2151 (11-16-10), citing *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 323, 788 NW2d 679 (2010); *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 254, 673 NW2d 805 (2003).

To establish tortious interference with a business expectancy, a plaintiff must show the defendant(s) acted both intentionally and improperly or without justification. *Dalley*, 287 Mich. App. 296 at 323. “One who alleges tortious interference with a contractual or business relationship must \*15 allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual or business relationship of another.” *Badiee v Brighton Area Schools*, 265 Mich App 343, 367, 695 NW2d 521 (2005), quoting *CMI Int'l, Inc v Internet 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). To establish that a lawful act was done with malice and without justification, a plaintiff must prove, with particularity, affirmative acts taken by the defendant that corroborate the improper motive of the interference. *Mino v Clio School Dist*, 255 Mich App 60, 78, 661 NW2d 586 (2003); see also *Dalley*, 287 Mich App at 324.

A per se wrongful act is an act that is inherently wrongful or an act that can never be justified under any circumstances. *Badiee*, 265 Mich App at 367; *Prysak v R L Polk Co*, 193 Mich App 1,12-13, 483 NW2d 629 (1992). When a defendant's conduct was not wrongful per se, a plaintiff must show specific, affirmative acts that corroborate the unlawful purpose of the interference. *Badiee*, 265 Mich App at 367. “Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.” *Id.*

In a recent case, this Court reversed dismissal of a tortious interference with a business expectancy claim since the evidence showed false statements were made to disparage another business with the improper purpose of stealing the contract from that business. *Cendroni Associates, Inc. v. Tomblinson, Harburn Associates Architects & Planners, Inc.*, COA No. 287024, 2010 Mich App LEXIS 2151 (11-16-10). This Court's recent ruling in *Cendroni Assocs.* explains why the proof available to Green, showing him Dr. Eagle's and Dr. Aaronson's false accusations against Nicklas, and their concerted smear campaign was wrongful and tortious. They sought the improper goal of gaining an advantage at Dr. Nicklas' expense – i.e. removing him from his role in the hospital.<sup>20</sup>

**\*16 Conclusion:** Judge Swartz clearly erred to dismiss the entire case when this valid claim remained. It requires different proofs and elements than defamation. The tortious conduct is not privileged.

**II. LEGAL ARGUMENT II: THE JUDGE ERRED TO FIND NO DEFAMATORY SPEECH WAS UTTERED OR WRITTEN BY DR. EAGLE AND AARONSON IN 1997-1999. THE JUDGE FURTHER ERRED TO FIND THE SPEECH WAS UTTERED ON A “PRIVILEGED OCCASION.” NO PRIVILEGE ATTACHES TO THIS SPEECH. ANY CLAIM OF PRIVILEGE WAS FORFEITED SINCE THE FACTS SHOW THE PRIVILEGE WAS ABUSED AND SO WAS LOST.**

**Standard of Review.** Protections of the qualified privilege are lost if the speech is not uttered on a privileged occasion or defendant **abuses** the privilege by uttering speech unrelated to the purposes for which the privilege is created (such as to achieve an improper purpose of harming another out of spite and/or to gain an improper monetary or other advantage. If such proof exists, when all evidence is viewed in the light most favorable to the *Dadd v. Mt. Hope Church*, 486 Mich 857; 780 NW 2d 763 (2010) (reversing Court of Appeals decision mis-applying standard of review, and incorrectly treating as matter of law for court the issue of whether accusation by pastor that parishioner who owned insurance agency had committed “insurance fraud” repeatedly was unprivileged defamation per se, a case nearly identical to this case, in which Judge Swartz made precisely the same error.)<sup>21</sup>

**Standard of Review Allocating Issues Between Judge and Jury on Privilege.** The determination whether a qualified privilege exists is a question of law for the court. **\*17** *Bostetter v. Kirsch Co.*, 319 Mich 547, 555-556; 30 NW2d 276 (1948) The issue of whether a statement was made with actual malice is one for the jury to determine. *Konkle v Haven*, 140 Mich 472, 477; 103 NW 850 (1905). In other words, if a court determines there is a qualified privilege, the jury determines whether the defendant acted within the scope of the privilege. *Mundy v Hoard*, 216 Mich 478,492; 185 NW 872 (1921).

A trial court's findings of fact are reviewed for clear error. *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). A claim that the trial court made an error in the jury instructions given is reviewed de novo. *Case v Consumers Power Co*, 463 Mich 1,6; 615 NW2d 17 (2000). However, the trial court's determination whether evidence supports providing a particular instruction to the jury is given deference by a reviewing court. *Id.*

**Applicable Law On Elements of Qualified Privilege.** The elements of a valid claim of qualified privilege are (1) good faith, (2) a legitimate interest to be upheld, (3) a statement limited in its scope to this legitimate interest, (4) a proper occasion for communicating the statement, and (5) communication of the statement in a proper manner and to proper parties only. *Prysak v R L Polk Co*, 193 Mich App 1, 15; 483 NW2d 629 (1992).

**Defamation: Falsely Accusing Doctor Of Unnecessary Procedure Is Defamatory Per Se** Eagle and Aaronson said and wrote that Dr. Nicklas was performing unnecessary heart catherizations and was neglecting patients' needs and providing substandard care. They all met all of the elements of defamatory *per se*. There was proof of a false publication to Dr. Nabel and Heather Wurster plus evidence that Nicklas' reputation was being damaged through slanderous repetition. Libel requires a demand for retraction to ensure exemplary damages.<sup>22</sup> Green never made a demand for a retraction though his notes show he knew he had a libel case. Eagle and Aaronson's \*18 oral utterances are actionable slander.<sup>23</sup> Had Green timely sent a retraction letter *and* timely filed suit, he could have won this claim. He knew a claim existed based on words used in non-privileged way.

### The Law of Defamation

Defamation includes libel and slander – i.e. written or oral statements that deprives an individual of the interest in a reputation of good name. *Prosser on Torts*, 5th ed. at pg. 771. 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 to at least negligence on the part of the publisher; and, 4. A right of action due to the nature of the speech (i.e. harm it necessarily creates) (defamation *per se*) or existence of special harm arising from the use of the words in context (defamation *per quod*). *Heike v. Guevara*, 654 F. Supp. 2d 658 2009 U.S. Dist. LEXIS 79140 (2009).

When a plaintiff alleges **defamation per se**, he need not allege any special harm because such harm is presumed to have occurred. 2 Mich. Law & Practice, Torts, § 3.68 (2d ed. 2004) (explaining “Michigan courts traditionally characterized statements that held plaintiffs up to hatred, scorn, contempt, or ridicule, or that were made with a malicious intent, as constituting **defamation per se**”). False and malicious statements injurious to a person in his or her business are actionable *per se* at common law and special damages need not be alleged or proved. See e.g. *LL NJ, Inc. v. NBC - Subsidiary (WCAU-TV)*, 2008 U.S. Dist. LEXIS 34480; L.P., 36 Media L. Rep. I 746 (2008)(Mich, ED) (business performed facelifts and cosmetic surgery and TV station published statements impugning quality of procedures, their competence and suggested business misled advice to patients before they consented to procedure; held: the six statements are defamatory because they are arguably false and the plaintiffs suffered actual harm due to defendants' conduct), and citing \*19 *Heritage Optical Center, Inc.*, 137 Mich. App. at 797, 359 N.W.2d at 212.<sup>24</sup>

The speech at issue here was written and oral. It involves at least one, perhaps two, of the four traditional categories of defamation *per se*. **First**, “imputation of a person's unfitness for his trade or profession” is defamation *per se*. **Second**, “imputation of a crime” is defamation *per se*. *Restatement (Second), Torts, Sec. 571-74 (197)*. To accuse a doctor of not attending to patients in a hospital as required to meet their immediate medical needs is defamation *per se* (i.e. unfitness for his trade or profession). See, e.g., *Beasley v. St. Mary 's Hospital*, 200 Ill. App. 1024, 558 N.E.2d 677 (letter alleging doctor's “unwillingness to provide the minimal amount of emergency intervention” is libelous *per se*). To accuse a doctor of performing unnecessary heart catherizations fits the unfitness for his profession category as *well as* the imputation of a crime form of defamation *per se*.

There are definite legal consequences if a doctor is falsely accused of doing unnecessary procedures. All of the consequences pose a threat to the doctor's ability to continue to practice medicine. Thus, The defamatory *per se* character of this accusation is clear given applicable law. \*20 The Joint Committee on Hospital Accreditation impose rules on the hospital they must enforce on staff as does the Medicare reimbursement statute.<sup>25</sup> JCAR mandates that the hospital review patient charts on a quarterly basis.”<sup>26</sup> Thus, when Eagle and Aaronson alleged Nicklas performed *unnecessary heart catherizations*, they uttered the most serious form of defamation *per se* one could against a doctor. And a doctor or hospital can face a claim for fraud for seeking reimbursement of unnecessary procedures.<sup>27</sup> Green had a duty to know this law and understand that uttering of these words, by Eagle and Aaronson, in the way they did, without proof, put at risk Dr. Nicklas' staff privileges and medical license and his future ability to practice academic medicine at the U of M.

Their words were not capable of an innocent construction. See Bruce W. Sanford, *Libel and Privacy*, 2nd Ed. (Wolters, Kluwer 2010), Sec. 4.7., p.4-30 - 4-33.

### **An Unprivileged Communication**

A qualified privilege only exists when the statement is made in good faith, to protect a proper interest, is limited in scope, made at a proper occasion, and published to proper parties only. *Smith v Fergan*, 181 Mich App 594 (1989). The burden is on the Defendant to establish the existence of

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\*25 and the false light in which the plaintiff would be perceived.” The jury found that the defendant acted with malice in making the statements which were the same ones alleged to have been defamatory.

Because this finding of malice negates the qualified privilege that may exist in the context of the plaintiffs claims for libel and slander, any error by the trial court in failing to instruct the jury on a qualified privilege for plaintiffs libel and slander claims is harmless. The defendants' remaining claims of error left unaddressed by the Court of Appeals are meritless.

In *Dadd*, five Justices reached this ruling leaving to jurors issues of fact. The *Dadd* Court, in a footnote, clarified it has long been settled law that “[w]here it appears that the occasion is subject to a qualified privilege, the burden is upon the plaintiff to prove the untruth of the statements and actual malice.” *Van Vliet v Vander Naald*, 290 Mich 365, 371; 287 N.W. 564 (1939). This Court must consider the finding of the Supreme Court in *Dadd* which was outside its consideration. In *Dadd*, the trial judge properly instructed jurors on the elements of the qualified privilege, and asked jurors if the pastor's statements were false and defamatory speech and privileged. *Id.* This Court should reach the same result for the same reasons, under the very different facts of this case, by applying the same analytical framework applied by the Supreme Court in *Dadd*. The analysis that led the Michigan Supreme Court to vacate the Court of Appeals decision in this case applies here as well to show why this Court must grant rehearing. This case falls within this framework of a defamation case where statements are so clearly untrue, and provably false, and made with malice that, if jurors find, as they can, that Eagle and Aaronson accused Nicklas about aspects of patient care out of malice, then no qualified privilege applies to them.

### **Qualified Privilege Applies On “Privileged Occasion” When Privilege Is Not **Abused****

A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation. [*Bufalino v Maxon Bros, Inc*, 368 Mich 140, 153; 117NW2d 150 \*26 (1962), quoting *Timmis v Bennett*, 352 Mich 355,368; 89NW2d 748 (1958), quoting 33 Am Jur, *Libel and Slander*, § 126, 124-126 (internal quotation marks omitted).]

Simply, the elements of qualified privilege are “good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.” *Id.* A defendant can only claim a qualified privilege when the circumstances of the occasion cast a “duty of making a communication to a certain other person to whom he makes such communication in the bona fide performance of such duty.” *Raymond v Croll*, 233 Mich 268,273; 206

NW 556 (1925). Qualified privilege applies to legal duties, as well as moral or social ones. *Bacon v Michigan Cent RR Co*, 66 Mich 166, 170; 33 NW 181 (1887).

**Qualified Privilege Was Applied to Dismiss the Case in Error. There Was More Than Sufficient Proof To Show the Statements Fall Outside Scope of Recognized Privileges.**

The Trial Court decision relied on an overly broad application of qualified privilege which expands it beyond the narrow bounds recognized by Michigan common law. Under the ruling, the Judge found statements between doctors practicing at a hospital about patients are all privileged. Michigan Courts have previously rejected such a broad, general and absolute privilege that attaches to all doctor statements about patients without regard to the subject, context or specific manner of communication of the statements, or the speaker's purpose and truth or lack of truthfulness of them. The Court's reasoning to support applying a qualified privilege here is clearly over-broad and wrong. Under a correct application of settled law of qualified privilege to the facts, there is no privilege.

The Courts have rejected a broad application of the qualified privilege defense to all commercial business affairs - and have done so even if a statement was made in good faith. The Courts reached this result since “[s]ociety is organized and courts [are] established for the protection of the rights of individuals.” *Pollasky v Minchener*, 81 Mich 280,287; 46 NW 5 (1890). While Michigan Courts have recognized a qualified privilege in some cases arising in the medical context, it has not created a blanket privilege that applies to all false statements by any doctor communicating \*27 to another doctor in the hospital setting. In a small group of doctors, some of the communications about patient issues are subject to qualified privilege and some are not.

The question raised by the facts of the underlying defamation suit Attorney Green did not timely file is whether two doctors (Eagle and Aaronson) were conferring with other doctors outside and inside the University of Michigan hospital for the purpose of making better patient care decisions. Alternatively, the question is whether they were targeting Dr. Nicklas for a personal attack without basis in any legitimate interest in improving patient care. Discussions amongst doctors about patient care typically arise in peer review meetings and the statements alleged to be defamatory here were not made in that context. When doctors confer at departmental meetings to discuss how patient care should be delivered, this can be privileged. But there are no statements alleged to be defamatory here that were made in departmental meetings.

The rule this Court has applied in clothing the statements with a broad qualified privilege is to find that mere membership as a staff physician with hospital privileges allows a doctor to say anything about another doctor, however true or false. The idea on which the Court's ruling is premised, apparently, is that if the statements touch on patient care issues, even if that is a ruse to attack a colleague, and no patient care issues lie behind the criticism, the qualified privilege must apply. Under this broad rule of qualified privilege, even if the statements are made behind the back of the doctor being accused (falsely) of bad patient care, and even if the accusations are not made in a context where they can be examined, they are subject to qualified privilege. Case law does not apply a broad qualified privilege in the way the Court has applied it. In *Westerhouse v DeWitt*, 215 Mich 295, 299; 183 NW 711 (1921), for example, the Supreme Court held a qualified privilege instruction was properly given when a statement relating to whether an **elder** in a church committed perjury in an earlier court proceeding was made at a meeting of the minister and **elders** of the church.

In *Van Vliet v Vander Naald*, 290 Mich 365, 370-371; 287 NW 564 (1939), this Court \*28 determined qualified privilege applied when the defendants made statements in the course of proceedings within the synod, the appellate tribunal of the church. This Court specifically noted the privilege applied since the synod was “acting within the scope of its authority in the course of a judicial proceeding....” Id. at 370. The same approach used in the above two Supreme Court cases should be applied to decide if there is a qualified privilege in this case.

Here the doctors are private figures and two of them are making false statements about another doctor's medical care. (See Affidavit of John Nicklas, M.D. attached and other exhibits.) The facts suggest false accusations were made for an improper purpose – namely, to cause the doctor being accused to lose ability to profit from research opportunities and benefits he enjoyed

as department head. So the question is whether it is qualifiedly privileged to make unsubstantiated accusations as a doctor at a hospital, against another doctor, as part of jockeying for position to remove the administrative job as head of the clinic from that doctor. If the reason for the false and defamatory speech (ostensibly about patient care, but without support in legitimate concern about real patients) is intended to get the head of the clinic (Dr. Nicklas) removed from that position, based on personal dislike and so the defamers can wrest control of the clinic, these false accusations against a doctor serve the speaker's interests but serve no valid public or patient interest.

That the false accusations were made behind Dr. Nicklas' back (so he had no chance to rebut the false allegations), and that specific comments were not even supportable by reference to any facts, and so bear no relationship to legitimate patient concerns, suggests that the subject (patient care) was a pretext for defamatory speech. When one engages in unsupportable gossip as part of a backstabbing campaign, this is not considered to be legitimate discourse protected by a privilege whose purpose is to serve a broad public interests.

The context of the speech matters in evaluating if it is subject to qualified privilege. Eagle and Aaronson did not take their concerns to a peer review committee. They refused to put \*29 accusations in writing or subject them to any formal review. This is the opposite that the qualified privilege doctrine seeks to protect.

The overwhelming rule applied by courts around the country is that a statement must be made in good faith on a subject that the parties have a proper interest or duty in hearing about. 431 NY Jur (2d ed.), *Defamation and Privacy*, § 173. The *Restatement of Torts (Second)* gives guidance followed by the Michigan Supreme Court and other courts on qualified privilege issues.

Significantly, the interest must be a substantially important one, not any vague assertion that a defendant can conjure. See *Restatement Torts, 2d*, § 594(a). The third party receiving a defamatory statement must receive it in service of a clearly identifiable and lawful protection of a specific interest. *Id.* at (b). A legitimate dispute of fact exists here on whether the intent behind the statements was to serve patient care or whether Dr. Eagle and Dr. Aaronson were motivated only to wrest control of the clinic from Dr. Nicklas to serve their own narrow economic motives.

As importantly, if a defendant **abuses** a qualified privilege, such as by seeking to use the false and defamatory speech solely to injure the target of the speech, and not to serve any recognized public policy interest, this vitiates the privilege. *Id.* at §§ 603, 604. In this case, the allegedly privileged speech was not uttered on a “privileged occasion” (which we can see from the manner and the forums in which the speech was uttered). *Id.* If “occasion” for speech reveals it falls outside the contexts that enjoy qualified privilege, no privilege exists. “[o]ne who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another that is within the privilege

Courts from around the nation have held that a communication that goes “far beyond the necessities of the case” is not authorized even by an arguable privilege and, in fact, **abuses** and vitiates the privilege that may have existed. *Lathrop v Sundberg*, 104 P 176, 178 (Wash 1909); see also *Sullivan v Strathan-Hutton-Evans Comm 'n Co*, 53 SW 912, 915 (Mo 1899). The Mississippi \*30 Supreme Court has aptly expressed this concept, stating, “There must be some bounds within which the right to retort upon one's adversary should be prescribed, or else there would be no sacredness to character.” *Hines v Shumaker*, 52 So 705, 708 (Miss 1910).

#### **Mr. Green and Drs. Eagle and Aaronson Did Not Meet Burden To Show Privilege.**

The burden of proof falls on a defendant alleged to have uttered defamatory speech to plead and prove facts sufficient to establish the existence of a qualified privilege to defame. If Green had timely amended the complaint against Eagle and Aaronson alleging they defamed Dr. Nicklas, he would have cast upon them the burden of coming forward with proof, and persuading a court, of the existence of a qualified privilege and that their speech did not **abuse** or exceed the scope of privilege.

Mr. Green in this suit must step in their shoes. That is to say, it is Attorney Green's burden to raise and prove with facts the existence of privilege (as it was Eagle's and Aaronson's burden.) It means Green had to depose Eagle and Aaronson in this suit to find facts showing existence of a privilege - and in failing to gather those facts, Green is forced to accept he has not shown privilege.

Defendant Green has the burden to show that statements were qualifiedly privileged when made which he previously claimed, in an amended complaint, were defamatory and not subject to privilege. Dr. Eagle and Dr. Aaronson defamed John Nicklas, M.D., according to Green's amended complaint. The Defendants (Eagle and Aaronson) in the underlying suit would have had the burden of proof to establish existence of a privileged occasion for the allegedly defamatory statements. *Lawrence v Fox*, 357 Mich 134, 141; 97 NW2d 719 (1959). The Court has not identified how Attorney Green or Defendants Eagle and Aaronson met their burden. The analysis is important. The facts and applicable law, as shown below, suggest they cannot do so.

Facts supporting qualified privilege claims must be plead and proven by the Defendant in their Answer who have defamed a plaintiff and seek immunity for injurious speech. *Rouch v. Enquirer & News of Battle Creek*, 427 Mich 157, 222; 393 NW2d 245, 275 (1986). Despite settled \*31 law allocating the burden to the defendant to plead and prove qualified privilege, the Court did not analyze whether the defendant failed to meet its burden from that perspective. The Court allocated a burden to the Plaintiff. This was an error. Proofs must be reconsidered under a proper standard.

Defendant Phil Green had to show Defendants in the underlying case could give sufficient facts in an Affirmative Defense claiming qualified privilege to prevail. The common law imposed a duty on one claiming a qualified privilege to defame that special facts must be plead to raise a qualified privilege defense to defamation. *Kenney v. Hatfield*, 351 Mich 498,514-15; 88 NW 2d 535 (1958) (duty to plead special facts in Answer to raise qualified privilege), 33 Am Jur, *Libel and Slander*, Sec. 248. Neither Attorney Green in his Motion for Summary Disposition, or the Court, showed such facts were plead here to show Defendants in the underlying had or could plead them.

### **The Proofs of “Malice” Are Sufficient to Overcome Any Claim of Privilege.**

The Trial Court's decision dismissing the case evinces no adequate consideration of specific facts showing Eagle and Aaronson said defamatory statements with malice (intent to injure Nicklas).

It is settled privilege law that a private party defamation plaintiff may overcome the qualified privilege by showing that the statement was made with actual malice, i.e., with knowledge of its falsity or reckless disregard of the truth. *Prysak v R L Polk Co*, 193 Mich App 1, 15; 483 NW2d 629 (1992). The Court ignores Plaintiff met his burden and overcame a qualified privilege claim. He did so by offering proof of statements made not in good faith and with an intent to injure. This proof meets the definition of “common law malice” and any qualified privilege that may attach to the communications has been lost. The statements were made by Drs. Eagle and Aaronson outside peer review of patient care issues *and* outside of consideration of how the CHF program should be run. The critical factor is that Dr. Nicklas was *not* told what was being said about him. The comments were made behind his back to Dr. Nabel and others with an intent to influence Dr. Nicklas' professional success - but without giving Nicklas any chance to respond. This evinces an intent by \*31 Dr. Eagle and Aaronson to injure and a goal of achieving his removal as head of the CHF program. and without addressing alleged mistreatment of patients.

When alleged defamatory statements are made outside the context for which privilege is created, courts have held that the qualified privileged is not applicable to them. In many cases, Michigan Courts have refused to extend an absolute privilege “beyond the necessities of the judicial, legislative or military occasions,” *Timmis v. Bennett*, 352 Mich 355 (1958), *citing Mundy v. Hoard*, 216 Mich 478; *Bolton v. Walker*, 197 Mich 699; *Trebilcock v. Anderson*, 117 Mich 39; *Wachsmuth v. Merchants' National Bank*, 96 Mich 426.”

In assessing the proofs, the court must examine external circumstances surrounding publication to decide if they give rise to a privileged communication. *Lawrence v Fox*, 357 Mich 134, 139-140; 97 NW2d 719 (1959). If facts are not plead, or do not

suffice, to show all five elements of privilege, the defense is lost. However, if facts are in dispute, the court must decide, based on facts found by a jury, whether the statement is privileged, or the court can instruct jurors on facts to be found to hold the statement privileged. *Id.* at 141.

### **Court Should Find Existence of Qualified Privilege Is Issue for Jury To Decide.**

The Trial Court should have considered the facts showing there is a genuine issue of fact whether the statements were said with malice to forfeit privilege as a matter of law. Ultimately, the case may not be dismissed given the proofs. Jurors must decide existence of qualified privilege and, if it exists, whether it was forfeited.

The Michigan Supreme Court held that whether an occasion gives rise to privilege and rebuts the inference of malice is a question for the Court, as a matter of law. But the question of “bona fides” or malice of speaker, in making allegedly privileged statements is for jurors to decide. *Weeren v. Evening News Assoc.*, 379 Mich 475, 510; 152 NW2d 676,689 (1967) ([t]he question whether the occasion is such as to rebut the inference of malice if the communication is treated as being bona fide and is one of law for the court; but whether bona fides exist is one of fact for the jury.); *Timmis v. Bennett*, 352 Mich 355, 367, and *Bacon v. Michigan Central R. Company*, 66 Mich 166, 173.

In *Smuck v. Terlecky*, 235 Mich. 568, 209 N.W. 814 (1926), the Supreme Court held that proof of “reckless disregard” of truth, or malice, or bad faith, will cause a privilege, that might attach to defamatory statement to be lost, even if the statements are made to a group, to address matters of common interest, where the speaker has a duty to report, and where the reporting is made in a manner carefully limited to fall within the narrow parameters where the law recognizes privilege.

The black letter of the law of this holding is that this privilege is qualified, not absolute. On defendants' own theory, the words of Drs. Eagle and Aaronson were not absolutely privileged. At most, they were subject to qualified privilege and so the communication was not made in good faith but was made with an intent to injure - and not to improve patient care. As stated by Aaronson, he wanted his “piece of the kingdom” to be taken from Nicklas' CHF program. Eagle repeated Aaronson's accusations of poor patient care knowing they were false, behind Nicklas' back, in a covert effort to cause Nicklas removal as director of the program Nicklas had created. Though the subject matter of the speech purports to seek to improve patient care, it substance betrays its message. It was a subterfuge. Dr. Nicklas was merely shifted into clinical practice but denied is role as director of the CHF program. No patient good was served. The true purpose of the speech was to injure Dr. Nicklas, remove him and to take his program. The speech had its intended effect - i.e. showing it was defamatory per se that caused injury and is non-privileged. When a statement is made maliciously or in bad faith or outside the purposes for which a qualified privilege is created, then the Court may deny a speaker protection from defamation liability offered by the qualified privilege doctrine. See *Raymond v. Croll*, 233 Mich. 268 and *Smuck v. Terlecky*, supra, 235 Mich. at 570.

Michigan Courts have repeatedly found the question of whether defamatory statements were made with “actual malice” to be an issue of fact for jurors. The Supreme Court said as much in \*34 Rouch: In *Arber v Stahlin*, 382 Mich 300; 170 NW2d 45 (1969), we held that the existence of “actual malice,” defined as knowledge of falsity or reckless disregard of the truth, is a question of fact.” *Rouch v. Enquirer & News of Battle Creek*, 427 Mich 157, 197; 393 NW2d 245, 263 (1986).

### **III. LEGAL ARGUMENT III: ATTORNEY PHIL GREEN FAILED TO TIMELY SUE TWO DEFENDANTS WHO DEFAMED HIS CLIENT, DR. NICKLAS, AND HE THEREBY COMMITTED MALPRACTICE PER SE WITH A VALID REASON.**

**Standard of Review.** A MCR 2.116 ( C ) (10) motion views all the proofs in the light most favorable to the Plaintiff to see if genuine issues of material fact exist. *Maiden v. Rozwood*, 461 Mich 109, 119. Existence of legal duty is a question of law. *Simko v Blake*, 448 Mich 648, 655-658; 532 NW2d 842 (1995).

Green did not timely send a retraction demand. He did not timely sue Eagle or Aaronson for their wrongful speech and conduct in 1997-1999. Green waited to initiate suit against Eagle until 2001 (too late). Errors of legal analysis blew it.<sup>32</sup> Failure to timely bring a valid claim is malpractice.

Phil Green was retained by Dr. John Nicklas to file a lawsuit against Dr. Kim Eagle and Dr. Keith Aaronson. Green was retained, within the applicable statutes of limitations for defamation, tortious interference and injurious falsehood, Green convinced himself that he had found a loophole in the statutes of limitations; he imagine that he could name Eagle and Aaronson as John Doe and Richard Roe and thereby toll the statutes. He then contrived a strategy of suing witnesses to the defamatory attacks intending to provoke damning testimony against the two tort-feasors. But naming Doe and Roe Defendants does not toll the statute of limitations as he had mis-perceived and it was likewise a misrepresentation to the Court because Green in fact knew who they were. In addition, suing witnesses for the sole purpose of eliciting testimony violates [MCR 2.114](#).

Convinced that he had found a hidden loophole in the statute of limitations, Green procrastinated for nearly two years in seeking to amend and properly name the true targets of the \*35 case. For months prior to filing a second amended complaint, Green promised his client he would sue Eagle and Aaronson. When he finally filed a second motion to amend, he learned of his mistake (i.e. that claims against Koelling, Eagle and Aaronson for defamatory statements and tortious conduct in 1997-1999 were now time barred.) These were the claims he was retained to pursue. Now all the key proofs of defamation and tortious conduct would be excluded from his case against Eagle and Koelling - and no claims or proofs could be offered against Aaronson - due to pleading the claims too late. Instead of admitting his mistake, Green developed an elaborate ruse, recasting defamatory statements made by Aaronson, and repeated by Eagle, into statements that Green alleged Koelling made. Under Green's new approach, the tortious conduct and defamatory statements made by Eagle and Aaronson were not statements of Koelling. His approach did not fit the facts.

Green lied to Dr. Nicklas, misrepresenting that the law had changed [and previously allowed Eagle and Aaronson to be sued as "Doe" and "Roe," thereby tolling the statute of limitations. This was untrue. The law did not allow such a pleading or toll the statute of limitations as to "Doe" and "Roe" defendants known to Attorney Green when he filed suit.

Attorney Green promised Nicklas the remaining claims had merit. Green conceded that Nicklas has a cause of action for legal malpractice if he knew of Eagle's and Aaronson's defamation (which he did) and if did not seek a retraction or timely file suit (which he admits he did not do).<sup>33</sup> Green said "if I had timely notice of a viable claim and failed to plead it and allowed the statute to run, that certainly would be a cause of action [of legal malpractice against me]."<sup>34</sup> By this admission, Green conceded, if undisputed facts are true (he knew of the defamatory statements by Eagle and Aaronson and did not timely file suit) then a cause of action for legal malpractice would exist.

Green persists in denying knowledge of it. Green said he was *never* concerned Nicklas might have a legal malpractice action against him *and* he did not notify his insurance carrier *even after* his \*36 amended complaint was denied in 2001 since it was filed late.<sup>35</sup> Green admitted at his deposition a retraction letter should be sent "to minimize damage" before filing a defamation suit within one year of the defamatory statements.<sup>36</sup> By not sending a retraction letter or timely suing, Green did not preserve Nicklas' defamation claims. This obvious mistake led to forfeiture of provable and valuable claims of defamation and intentional interference against Eagle and Aaronson.

**Expert Opined Attorney Green Breached of Clear Duty To Timely Sue Eagle and Aaronson for Intentional Interference And Timely Filing Suit Is Not A Judgment Call**

Dr. Nicklas offered an expert opinion about Attorney Phil Green's breach of his duties of care. Attorney Pat McLain has practiced since 1975 - for 35 years - in areas of libel defense, business tort litigation, and legal malpractice defense, and other areas of complex civil litigation. He reviewed Attorney Green's work and said it fell below a threshold of minimum competence.

(Affidavit of Pat McLain, 4-7-10, p.4, para. 6.) As set forth below, the breaches of duty were on the most fundamental aspects of the civil litigation process.

**First**, Mr. Green did not send a demand for a retraction, thereby waiving his client's statutory and common law rights to seek monetary compensation for harm to his reputation resulting from the defamation he alleged. To seek a retraction before filing suit alleging defamation is the first step in any defamation suit. All the treatises on defamation emphasize the necessity of sending the letter to seek damages in suit. They cover this in the first chapter. All short ICLE style articles on defamation mention this fact. Attorney McLain said Mr. Green's failure to send a retraction letter denied Dr. Nicklas' a right to see exemplary damages and denied his ability to obtain relief without filing suit.<sup>37</sup>

\*<sup>37</sup> Attorney McLain explains further Mr. Green offered to represent Dr. Nicklas on a contingency.<sup>38</sup> This meant Mr. Green could be paid only from a monetary settlement or relief granted on non-defamation claims. And yet, "Dr. Nicklas' priority wasn't monetary enrichment, [but rather] it was protection of his professional statute and reputation." Failure to demand a retraction waived Dr. Nicklas' ability to realize his goals. Specifically, it denied him an ability to obtain disclosure of the content of defamatory statements and a retraction of them. It thereby prevented him from restoring his prior good general reputation among his colleagues at the hospital without litigation.

**Second**, after Mr. Green made it impossible for his client to collect any damages for defamation, he proceeded to file suit and to prolong the litigation on many fronts for seven years. This is as close to the opposite of what Dr. Nicklas was seeking, or needed, as one can imagine. Even more troubling, when Attorney Green did file suit, however, he sued two defendants (Dr. Eagle and Dr. Aaronson) who had defamed him as "Doe" and "Roe." Green did not give a legally valid reason to use this archaic legal way of pleading *since* he admits he knew their identity!<sup>39</sup> Attorney Pat McLain concluded the pleading was a "fraud on the court,"<sup>40</sup> and said "a lawyer may not legitimately use Doe/Roe designations for known defendants, only unknown defendants."<sup>41</sup>

Attorney McLain said why Mr. Green's failure to timely amend was a breach of duty just as serious as his failure to properly plead valid claims against the two key defendants in the first place:

\*<sup>38</sup> "Mr. Green was obligated to timely amend the Complaint to name Eagle and Aaronson in an action based on tortious interference or injurious falsehood. These torts, while not providing all the remedies that a timely defamation suit would have a more generous three year statute of limitations. Mr. Green did not amend to allege these torts against Aaronson at all. Against Eagle he amended on February 26, 2002, so all evidence against Eagle arising from conduct prior to February 26, 1999 was excluded by the court as time-barred. This was the vast majority of the pertinent evidence against Eagle, and as a result the trial presentation was drastically limited. Aaronson was not sued at all: instead Mr. Green attempted, with predictable lack of success, to attribute Aaronson's misdeeds to the innocent Koeling."<sup>42</sup>

Instead of bringing suit about the defamation he could prove, Mr. Green filed suit against Elizabeth Nabel, M.D., Todd Koelling, M.D. and Dan Cutler. As Attorney McLain explained, Phil Green chose to sue these three defendants who uttered no defamation he could prove, while not suing the two defendants (Dr. Kim Eagle and Dr. Aaronson) who had defamed his client.

The three defendants that Mr. Green did choose to sue "were not only not liable to his client [but] suing them could be expected to worsen his client's plight." (Affidavit of Attorney McLain 4-7-10, p.5, paras. 9). The suit Mr. Green filed would predictably cause more harm to the client than good. Green should have figured this out.

Mr. Green named Elizabeth Nabel who was Dr. Nicklas' boss. She was dismissed from the suit since Attorney Green could not even allege she had uttered any defamatory speech. His only allegation was from Dr. Humes' testimony about Dr. Nabel refusing to meet Dr. Nicklas to discuss remarks that were made about him. The Trial Judge dismissed claims against Dr. Nabel. Mr. Green did not counsel Dr. Nicklas to appeal that ruling or suggest it was incorrect. Attorney Pat McLain gave additional

reasons why it should have been obvious to Attorney Green that it made no sense to sue Dr. Betsy Nabel In his affidavit, Attorney McLain explained his reason:

Dr. Nabel was Dr. Nicklas' boss, had just arrived at the University of Michigan shortly before the events at issue, had no axe to grind with Dr. Nicklas, and took action against him only because of the defamation of Eagle and Aaronson. Dr. Nabel figured to be \*39 and was a sympathy inspiring defendant, not a villain.<sup>43</sup>

Mr. Green should have seen suing Dr. Nabel would likely bring only further harm to Dr. Nicklas.

Mr. Green sued Dan Cutler as well. The Trial Judge dismissed claims against Mr. Cutler. The claim of alleged defamation by Mr. Cutler was more frivolous than the allegation made by Mr. Green against Dr. Nabel. He alleged that Mr. Cutler “did not respond to one of [Dr. Nicklas’]

emails.” This is not actionable defamation. Any ordinary lawyer of minimal competence would know this. As Attorney Pat McLain explained in his Affidavit: “Dan Cutler was sued because, supposedly, he said plaintiff didn’t respond to one of his emails.” Mr. Cutler isn’t a physician and didn’t belong in the case.” (Affidavit of Attorney Pat McLain, 4-17-10, p.6, para. 9).

Mr. Green also sued Dr. Todd Koeling. He had been hired by the University to work at the hospital just days before suit was filed. The Trial Judge allowed claims against Dr. Koeling to proceed to trial. The jury found no merit in claims against Dr. Koeling. This was a predictable result.<sup>44</sup> As Attorney McLain explained in his affidavit, “Dr. Koeling was a new hire, at [the University of] Michigan for mere days when the complained-of action was taken against plaintiff by Dr. Nabel at the instigation of Eagle and Aaronson. He too was an innocent and sympathy inspiring defendant, not a villain.” (Affidavit of Attorney Pat McLain, 4-17-10, p.6, para. 9).

At one point, Attorney Green told Dr. Nicklas he did not sue defendants Eagle and Aaronson since he wished to give three other defendants an incentive to point fingers at those two (as the one who defamed Dr. Nicklas.) This is not a reason to sue the three defendants. Green never explains why those three individuals could not give that testimony as witnesses.

Attorney Pat McLain summed up why Mr. Green's pleadings breached his duty of care:

So instead of suing the right defendants, as a tactic Mr. Green knowingly sued the \*40 wrong defendants, predictably antagonizing his client's employer. He did this, he says, because he thought he could amend years later and identify Doe and Roe as Eagle and Aaronson, notwithstanding the statutes of limitation. In this believe, he was mistaken.<sup>45</sup>

### **Green Cannot Give a Professional Judgment Reason For Failing To Timely File Suit**

Mr. Green could point to no case law or court rule supporting this novel view that, by naming a Doe and Roe defendant he could toll the statute of limitations that applies to them. To say he thought naming Eagle as Doe and Aaronson as Roe preserved his right to “toll the statute of limitations” in regard to claims against them is an admission of breach of a duty.<sup>46</sup> Mr. Green did not investigate the law governing this aspect of his pleadings which is a breach of the duty of care.<sup>47</sup> A simple Lexis search would reveal Mr. Green's “belief” was doubly wrong - first, there is not a Defendant John Doe exception to the statute of limitations for any tort claim, and, second, the law never changed (it was always the same). Green should have known he had to name Eagle and Aaronson in the suit and sue them as to each relevant tort claim within the applicable time period set by the statute of limitations. A Court must have personal jurisdiction over a defendant to adjudicate the subject matter of any claims alleged against them.<sup>48</sup> By not suing, he waived claims.

If an attorney claims to have used professional judgment, but the proofs suggest that the claimed professional judgment is a pretext, and is not the truth, the jury may appropriate conclusions. The jury could evaluate Mr. Green's stated reason for filing suit against Nabel, Koelling and Cutler to conclude he filed suit for improper reasons against these defendants. Mr. Green said his objective was to get testimony from these defendants to prove defamation by Dr. Eagle and Dr. Aaronson. If this was his motive, he is admitting he sued these defendants for an ulterior motive, instead of trying \*41 to obtain relief against them on meritorious claims. This is an improper purpose. If this was Mr. Green's reason to sue Dr. Nabel, Dr. Koeling and Dan Cutler, then this reason no longer was valid once Green had blown his client's right to sue Eagle and Aaronson for their defamatory statements and tortious acts of interference in 1997-1999 (which he could prove). Mr. Green should have counseled Dr. Nicklas to drop the pending suit as soon as he realized he had lost the right to sue Dr. Eagle and Dr. Aaronson. Instead, he encouraged Dr. Nicklas to continue that suit. Unbelievably, even after jurors rendered a verdict at trial and found that Defendant Koelling had not made any of the statements Green had alleged he had made, Mr. Green's response was to ask the judge to set aside the verdict (as against the great weight of evidence) and grant a new trial so that Dr. Nicklas could suffer further harm from a second trial!<sup>49</sup> Mr. Green's Brief in Support of his New Trial Motion discusses the fact that the judge found statements by Koelling to be matters of opinion. (See Ex. 6, Brief in Support of New Trial Motion, p.5.) This rational view of Koelling's comments to Dr. Mathier also accounts for why jurors could conclude (a) Koelling made the statements, (b) but they were not statements of fact. Mr. Green's motion elides over this distinction. He does not say Koelling just gave his opinion to his old colleague from Massachusetts General Hospital. Jurors' rejection of the claim Koelling defamed Dr. Nicklas suggests the suit lacked merit when limited to a few innocuous statements.

Attorney McLain explains that, when Green discovered his mistake in 2002 in reading the response to his motion to amend his complaint, he had a duty to tell his client of his mistake.

According to Attorney McLain: "Mr. Green had a duty to disclose his mistake to his client and to recommend to the client that he seek independent advice regarding how to proceed."<sup>50</sup> \*42 Attorney Green chose not to report his error to his client, or suggest he get a second opinion, thereby causing Dr. Nicklas to suffer further harm. As Attorney McLain explained, Mr. Green had a reason to keep litigating to cover up his error, whereas "a disinterested lawyer consulted by Dr. Nicklas in 2002 might have counseled him to avoid a further confrontation with his employer." *Id.*

The option of abandoning the suit, to cut his losses, made sense since, due to Mr. Green's mistakes, "he [Dr. Nicklas] was in no position to present evidence necessary to prevail."<sup>51</sup> For example, a disinterested lawyer who candidly assessed prejudice caused by Green to Dr. Nicklas case might propose settlement. The options that Dr. Nicklas had to consider, given the fatal defects in his case as plead, was a monetary settlement or dismissal without payment of money.

A reason to accept this would be that a legal malpractice suit against Mr. Green afforded an alternative way to recover damages. In addition, nothing can be gained from a suit where the proper parties were not timely sued on all meritorious claims. But Mr. Green denied his client the advice that he should assess the case in light of the mistakes he had made and prejudice it caused.

Dr. Nicklas was harmed by the decision to go forward with a trial that could not be won. The fact Mr. Green did not tell him to seek outside counsel about the effect of mistakes caused this harm. Attorney McLain explains that the jury verdict gave an impression that statements by Eagle and Aaronson must have been true and this caused further harm to Nicklas' reputation: "Since Dr. Nicklas didn't realize his lawsuit was mortally wounded by his attorney's malpractice, he proceeded to trial and lost, which creates and understandable impression within the University of Michigan Health System that all things Eagle and Aaronson said about Dr. Nicklas in 1997 must therefore have been judged true by a court. That was not the legal import of the jury's verdict, but Dr. Nicklas suffered avoidable additional harm as a result of his lawyer's self-interested failure to disclose his own malpractice in 2002." (Affidavit of Attorney Pat McLain, 4-17-10, p.9, para. 17.)

The trial caused great strain on Dr. Nicklas' relationships with his colleagues at the hospital too.

**Third**, due to fatal defects in Mr. Green's defamation pleadings, he sought a remedy for his \*43 client (Dr. Nicklas) under the tort of intentional interference with a business expectancy. Yet, he brought the claim too late. He laid out the facts and his theory of liability in his amended complaint filed in 2002. Under the three year statute of limitations governing this intentional tort claim, the amended complaint was timely only back to 1999. That is, it was timely only as to a period after the tort had been committed.

In other words, Green filed this amended complaint against Dr. Eagle too late since the tortious actions had occurred more than three years before the date when he sought to add this claim. The Trial Judge ruled no facts could be offered to the jury, and no arguments made, about any prior tortious conduct. This made it impossible to bring to jurors' attention the tortious conduct committed by Dr. Eagle that caused a third party (Ms. Nabel and the University of Michigan) to interfere with his contractual relation (i.e. to cause the harm.)

In addition, no timely claim was ever filed alleging this tort against Dr. Aaronson - despite the ample evidence set forth by Mr. Green himself suggesting Dr. Aaronson played the key role in seeking to interfere with Dr. Nicklas' business expectancies (albeit along with Dr. Eagle.) Accordingly, as with the defective defamation, the necessary parties were never properly sued.

Attorney Green wrote notes, in his file, and sent correspondence to his client stating he would amend the complaint to add claims against Dr. Eagle and Dr. Aaronson back to 1997. In this paper trail, we see a confident Attorney Green promising to cure the defects in his pleadings. It is possible Attorney Green suffered a mis-impression on his ability to amend the pleading. If so (and to the extent that) his legal error caused his client to lose a cause of action, it is malpractice. It is malpractice per se since a lawyer has a duty to know how to timely plead a cause of action.

It is also possible Attorney Green procrastinated and waited too long without thinking. If he made the legal error due to procrastination, and failure to monitor his litigation files, then this too is malpractice. It is malpractice per se. Mr. Green discovered his error when the judge did not \*44 amendment to the complaint to sue Dr. Eagle or Dr. Aaronson for tortious acts in 1997-1999. It was Mr. Green's decision not to appeal this decision. He impliedly conceded the law was applied correctly by the Trial Judge in declining to let him sue and relate back long after the statute ran. He has essentially admitted his error.

It was at this point Attorney Green crossed a threshold. Up to this point, he had told his client he could sue the principal tortfeasors (Dr. Eagle and Dr. Aaronson) for their wrongdoing in 1997-199 that led to his removal as clinic director, and that sabotaged his job search. Having lost his clients' right to sue them for defamation or intentional interference with business expectancy, Attorney Green could have been candid with his client about the prospects of prevailing at trial. He could have told his client the remaining case excluded necessary parties and essential proofs. Instead, he chose to tell his client full relief was possible despite defects in the pleadings. It was not true.<sup>52</sup>

**IV. LEGAL ARGUMENT IV: THE TRIAL COURT ERRED TO APPLY “ATTORNEY JUDGMENT” RULE AS DEFENSE TO MALPRACTICE. MR. GREEN'S AMENDED COMPLAINT, AND WHAT HE TOLD HIS CLIENT, EQUITABLY ESTOPS AND BARS THIS JUDGMENT DEFENSE. THE FACTS SHOW NO EXERCISE OF JUDGMENT OCCURRED. IF THE DEFENSE CAN BE RAISED, GREEN'S JUDGMENT DEFENSE IS LEGALLY FRIVOLOUS SINCE HE HAD A DUTY TO TIMELY FILE TORT AND DEFAMATION CLAIMS AGAINST EAGLE AND AARONSON. FACTS REVEALED EXISTENCE A VALID CLAIM?**

*Standard of Review.* A MCR 2.116 (C) (10) motion views all the proofs in the light most favorable to the Plaintiff to see if genuine issues of material fact exist. *Maiden v. Rozwood*, 461 Mich 109, 119. Existence of legal duty is a question of law. *Simko v Blake*, 448 Mich 648, 655-658; 532 NW2d 842 (1995).

*No Ruling. No Analysis. Dismissal Ruling Contradicts Prior Rulings In Same Case.* Judge Swartz concluded, without analysis, Green used professional judgment to blow a statute and \*47 malpractice suit. *Simko, supra*. 660. Attorney Green cannot claim, sincerely and in good faith, that he exercised judgment to not sue Eagle and Aaronson for 1997 words and conduct.

To validate that claim we would have to subject to erasure the words he signed in the amended complaint.<sup>54</sup> Having filed the amended complaint and the motion to amend, Attorney Green is now equitably estopped from now asserting either that the facts or law do not support that claim.<sup>55</sup> To make that assertion suggests he filed a frivolous motion unsupported by facts in the amended complaint. It was Green's fraud on his client (Nicklas) to cause him to proceed to trial on claims that could not succeed (due to his pleading errors) that then subjected Nicklas to a known harm (further punishment by the University of Michigan for continuing to litigate).<sup>56</sup>

If no valid claim of attorney judgment applies, the sole question is whether there is a qualified privilege. As to that question, the Court should decide in favor of finding it is for jurors to decide since a proper analysis requires the jury to decide genuine issue of fact as to malice. The Trial Court incorrectly applied qualified privilege doctrine. This Court should remand for a jury trial on whether Attorney Green committed legal malpractice in failing to timely perfect a suit against Drs. \*44 Eagle and Aaronson for defamation per se.

**V. LEGAL ARGUMENT V: ATTORNEY GREEN BREACHED A DUTY WHEN HE FAILED TO INFORM HIS CLIENT HE HAD NOT PLEAD ALL VALID CLAIMS AGAINST ALL DEFENDANTS. GREEN BREACHED A DUTY TO DISCLOSE ERRORS AND SEEK TO HELP HIS CLIENT AVOID PREJUDICE THAT RESULTED FROM CONTINUING TO LITIGATE UNWINNABLE CLAIMS AGAINST DR EAGLE AND DR. KOELLING FOR POST-1999 CONDUCT. GREEN HAD A DUTY TO ADVISE HIS CLIENT TO SEEK INDEPENDENT ADVICE FROM A DISINTERESTED ATTORNEY ONCE HE LEARNED HIS ERRORS DENIED THE CLIENT A RIGHT TO SUE ON HIS PRINCIPAL TORT AND DEFAMATION CLAIMS. AT THAT POINT, IN 2001-2002, GREEN'S BREACH OF DUTY CAUSED HARM TO HIS CLIENT. HE SOUGHT TO GO TO TRIAL ON CLAIMS MADE UNWINNABLE BY HIS OWN ERRORS. THIS HARMED HIS CLIENT. THE TRIAL WAS AGAINST THE CLIENT'S COLLEAGUES AT THE HOSPITAL. THIS HARMED HIM IN HIS PROFESSION WITHOUT ANY BENEFIT TO THE CLIENT. GREEN WAS LITIGATING TO SET UP HIS PROFESSIONAL JUDGMENT DEFENSE AT HIS CLIENT'S EXPENSE. THIS BREACH A FIDUCIARY DUTY. THE CLIENT LOST A CHANCE TO SETTLE.**

*Standard of Review.* De novo. A [MCR 2.116 \( C \) \(10\)](#) motion views all the proofs in the light most favorable to the Plaintiff to see if genuine issues of material fact exist. *Maiden v. Rozwood*, 461 Mich 109, 119. Existence of legal duty is a question of law. *Simko v Blake*, 448 Mich. 648.

“A legal malpractice claim can be based on a law firm favoring its interests or the interests of another [and] the wrong is favoring the law firm's interests over the interests of another [and] [t]hus, the analytical approach is [the same as] for conflicts of interest.” Ronald E. Mallen, *Jeffrey M. Smith, Legal Malpractice* (2009 Edition) (West), Sec. 16:3, p.832, Sec. 16:10, p.905. (Lawyer's personal interest in avoiding malpractice suit by client for error in litigation may require lawyer to advise client of error and conflict and need to obtain independent counsel to finish litigation).

Green had a duty to fully disclose both his conflict and his mistakes. An attorney's duty to report his own acts that may amount to legal malpractice is well settled. See gen., Article: [The Lawyer's Duty to Inform his Client of his Own Malpractice](#), 61 *Baylor L. Rev.* 174 (Winter 2009). “Disclosure is required despite the sophistication of the client,” Mallen & Smith, *Legal Malpractice* (West 2009).

A client must decide how to proceed if his attorney's errors makes recovery impossible. One option is to sue one's lawyer (who forfeited the right to relief) instead of continuing to litigate the \*999 underlying case against a defendant that has been so hobbled it cannot succeed. Why litigate this?

Green admitted he thought the University of Michigan was punishing Dr. Nicklas for having filed the lawsuit.<sup>58</sup> This means he knew a trial posed grave professional risks for his client. Without disclosing the mortal harm Green had done, by his error, to Nicklas's cause of action, Green could not help Nicklas assess whether to go to trial, putting a career further at risk, or settle to avoid harm. Green was materially limited in his ability to provide quality representation or this advice. "The consequence of the conflict of interests [e.g. where the lawyer represents a client's interests as well as his own when they are 'directly adverse.'] is that the lawyer may not provide truly independent, objective advice concerning the effects of the conflict." Mallen & Smith, *Legal Malpractice* (West 2009), Sec. 17:14, p.974, note 38, citing *CenTra, Inc. v. Estrin*, 2008 WL 3540081 (6th Cir. 2008).<sup>59</sup> In the *CenTra, Inc.* case, the bridge builder client supplied an expert attorney affidavit stating that "I simply do not see how a law firm can offer sound professional services simultaneously to a client it is helping to build a bridge and to a client it helping to block or delay construction of a bridge. This is not even a close question."<sup>60</sup> The Sixth Circuit agreed with the expert, ruling "there was an issue of fact of whether the conflict was consentable and whether the consent given was informed." *Id.*

The same ruling is required here. Dr. Nicklas supplied Judge David Swartz with an affidavit of a disinterested lawyer who expressed an opinion on the same conflict of interest issue raised in *CenTra, Inc.* This disinterested lawyer (Attorney Pat McLain) expressed an the same view in identical terms, using almost the same language. Judge Swartz ignored the issue and the conflict and the expert. This case must be remanded to Judge Swartz for a jury to decide Green's negligence on \*999 this independent theory of breach of duty by him causing a separate type of damages. Courts recognize an attorney's failure to report his malpractice is an independent tort if the client suffers tangible harm as litigation continues due to the lawyer's failure to advise his client of errors and mitigate the harm they caused. This claim was well plead, supported by ample proofs and by an expert attorney affidavit. Judge Swartz never decided this claim. This Court should remand so that the malpractice suit can proceed to trial on this independent malpractice claim founded on breach of the duty to advise the client, breach of fiduciary duty and conflict of interest. A jury can find Green liable under this theory.<sup>61</sup>

**REQUEST FOR RELIEF:** Plaintiffs asks for an order granting the same relief as was granted in *CenTra, Inc.*, supra, and *Dadd*, supra, vacating the wrongful grant of dismissal of tortious interference claims and defamation claims since elements of the interference tort were shown, and defamation per se was shown, and existence of any qualified privilege is a question for the jury. Plaintiff asks for a remand order stating a genuine issue of fact exists for the jury on Green's negligence on the various claims of breach of duty and no professional judgment immunity applies.

#### Footnotes

- 1 \*Actually, the Trial Judge did not answer this question, *except* to find the allegedly defamatory statements were privileged and then to find there was no valid defamation claim or intentional tort claim, thereby making any errors to not raise the claims non-negligent.
- 1 The Statement of Facts relies on and closely follows Plaintiffs Response to Green's Motion for Summary Disposition, and the 33 exhibits filed with the Response, as well as on the Plaintiffs Motion for Rehearing, and exhibits filed with that, and Dr. Nicklas's Supplemental Affidavit, and exhibits filed with it, as well as on the relevant pleadings *and* the Trial Transcript in the case that went to trial against Dr. Todd Koeling and Dr. Kim Eagle before Judge Swartz. (See Index of Exhibits in Support of Appellant's Brief on Appeal). It also relies on Depositions of Phil Green, John Nicklas, Kim Eagle and Keith Aaronson taken prior to that trial.
- 2 (See Plaintiffs Response to Green's Summary Disposition Motion and Exhibits; Plaintiffs Motion for Rehearing and Exhibits, Depositions of Eagle, Aaronson, Koelling, Nicklas, Humes and Green and Exhibits to Depositions, Trial Transcript, Nicklas Supplemental Affidavit and Exhibits.)
- 3 *Id.*
- 4 *Id.*
- 5 (Ex. 17 to Plaintiffs Response," Aaronson: Aug 1997 Notes for Meeting w/Dr. Nabel).
- 6 This was the evidence of malice; an added element of defamation.
- 7 This was the evidence of publication which the defense here says was lacking.
- 8 Dr. Nabel was then Chair of the Department of Cardiology, and later was a prominent appointee to the National Institute of Health and influential in approving research grants.

- 9 Koelling was a recent hire and a neighbor to Nicklas. He had only been at U of M for nine days when Nicklas was removed as Director of the CHF Program.
- 10 Dan Cutler was videographer employed by U of M to assist in making educational videos.
- 11 (See depositions taken in early 1999 of Dr. Eagle and Dr. Aaronson.)
- 12 (Ex. 6, Letter from Philip Green to John Nicklas (dated 9-27-2000), Exhibit 6 in support of Plaintiff's Response to Summary Disposition.)
- 13 Id.
- 14 In his letter to John Ronayne, Esq., Mr. Green said: "Lastly, I am filing the Amended Complaint...I assume you will stipulate to the filing of this pleading in light of our conversations with Joanne Barron. If not, let me know so I can motion it up. Other than naming John Doe and Richard Roe, and inserting their identities in appropriate places, paragraph 15 contains a slight, but substantive, change." Ex. 6 filed in support of Plaintiff's Response to Summary Disposition.
- 15 See MCR 2.118(D) "Relation Back of Amendments". See also *Amer v. Clarence A. Durbin Associates, Inc.*, 87 Mich. App. 62; 273 N.W.2d 588 (1978)
- 16 See Ex. 3, Plaintiff's First Amended Complaint, Count I, Defamation (as to Dr. Koelling), p. 4-5, paras. 14-19. See Trial Transcript, Special Jury Verdict, last page, last day.
- 17 Tr., Hearing on Motion for Summary Disposition, p.3, In. 20-15 (4-28-10).
- 18 *Id.*, p.18, In. 8-20.
- 19 *Id.*, citing *Peter Bill & Associates, Inc. vs. Mich. Dept. Of Nat. Res.*, 93 Mich App 724, 287 NW2d 334, 338 (1979); *Northern Plumbing & Heating, Inc. V. Henderson Bros., Inc.*, 83 Mich app 84, 93, 268 NW2d 296 (1978); *Joba Constr. Co. V. Bums & Roe, Inc.*, 121 Mich app 615, 329 NW2d 760, 770 (1982); *Safie Enterprises, Inc. v. Nationwide Mut. Fire Ins. Co.*, 146 Mich App. 483, 381 NW2d 747, 753 (1985).
- 20 The Court in *Cendroni Associates* said proofs of tortious interference were sufficient for reasons that apply equally well to the facts of this case:
- We further reject the trial court's determination that, as a matter of law, plaintiff failed to show that defendant did anything improper. Plaintiff submitted evidence sufficient to create a factual dispute with respect to whether defendant's conduct was intentional and improper, motivated by malice and not legitimate business reasons. On this issue, we emphasize that the exercise of professional business judgment in making recommendations relative to government contracts and projects must be afforded some level of protection and deference. But we will not preclude litigation when there exists evidence suggesting that the ostensible exercise of professional business judgment is in reality a disguised or veiled attempt to intentionally and improperly interfere with the contractual or expectant business relationships of others. *Cendroni Associates, Inc.*, Mich COA No. 287024, supra, slip op at pp.2-3.
- 21 *Id.*, reversing *Dadd v. Mount Hope Church*, Mich COA No. 278861, 2009 Mich. App. LEXIS 761 (Mich. Ct. App., Apr. 9, 2009) (reinstating jury verdict awarding damages to Plaintiff for harm to her reputation caused by non-privileged defamation per se uttered with malice and to seek improper purpose outside of any privileged occasion), Eaton CC: 05-000878-NO.
- 22 *Peisner v. Detroit Free Press*, 104 Mich. App. 59; 304 N.W.2d 814, (1981) ("Exemplary and punitive damages shall not be recovered in actions for libel unless the plaintiff, before instituting his action, gives notice to the defendant to publish a retraction....before instituting suit [and before the one year statute of limitations period has run].")
- 23 If the statement itself, standing alone, is plainly libelous, or manifestly wanting in any defamatory meaning, it is the duty of the court to so declare either way, and instruct the jury accordingly. *Action Auto Glass v. Auto Glass Specialists*, 2001 U.S. Dist. LEXIS 22127 (2001)(Mich WD), citing *Bourreseau v. Detroit Evening Journal*, 63 Mich. 425, 30 N.W. 376 (1886).
- 24 In *Heritage Optical*, after leaving his employment with Heritage, an eye doctor phoned Heritage's clients to persuade them to end their relationship with that company. 137 Mich. App. 793 at 795, 359 N.W.2d at 211 (1984). Heritage alleged that the doctor had told clients that the company had moved, or was closed or out of business and unable to render services. *Id.* at 795. The Michigan Court of Appeals held that the statements were sufficient to form the basis of a cause of action for *slander per se*. *Id.* at 798. A similar result was reached in *Michigan Microtech, Inc. v. Federated Publications, Inc.*, 187 Mich. App. 178, 466 N.W.2d 717 (1991). See also *Van Lonkhuyzen v. Daily News Co.*, 195 Mich. 283, 161 N.W. 979 (1917) (statement in newspaper accusing minister who was critical of feelings toward war in Europe was "an interloper, a meddler, and a spreader of distrust, discontent and sedition" held libelous per se); *Smith v. Hubbell*, 142 Mich. 637, 106 N.W. 547 (1906) (statement by newspaper owner that village attorney was a pettifogger and incompetent and charging him with dishonesty and perjury held libelous per se); *Smedley v. Soule*, 125 Mich. 192, 84 N.W. 63 (1900) (statement by members of common council that attorney's bill was fraudulent and implying that a portion was being returned to mayor's pocket in the form of graft held libelous per se); *Mains v. Whiting*, 87 Mich. 172, 49 N.W. 559 (1891) (witness's statement in court that defense attorney was "the dirty sewer through which all the slums of this embezzlement have flowed" held actionable per se); *Kinun v. Steketee*, 48 Mich. 322, 12 N.W. 177 (1882) (foreign language newspaper article charging that druggist produced counterfeit Haarlem oil in counterfeit wrappers held libelous); *Atkinson v. Detroit Free Press Co.*, 46 Mich. 341, 9 N.W.

- 501 (1881) (attorney charged with giving dishonest and unprofessional advice, making false statements, misconduct and “extorting” excessive compensation).
- 25 Medicare imposes standards on hospitals, and their staff doctors, as a condition of the hospital's participation in federal reimbursement for services covered by Medicare. Miller, *Problems In Health Care Law*, *supra*, Sec. 5-5, p.66, note 144, citing federal statute (42 U.S.C. Sec. 1395x(e) [governing hospital participation in Medicare], and the federal regulations. The Medicare Fraud and Abuse Statute, 42 U.S.C. 1320a-7(b)(6)(B) (allowing program exclusion for anyone furnishing patient services “of a quality which fails to meet professionally recognized standards of health care”), 42 U.S.C. 1396a(a)(30)(A) (requiring a state plan for medical assistance to specify payment for service procedures sufficient “to assure that payments are consistent with ... quality of care”) and 42 C.F.R. 455.2 (defining “abuse” for the purpose of Medicaid exclusion as “provider practices that are inconsistent with sound ... medical practices, and result in an unnecessary cost to the Medicaid program, or in reimbursement for services ... that fail to meet professionally recognized standards for health care”).
- 26 So if Eagle and Aaronson had made their accusation in any formal way, the hospital would have had to investigate - and that would be privileged. “Courts generally understand that hospitals must take action against employees who fail to maintain necessary licenses and other requirements.” Miller *supra* Sec. 4-1, p.125.
- 27 See gen. Timothy Blanchard, “Medical Necessity” Determinations - A Continuing Health Care Problem,” 37 Health Care L. J. 599, note 90 (Fall 2004) (discussing fraud claims under federal law brought against cardiovascular surgeon for invasive cardiac procedures by two surgeons).
- 32 Most attorneys fail to meet an applicable statute of limitations do so by ignorance (i.e. failure to recognize the claim exists or to seek the proof until it is too late) *or* due to inadvertence. In Phil Green's case, he was neither ignorant of the facts or the law governing the tort claims - and he knew he would be suing Eagle and Aaronson. But he was ignorance of procedural law.
- 33 See Deposition of Phil Green p.123, In. 1-21 (10-28-09).
- 34 *Id.*, In. 15-18.
- 35 *Id.*, In. 1-10.
- 36 *Id.*, p.7, In. 1-25.
- 37 In his Affidavit, Attorney McLain wrote on 4-7-10, at p.4, paras. 7-8 that:  
*Para. 7.* Dr. Nicklas, a physician employed by the University of Michigan, retained Mr. Green and his firm in 1997 to investigate and if appropriate file an action for defamation against fellow faculty members Dr. Keith Aaronson and Dr. Kim Eagle.  
*Para. 8.* Although Mr. Green was provided evidence of libelous statements made by both Eagle and Aaronson in early March, 1998, Mr. Green did not demand a retraction prior to filing the lawsuit. Demanding a retraction is not only required as a pre-condition to the recovery of exemplary damages by the controlling statute, it would have provided Dr. Nicklas with a significant benefit. As is intended by the statute, had the real defendants received a demand for retraction in 1997 or early 1998, an investigation might have ensued leading to a negotiated solution short of litigation.
- 38 *Id.*, para. 8.
- 39 Attorney Phil Green's wrote, in his own handwriting, the names of Keith Aaronson and Kim Eagles on a sheet reflecting his discussions about this case. Their names are listed prominently at the top with Betsy Nabel's name. (Ex. 4). At the bottom appears to be a reference to removal of Dr. Nicklas as head of the CHF program, stating what seems to be “David Humes made decision” and “Keith and Kim were cause of it.”*Id.*)
- 40 See Affidavit of Pat McLain, 4-17-10, p.6, para. 9; p.7, paras. 10-11.
- 41 *Id.*, p. 7, para. 10.
- 42 See Affidavit of Attorney Pat McLain, 4-17-10, p.7, para. 13; and Ex. 4, Order Granting Rehearing (10-23-06) (allowing tortious interference claims against Eagle but only after 1999).
- 43 Affidavit of Attorney Pat McLain, 4-17-10, p.6, para. 9.
- 44 In response to Dr. Koelling's summary disposition motion, Mr. Green offered precious little to show defamatory statements or conduct amount to intentional interference by him. Ex. 2, Plaintiffs Supp. Brief Re: Koelling's Motion for Summary Disposition (4-25-03), pp. 1-6.
- 45 Affidavit of Attorney Pat McLain, 4-17-10, p.6, para. 9.
- 46 Affidavit of Attorney Pat McLain, 4-17-10, p.6, para. 10.
- 47 *Id.*
- 48 This rule governs all federal and state court proceeding. It is a requirement of the U.S. Constitution. If a defendant is not named in the suit before the statute of limitations has run, or is not timely served after the suit papers naming them are filed, the plaintiff cannot obtain a remedy against that defendant. This foundational principle of law is covered in the First Year Law Class in civil litigation as the first topic (in personam jurisdiction). Cite Civil Procedure textbooks.

- 49 Plaintiff's New Trial Motion, pp.1-4 (12-14-06), esp. p.2, para. 4 (stating Koelling admitted on witness stand making several of the statements he was accused of making), para 3, suggesting that "defense counsel conceded that some of the statements that Koelling had been charged with making were in fact made but were true").
- 50 Affidavit of Pat McLain, 4-17-10, page 8-9, paras. 14-18.
- 51 *Id.*, p.8-9, para. 17.
- 52 The truth is found in Mr. Green's prior pleadings and by the result of the trial. Mr. Green counseled his client to proceed to a trial. He gave this advice without qualification. It resulted in a trial causing harm to Dr. Nicklas' relationships with colleagues. When Mr. Green was confronted by his client about pleading mistakes, and about their impact on his chances of prevailing, he did not explain how his pleading errors had prejudiced any chance to win the suit.
- 54 A court may not be party to a ruling removing a pleading from a court file - i.e. a fraud. The U.S. Supreme Court, citing Michigan case law, *Faxton v. Faxton*, 28 Mich 159, explained in *Dickerson v. Colgrove*, 100 U.S. 578 (1879), that "equitable estoppel *in pais*" applies to one "who by his language or conduct leads another to do what he would not otherwise have done." Such person "shall not subject [the other] such person [who relied on their words and conduct] to [suffer] loss or injury by disappointing the expectations upon which he acted." *Id.* This doctrine "sternly forbids" such change of position, according to *Colgrove* and Michigan law.
- 55 "Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Lakeside Oakland Dev., L.C. v. H & J Beef Co.*, 249 Mich App 517, 527; 644 NW2d 765 (2002), quoting *Conagra, Inc. v. Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999).
- 56 Green's professional judgment defense itself creates an issue of fact on whether Green breached a fiduciary duty owed to Nicklas (See Legal Argument IV.) Green had no right, using his license to practice law, to cause his client to do that which he would not have done, subjecting him to loss and injury (from an unnecessary trial), and then taking a contrary position later (which suggests the winning claims should have been filed sooner or no cause should have been filed at all). Green's professional judgment was not valid to the extent it caused serious harm to his client's detriment.
- 58 Dep. Of Attorney Phil Green (10-28-09). p.125, In. 15-19.
- 59 In *Centra, Inc.*, the Sixth Circuit held that, under Michigan's version of Rule 1.7 ("MRPC 1.7"), a law firm could not represent CenTra, a client seeking to build a bridge from Windsor, Ontario to Detroit and concurrently represent Windsor, Ontario. "Michigan's version of Rule 1.7 provide[s] in the comment that a conflict is non-consentable "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances." *Id.*, citing and quoting MRPC 1.7.
- 60 *Id.*, p.971 quoting Sixth Circuit Opinion in *CenTra, Inc.* (which quoted the expert).
- 61 If the case is remanded, moreover, parties should be all owed to accept the case evaluation award within the days that are remaining (i.e. the full 28 day period to accept the award had not elapsed at the time Judge Swartz prematurely dismissed part of the case, without deciding all pending claim.)