

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT**

**CAROLE POWELL,  
Plaintiff,**

v.

**Case No. 13-135532-CZ  
Hon. James M. Alexander**

**KAREN KRONK, ET AL,  
Defendants.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendants’ Motion for Summary Disposition. This case stems from a dispute over the management of a non-profit corporation called K-9 Stray Rescue League. Plaintiff is the founder and former board member of K-9. Defendants are (or were at the time of the allegations in the pleadings) board members of K-9.

Essentially, Plaintiff claims that she created and grew K-9 into a “successful, well-respected organization” by contributing “significant portions of her time and hundreds of thousands of dollars.” To protect these investments, Plaintiff claims that K-9’s governing documents safeguarded her position as a board member, officer, and executive director.

Over time, however, Plaintiff claims that the Defendants used their positions to “mov[e] K-9 away from its original and stated mission.” Plaintiff claims that Defendants then “improperly and illegally removed [her] as a board member, officer and executive director.” This caused her to file the present Complaint on claims of: (1) Breach of Fiduciary Duty, (2) Defamation, (3) Intentional Infliction of Emotional Distress, (4) Fraudulent Misrepresentation, (5) Concert of Action, (6) Civil Conspiracy, and (7) a Declaratory Claim.

Defendants now move for summary disposition under MCR 2.116(C)(8) and (C)(10). A (C)(8) tests the legal sufficiency of the complaint. A motion under this subrule may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Wade v Dept of Corrections*, 439 Mich 158; 483 NW2d 26 (1992). And a motion under (C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

In their motion, Defendants argue that “[a]lthough she has pled a litany of claims, Plaintiff cannot meet her burden on any one of them.” This is so, Defendants argue, because “they acted in accordance with the bylaws in removing Plaintiff from the board of directors.”

### **1. Breach of Fiduciary Duty (Count I).**

Defendants first claim that Plaintiff's breach of fiduciary duty claim must be dismissed. Under the Nonprofit Corporations Act, “A director or an officer shall discharge the duties of that position in good faith and with the degree of diligence, care, and skill that an ordinarily prudent person would exercise under similar circumstances in a like position.” MCL 450.2541(1).

On this issue, Defendants argue that Plaintiff did not file this claim in the name of the corporation. As a result, Defendants argue that Plaintiff alleges this claim solely in her individual capacity. In other words, Plaintiff alleges that Defendants somehow owed a fiduciary duty **to her** (separately from the corporation), and Defendants breached that duty.

Plaintiff claims that this duty stems from K-9's Bylaws that provide:

The Executive Director – Carole Powell – will maintain a permanent seat on the Board of Directors until she deems it necessary to resign at which time she will appoint a new Executive Director who will maintain the same rights. (Article IV, paragraph C).

Plaintiff alleges that Defendants breached this provision by voting for her removal as a member of K-9. Defendants, however, cite to paragraph F, which provides:

Any Board member may voluntarily withdraw or may be suspended / expelled by a majority vote of the Board of Directors for violation of the Bylaws and/or Policies and Procedures or conduct deemed detrimental to the organization. (Article IV, paragraph F).

In any event, as Defendants point out, the duty that Plaintiff alleges breached was owed to the corporation – and not to Plaintiff individually. And Plaintiff concedes in her Response that “this claim may be difficult to fit into the context of the relationships in this matter.” The Court agrees. Plaintiff offers **no authority** that would permit this claim in these circumstances.

Michigan law is clear that, however, that “[a] party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim.” *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

For the foregoing reasons, the Court finds that there are no material facts in dispute and Defendants are entitled to judgment as a matter of law under (C)(10). Therefore, Defendants’ motion for summary disposition of Plaintiff’s Breach of Fiduciary Duty claim (Count I) is GRANTED, and said claim is DISMISSED.

## **2. Defamation (Count II)**

Defendants next allege that Plaintiff failed to state a valid defamation claim.

The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

In *Ireland v Edwards*, 230 Mich App 607; 584 NW2d 632 (1998), the Court of Appeals reasoned that, generally, “the determination of truth or falsity in defamation cases [is] a purely factual question which should generally be left to the jury.” *Id.* at 621-622, quoting *Locricchio v Evening News Ass’n*, 438 Mich 84, 137; 476 NW2d 112 (1991) (Cavanagh, J., concurring).

The *Ireland* Court, however, noted that “not all defamatory statements are actionable. If a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment.” *Ireland, supra* at 614, citing *Milkovich v Lorain Journal Co*, 497 US 1, 20; 110 S Ct 2695; 111 L Ed 2d 1 (1990); *Garvelink v Detroit News*, 206 Mich App 604, 608-609; 522 NW2d 883 (1994). In other words, “a statement must be ‘provable as false’ to be actionable.” *Ireland, supra* at 616, quoting *Milkovich, supra* at 17-20. In addition, “a court may decide as a matter of law whether a statement is actually capable of defamatory meaning. Where no such meaning is possible, summary disposition is appropriate.” *Ireland, supra* at 619, citing *Sawabini v Desenberg*, 143 Mich App 373, 379; 372 NW2d 559 (1985).

In her Response, Plaintiff identifies an April 2012 email from Defendant Karen Kronk and meeting minutes from a board meeting the same month as constituting a defamatory statement.<sup>1</sup> But said email and meeting preceded the August 2013 filing of the Complaint by approximately 16 months, and there is a one-year statutory limitations period on such a claim. MCL 600.5805(9). As a

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<sup>1</sup> The email reads, in full:

Carol is in disagreement with a board decision to evaluate dogs before bringing them to the kennel to help reduce the number of dogs with issues. She told us she wouldn't be picking up dogs any more in an extremely long e-mail that included some very nasty name calling. Now she is bad mouthing K9 to the animal control facilities she has an ear with – which really hurts K9 as a whole – not just me. She wants to get rid of the board completely and close K9 down, but she can't because it's incorporated and the property was deeded over to K9 years and years ago. She even said we should turn it into a boarding kennel and low cost spay-neuter clinic. She even commented to Mike that she wanted to close it down and put all the dogs to sleep. We are trying very hard to make improvements (you should see the place!) and keep it going in spite of the negative comments and anger towards us.

result, Plaintiff's defamation claim based on these alleged statements is untimely.

Assuming *arguendo* that use of these particular statements was not time-barred, the Court finds that no reasonable fact-finder could determine that the same rise to the level of defamation.

For the foregoing reasons, the Court finds that there are no material facts in dispute and Defendants are entitled to judgment as a matter of law. Therefore, Defendants' motion for summary disposition of Plaintiff's Defamation claim (Count II) is GRANTED, and said claim is DISMISSED.

### **3. Intentional Infliction of Emotional Distress (Count III)**

Defendants next claim that Plaintiff cannot prevail on her claim for intentional infliction of emotional distress. A claim for Intentional Infliction of Emotional Distress requires Plaintiff to allege and prove that Defendant engaged in intentional or reckless conduct that was extreme and outrageous and that caused Plaintiff to suffer severe emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985).

The threshold for showing extreme and outrageous conduct is high. No cause of action will necessarily lie even where a defendant acts with tortious or even criminal intent. Rather, liability is imposed only where "the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *VanVorous v Burmeister*, 262 Mich App 467, 481-482; 687 NW2d 132 (2004) quoting *Roberts, supra* at 602-603, and Restatement Torts, 2d, § 46, comment d pp 72-73.

Defendants argue that Plaintiffs have failed to allege any conduct that is extreme and outrageous. The Court agrees. Plaintiff only alleges that "Defendants illegally removed her, without her input. They took away one of the most important accomplishments in Plaintiff's life" and "began spreading lies and untruths about her to colleagues in the rescue community, volunteers at K-9 and

people outside the organization.” Plaintiff, however, fails to support these allegations with any evidence. And even if she could, her allegations simply do not rise to being “so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *VanVorous*, supra at 481-482.

For the foregoing reasons, the Court finds that there are no material facts in dispute and Defendants are entitled to judgment as a matter of law. Therefore, Defendants’ motion for summary disposition of Plaintiff’s Intentional Infliction of Emotional Distress claim (Count III) is GRANTED, and said claim is DISMISSED.

#### **4. Fraudulent Misrepresentation (Count IV)**

Defendants next argue that Plaintiff fails to state a claim for fraud. The Michigan Court of Appeals has held:

To establish a claim of fraudulent misrepresentation, plaintiff was required to prove that: (1) defendant made a material representation; (2) the representation was false; (3) defendant knew, or should have known, that the representation was false when making it; (4) defendant made the representation with the intent that plaintiff rely on it; (5) and plaintiff acted on the representation, incurring damages as a result. Plaintiff must also show that any reliance on defendant’s representations was reasonable. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005). *Hi-Way Motor Corp v Int’l Harvester Co*, 398 Mich. 330, 336; 247 N.W.2d 813 (1976), citing *Candler v Heigho*, 208 Mich. 115, 121; 175 N.W. 141 (1919).

Plaintiff alleges that the basis for her fraudulent misrepresentation claim is that she was not timely notified of an annuity gift from a K-9 supporter that had passed away. Defendants respond that this money was a gift to K-9 – not to Plaintiff, and Plaintiff admits learning about the gift in May 2012 – before it was received. And this annuity remains fully intact and benefiting K-9. Under these circumstances, the Court concludes that there is no factual basis for a fraudulent misrepresentation

claim. Plaintiff has failed to identify numerous elements of this cause of action.

For the foregoing reasons, the Court finds that there are no material facts in dispute and Defendants are entitled to judgment as a matter of law. Therefore, Defendants' motion for summary disposition of Plaintiff's Fraudulent Misrepresentation claim (Count IV) is GRANTED, and said claim is DISMISSED.

### **5. Concert of Action/Civil Conspiracy (Counts V & VI)**

Defendants next argue that a claim for civil conspiracy must be based on a separate actionable tort. Because Plaintiff identifies no **valid** underlying tort, Defendants argue that Plaintiff's civil conspiracy claims must also fail.

Indeed, Michigan law is well settled that "a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003); quoting *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

Because Defendants claim that all underlying tort claims are properly dismissed as a result of their motions for summary disposition, the civil conspiracy claim must also be dismissed.

### **6. Declaratory Relief (Count VII)**

Finally, Defendants argue that they are entitled to dismissal of Plaintiff's claim for declaratory relief. Plaintiff seeks a declaration that she was improperly removed from K-9 and Defendants actually violated K-9's Bylaws and should be removed as a result. On this claim, Defendants offer no reasoning beyond a mere conclusion that Plaintiff's claim fails as a matter of

law.

MCR 2.605(A)(1) provides: “In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.”

Plaintiff claims that Defendants violated K-9’s Bylaws when they removed her and seeks a declaration of the parties’ respective rights under said Bylaws. This appears to be a valid claim. Because Defendants fail to identify the legal basis for their summary request, the Court is left with no choice but to DENY their summary request on this claim.

**Summary**

To summarize, Defendants’ motion for summary disposition is GRANTED as to Plaintiff’s claims for: (Count I) Breach of Fiduciary Duty, (Count II) Defamation, (Count III) Intentional Infliction of Emotional Distress, (Count IV) Fraudulent Misrepresentation, (Count V) Concert of Action, and (Count VI) Civil Conspiracy, and said claims are DISMISSED.

Defendants’ motion for summary disposition of Plaintiff’s declaratory claim (Count VII), however, is DENIED.

**IT IS SO ORDERED.**

December 10, 2014  
Date

/s/ James M. Alexander  
Hon. James M. Alexander, Circuit Court Judge