

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

CASE NO.: 13-1682

RAAKESH BHAN, M.D.

Plaintiff / Appellant

v.

BATTLE CREEK HEALTH SYSTEM, ET AL.,

Defendants / Appellees.

A DIRECT APPEAL OF A CIVIL CASE FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN (SOUTHERN DIVISION (1))

APPELLANT'S INITIAL BRIEF

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DISCLOSURE OF CORPORATE AFFILIATIONS

AND FINANCIAL INTEREST FORM

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 13-1682

Case Name: Raakesh Bhan, M.D. v. Battle Creek Health System, et al.

Name of counsel: Michael M. Brownlee, Esq.

Pursuant to 6th Cir. R. 26.1, Dr. Raakesh Bhan, M.D., makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on August 19, 2013, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/ Michael M. Brownlee, Esq.

TABLE OF CONTENTS

DISCLOSURE OF CORPORATE AFFILIATIONS ii

AND FINANCIAL INTEREST FORM..... ii

TABLE OF CONTENTSiii

TABLE OF CITATIONS iv

STATEMENT REGARDING ORAL ARGUMENT..... 1

STATEMENT OF JURISDICTION..... 2

STATEMENT OF THE ISSUE 3

STATEMENT OF THE CASE AND FACTS 3

SUMMARY OF THE ARGUMENT 10

ARGUMENT AND CITATIONS OF AUTHORITY 11

I. THE DISTRICT COURT ERRED WHEN IT DISMISSED DR. BHAN’S CLAIMS FOR TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP (COUNTS 3, 5, and 6)..... 11

II. THE DISTRICT COURT ERRED WHEN IT DISMISSED DR. BHAN’S DEFAMATION CLAIM AGAINST THE BCHS DEFENDANTS (COUNT 10) AND WHOLLY FAILED TO ADJUDICATE THE DEFAMATION CLAIM AGAINST THE BORGESS DEFENDANTS (CLAIM 7)..... 19

III. THE DISTRICT COURT ERRED WHEN IT DISMISSED DR. BHAN’S CLAIMS FOR BREACH OF CONTRACT (CLAIMS 11-13)..... 22

CONCLUSION 25

CERTIFICATE OF SERVICE 27

TABLE OF CITATIONS

Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009).....10, 11

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).....*passim*

Lambert v. Hartman, 517 F.3d 433 (6th Cir. 2008)*passim*

Cedroni Ass'n, Inc. v. Tomblinson, Harburn Associates, Architects & Planners Inc., 492 Mich. 40, 45, 821 N.W.2d 1, 3 (2012) 12

CMI Int'l., Inc. v. Intermet Int'l. Corp., 251 Mich. App. 125, 131, 649 N.W.2d 808 (2002) 12, 13

Feldman v. Green, 138 Mich. App. 360, 378, 360 N.W.2d 881 (1984)..... 11

Prysak v. R L Polk Co., 193 Mich. App. 1, 12–13, 483 N.W.2d 629 (1992)..... 12

Badiee v. Brighton Area Sch., 265 Mich. App. 343, 367, 698 N.W. 2d 522, 539 (2005) 14

Universal Health Group v. Allstate Ins. Co., 2010 WL 2278 (E.D. Mich. 2010)...14

Tamayo v. Blagojevich, 526 F.3d 1074, 1082–83 (7th Cir.2008) 15

Ledl v. Quik Pik Food Stores, Inc., 133 Mich. App. 583, 589, 349 N.W. 2d 529, 532 (1984) 18

Hernden v. Consumers Power Co., 72 Mich. App. 349, 356, 1249 N.W. 2d 419, 422 (1976) 20

Other Authority

28 U.S.C. §1291 2

42 U.S.C. § 1985 2

42 U.S.C. § 12182 2

42 U.S.C. § 12101.....	2
42 U.S.C. § 794.....	2
FED. R. APP. P. 4(A)(1)(A).....	2
FED. R. CIV. P. 12(B)(6).....	<i>passim</i>

STATEMENT REGARDING ORAL ARGUMENT

Dr. Bhan believes the issues on appeal can be assessed on the briefs and does not request oral argument.

STATEMENT OF JURISDICTION

The district court had federal question jurisdiction over this case pursuant to 28 U.S.C. § 1331, because the complaint alleged claims under the following federal statutes: 42 U.S.C. § 1985, 42 U.S.C. § 12182, 42 U.S.C. § 12101, 42 U.S.C. § 794. R.E. 51; Page ID# 1413. The district court had supplemental jurisdiction over the remaining claims pursuant to 28 U.S.C. § 1367.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court granted the motions to dismiss on February 12, 2012. R.E. 64. It resolved the remaining claims in its summary judgment opinion (R.E. 138), issued April 24, 2013, and entered a final judgment concluding the case on the same day (R.E. 139). Twenty-eight days later, on May 22, 2013, Dr. Bhan timely filed his notice of appeal. R.E. 140. FED. R. APP. P. 4(A)(1)(A).

STATEMENT OF THE ISSUES

I. Whether the district court erred in dismissing Dr. Bhan's claims for tortious interference with business relationships (claims 3, 5, and 6)?

II. Whether the district court erred when it dismissed Dr. Bhan's claim for defamation against the Battle Creek Health System Defendants-Appellees (claim 10) and failed to adjudicate Dr. Bhan's defamation claim against the Borgess Defendants-Appellees (claim 7)?

III. Whether the district court erred in dismissing Dr. Bhan's breach of contract claims (claims 11-13)?

STATEMENT OF THE CASE AND FACTS

This case arises out of the suspension of Dr. Raakesh Bhan's medical staff privileges at two Michigan hospitals: Battle Creek Health System ("BCHS"), located in Calhoun County, and Borgess Medical Center ("Borgess"), located in Kalamazoo County. On February 26, 2010, Dr. Bhan filed suit against the hospitals, its parent companies, and various individuals who helped bring about the suspensions. R.E. 1, Page ID# 1-15. The Defendants-Appellees moved to dismiss the complaint in March of 2010. R.E. 14, Page ID# 343-45; R.E. 16, Page ID# 365-93; R.E. 19, Page ID# 401-29.

On April 9, 2010, Dr. Bhan filed an Amended Complaint. R.E. 22, Page ID# 438-59. The Defendants-Appellees renewed their motions to dismiss in April 2010, raising, among other defenses, Dr. Bhan's failure to exhaust his administrative remedies associated with the suspension of his hospital privileges. R.E. 25, Page ID# 792-809; R.E. 26, Page ID# 843-854. In August 2010, the district court entered an order staying the case pending administrative review of the decisions to curtail Dr. Bhan's medical staff privileges. R.E. 31, Page ID# 931-33. In June of 2011, after the conclusion of the administrative proceedings, the district court entered an order lifting the stay. R.E. 42, Page ID# 966.

The Defendants-Appellees again renewed their requests to dismiss the complaint. R.E. 43, Page ID# 967-97; R.E. 44, Page ID# 1001; R.E. 45, Page ID# 1006-19. In response, Dr. Bhan, with leave of court, filed a Second Amended complaint. R.E. 47. The Defendants named in the Second Amended Complaint were: BCHS and its parent company, Trinity Health Services ("Trinity"); Borgess and its parent company, Ascension Health; and six individuals who brought about the suspension of Dr. Bhan's privileges: Patrick Garrett (Vice President of Trinity and former CEO of BCHS), Jeffrey Mitchell (Former Chief Medical Officer of BCHS), Denise Brooks-Williams (CEO of BCHS), Paul Spaude (CEO of Borgess), Terry Baxter (Chief Medical Officer of Borgess), and Robert Brush (Chief Quality Officer of Borgess).

The Second Amended Complaint contained the following allegations: Dr. Bhan was a critical care doctor of Indian descent appointed to BCHS's medical staff in 1986, and appointed to Borgess's medical staff in 1991. R.E. 51; Page ID# 1414. He only served Calhoun and Kalamazoo counties, so staff privileges at BCHS and Borgess were essential to his practice. *Id.* In January 2007, Dr. Baxter and Mr. Brush told Dr. Bhan that Borgess was implementing a new policy in its critical care unit. *Id.* The new policy required any critical care practitioner at Borgess to respond to the bedside of an ICU patient within 5 minutes of paging (the "bedside policy"). *Id.*

Borgess knew Dr. Bhan could not comply with the bedside policy, which Dr. Bhan alleged was adopted in bad faith, for the specific purpose of disrupting his practice. R.E. 51; Page ID# 1415. In an effort to comply, Dr. Bhan tried to arrange an affiliation with the Kalamazoo Center for Medical Studies ("KCMS"), which would have given him access to interns and residents, and would have made compliance with the bedside policy feasible. *Id.* KCMS is partially owned and controlled by Borgess. *Id.* Dr. Baxter contacted KCMS and thwarted Dr. Bhan's attempt to affiliate with KCMS. *Id.*

Dr. Bhan also tried to comply with the bedside policy by coordinating with third party medical providers who could provide immediate coverage in the event Dr. Bhan was paged and could not arrive at the patient's side within five minutes.

R.E. 51; Page ID# 1416. However, Dr. Baxter and Mr. Brush interfered with Dr. Bhan's efforts by contacting the third party providers and forcing them to withdraw their coverage assistance. *Id.* Ultimately, Dr. Bhan began sleeping at Borgess to try to comply with the bedside policy. *Id.*

As a result of his efforts to comply with the bedside policy, Dr. Bhan suffered a stroke on February 27, 2007, and was disabled for six months. *Id.* Following this six month period, however, Dr. Bhan recovered from the stroke, such that he was able to resume his practice effectively. *Id.* Numerous independent medical examinations established that, while Dr. Bhan had some extremity disability as a result of the stroke, he was fully able to perform all the tasks associated with critical medical care. *Id.*

Nonetheless, when he returned to full-time practice after recovering from the stroke in late 2007, Borgess informed him his services were no longer needed. *Id.* During Dr. Bhan's six month absence, Borgess and BCHS implemented "closed" intensive care units, meaning that instead of hiring outside physicians to practice in the ICUs, the hospitals would employ their own physicians. *Id.* Therefore, since Borgess and BCHS were in direct financial competition with Dr. Bhan when he returned from his disability absence, they had a financial incentive not to use his services. *Id.*

As a result, Dr. Mitchell, Mr. Garrett, and Ms. Brooks-Williams requested

repeated testing and evaluations of Dr. Bhan even after numerous independent medical examinations established his ability to work effectively. *Id.* Dr. Bhan claimed that after he proved his disability in no way impacted his ability to practice medicine at BCHS, Dr. Mitchell and Mr. Garrett continued to harass him and threaten him with suspension. *Id.* at 1423. Dr. Mitchell and Mr. Garrett targeted Dr. Bhan because of his perceived disability and unlawfully suspended his rights at BCHS. *Id.*

Borgess and BCHS suspended Dr. Bhan's privileges following hearings conducted by each hospital's respective personnel. Dr. Bhan alleged that neither Borgess, nor BCHS, followed the protocol outlined in their bylaws in suspending him. For instance, Dr. Bhan alleged that Borgess, through Dr. Baxter and Mr. Brush, failed to properly review medical charts that were presented to various committees at Borgess tasked with deciding whether he would keep his staff privileges. R.E. 51; Page ID# 1418. He claimed that Dr. Baxter and Mr. Brush knew the information in the medical charts was false and that the committees' review of this medical information led to the suspension of his rights at Borgess. *Id.* He claimed the "Fair Hearings" were unfair and did not comport with due process. R.E. 51; Page # 1418-20. Dr. Bhan also alleged that at one point, the Borgess Medical Executive Committee recommended setting aside Dr. Bhan's suspension, but Dr. Baxter and Mr. Spaude prevailed in convincing the Committee

to continue the suspension. R.E. 51; Page #1421.

Dr. Bhan alleged that Dr. Baxter's actions were motivated by racial animus. R.E. 51; Page #1415, 1420, 1421. According to Dr. Bhan, Dr. Baxter had displayed outward hostility toward Dr. Bhan in the past that he did not display towards Caucasian personnel at Borgess. *Id.* at 1415. Dr. Bhan believed that he was targeted by Dr. Baxter for suspension of his rights at Borgess because of his race. *Id.* at 1420.

In addition, Dr. Baxter and Mr. Brush were motivated by the prospect of financial gain. Dr. Bhan alleged that Dr. Baxter's wife was a senior member of a medical practice that was a direct competitor of Dr. Bhan's practice. *Id.* at 1415. When the bedside policy was adopted, Mr. Brush was a member of the same competing practice and received a payout when he left the practice. *Id.* Thus, at the time the bedside policy was adopted, Dr. Bhan's business losses translated into financial gain for Dr. Baxter and Mr. Brush. *Id.* According to Dr. Bhan, Mr. Spaude supported the actions of Dr. Baxter and Mr. Brush, and contributed to the loss of Dr. Bhan's rights at Borgess. *Id.* at 1421.

The specific claims in the Second Amended Complaint were as follows:

Count 1 - Borgess, Baxter, Spaude, Brush, and Ascension Health discriminated against Dr. Bhan and violated Michigan's Elliott-Larsen Civil Rights Act, M.C.L. § 37.2302. R.E. 51; Page ID# 1417;

Count 2 - BCHS, Garrett, Mitchell, Brooks-Williams, and Trinity violated the American with Disabilities Act ("ADA"), 42 U.S.C. §

12101, *et seq.*;

Counts 3 - 6 - Baxter, Brush, Spaude, Borgess, Ascension Health, BCHS, Brooks-Williams, and Mitchell tortiously interfered with Dr. Bhan's advantageous business relationships with his patients and with the two hospitals;

Counts 7 and 10 - Baxter, Spaude, Borgess, Ascension Health, Brooks-Williams, Mitchell, Garrett, BCHS, and Trinity defamed Bhan;

Counts 8 - 9 - Brooks-Williams, Garrett, Mitchell, BCHS, Baxter, Brush, Spaude, Borgess, Trinity, and Ascension Health denied Bhan his due process rights in violation of 42 U.S.C. § 1985;

Counts 11 - 13 - Borgess, Ascension Health, BCHS and Trinity breached contracts with Dr. Bhan;

Count 14 - the Defendants-Appellees conspired to adversely affect Dr. Bhan's medical privileges; and

Counts 15-17 - BCHS and Borgess should be enjoined from enforcing the suspension of his medical privileges and credentials.

R.E. 51, Page ID# 1411-49.

Once again, the Defendants-Appellees filed motions to dismiss the Second Amended Complaint. R.E. 52, R.E. 53; R.E. 55. On February 14, 2012, the district court dismissed Dr. Bhan's claims against all parties, except Count 1 (violation of the Elliott-Larsen Civil Rights Act), Count 7 (defamation) against Ascension Health, Spaude, Baxter, and Brush, and Count 2 (violation of the ADA) against BCHS.

Thereafter Defendants-Appellees moved for summary judgment on the remaining claims. R.E. 107, 128, 111. The district court issued an opinion granting the motions for summary judgment on April 24, 2013. R.E. 138. The court entered an order granting judgment in favor of the Defendants-Appellees that same day. R.E. 139. On May 22, 2013, Dr. Bhan timely filed a notice of appeal. R.E. 140. This appeal follows.

SUMMARY OF THE ARGUMENT

The district court erred when it dismissed Claims 3, 5, and 6, because Dr. Bhan sufficiently pleaded causes of action for tortious interference with business relationships. In each tortious interference claim Dr. Bhan provided fair notice of his claim and the factual grounds upon which it rested. The court erred in dismissing these counts, in part, by applying a summary judgment standard to assess the claims, rather than determining whether the claims were sufficiently pleaded.

Dr. Bhan's defamation claim against the BCHS defendants (Claim 10) was improvidently denied for the same reason. Instead of assessing whether the claim was adequately pled, the court relied on two summary judgment cases when it dismissed the count.

This case must be remanded to the trial court for adjudication of Dr. Bhan defamation claim against the Borgess defendants (Claim 10). The Borgess

defendants did not move for dismissal of Claim 10, and the district court never addressed the claim in its summary judgment order.

Finally, Dr. Bhan's breach of contract claims (Claims 11-13) should have survived the 12(b)(6) motions filed by the Defendants-Appellees. The district court's rationale for dismissing each breach of contract claim was the same. It found that bylaws comprising the parties' contracts contained a broad release of liability. They did not. The release language the court seems to be referring to (it did not specify which language contained the release) does not confer the Defendants-Appellees immunity for all of Dr. Bhan's claims.

Dr. Bhan does not challenge the district court's disposition of any of Dr. Bhan's claims on summary judgment.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ERRED WHEN IT DISMISSED DR. BHAN'S CLAIMS FOR TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP (COUNTS 3, 5, and 6)

A. Standard of Review

When deciding a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, the district court must construe the complaint in the light most favorable to the plaintiff and must accept all the factual allegations contained in the complaint as true. *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). In order to survive a Rule 12(b)(6) motion to dismiss, Dr.

Bahn's Second Amended Complaint only needed to contain "enough facts to state a claim to relief that is plausible on its face." See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). This court reviews *de novo* the district court's grant of a 12(b)(6) motion to dismiss. *Lambert*, 517 F.3d at 438–39.

B. Argument on the Merits

The elements of tortious interference with a business relationship under Michigan law are (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the defendant; (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy; (4) and resultant damage to the plaintiff. *Cedroni Ass'n, Inc. v. Tomblinson, Harburn Associates, Architects & Planners Inc.*, 492 Mich. 40, 45, 821 N.W.2d 1, 3 (2012).

“[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.’ ” *CMI Int'l., Inc. v. Internet Int'l. Corp.*, 251 Mich. App. 125, 131, 649 N.W.2d 808 (2002) (quoting *Feldman v. Green*, 138 Mich. App. 360, 378, 360 N.W.2d 881 (1984)). “A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under

any circumstances.” *Prysak v. R L Polk Co.*, 193 Mich. App. 1, 12–13, 483 N.W.2d 629 (1992). “If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference.” *CMI Int'l* at 131.

Dr. Bhan properly pled actions for tortious interference with a business relationship in Claims 3, 5, and 6¹. In Claim 3, Dr. Bhan identifies the business relationship subject to interference: his business relationship with patients he treated at Borgess. R.E. 51; Page #1424. Dr. Bhan then alleges that Dr. Baxter, Mr. Brush, and Mr. Spaude unlawfully and maliciously interfered with those relationships, “as set forth in the prior allegations” of the Second Amended Complaint. *Id.* at 1425. Earlier in the Second Amended Complaint, Dr. Bhan alleged that:

- (a) Dr. Baxter thwarted Dr. Bhan’s attempt to comply with the bedside policy by affiliating with KCMS. (*Id.* at 1415);
- (b) Dr. Baxter and Mr. Brush interfered with Dr. Bhan’s efforts to comply with the bedside policy by forcing third party providers with whom Dr. Bhan had arranged coverage assistance to withdraw their assistance. (*Id.* at 1416);
- (c) Dr. Baxter and Mr. Brush knowingly presented false information to the Borgess reviewing committees which directly led to the suspension of his privileges at Borgess. (*Id.* at 1418);
- (d) Dr. Baxter and Mr. Spaude reversed Borgess’s decision to discontinue Dr. Bhan’s suspension. (*Id.* at 1421);

¹ Dr. Bhan does not challenge the district court’s dismissal of Claim 4.

(e) Dr. Baxter's actions were motivated by racial animus. (*Id.* at 1415, 1420, 1421);

(f) Dr. Baxter and Mr. Brush were motivated by the prospect of financial gain. (*Id.* at 1415);

(g) Mr. Spaude supported the actions of Dr. Baxter and Mr. Brush, and contributed to the loss of Dr. Bhan's rights at Borgess. (*Id.* at 1421).

Viewed in sum, in the light most favorable to Dr. Bhan, these factual allegations meet the pleading standard for tortious interference and Claim 3 should have survived 12(b)(6) dismissal.

In dismissing Claim 3, the district court relied on *Badiee v. Brighton Area Sch.*, 265 Mich. App. 343, 367, 698 N.W. 2d 522, 539 (2005). That reliance was misguided. *Badiee* held that a plaintiff's tortious interference claim failed because the plaintiff did not present sufficient evidence *at trial* which countered the defendant's claim that it had a legitimate business reason for its action.

As the United States District Court for the Eastern District of Michigan recognized in *Universal Health Group v. Allstate Ins. Co.*, the *Badiee* case is inapplicable at the pleading stage. *Universal Health*, 2010 WL 2278618 (E.D. Mich. 2010) (report and recommendation adopted, 2010 WL 2287151 (E.D. Mich. 2010)). In *Universal Health*, the plaintiff's complaint included a tortious interference claim. The defendant filed a motion to strike, arguing that the plaintiff failed to allege facts showing the existence of a business relationship or expectancy

and because the defendant had a legitimate business reason for its actions. *Id.* at 5.

The defendant based its argument on the *Badiee* case.

The district court denied the motion to strike and specifically denounced the defendant's reliance on *Badiee*:

[D]efendant attempts to hold plaintiff to a pleading standard that is not warranted under the Federal Rules of Civil Procedure. Defendant relies on [*Badiee*] for the proposition that tortious interference claim will not lie where a defendant has a legitimate business reason for its actions. In *Badiee*, the court found that the plaintiff had presented insufficient evidence at trial to counter the defendant's evidence of a valid business purpose for its actions. Even if the Court were inclined to follow *Badiee* for what appears to be a purely procedural pleading issue, **nothing in *Badiee* suggests that the decision reached would be appropriate at the pleading stage.**

Id. (internal citations omitted); (emphasis added). As in *Universal Health*, this case was in its infancy, at the pleading stage. Accordingly, like the defendant in *Universal Health*, the district court's reliance on *Badiee* in this case was unfounded and Claim 3 should have survived 12(b)(6) dismissal.

Claim 5 should have survived as well. Claim 5 rests on the same facts alleged in support of Claim 3, but the business relationship is different. In Claim 5, Dr. Bhan identifies the business relationship subject to interference: his relationship with Borgess. R.E. 51; Page #1428. Dr. Bhan then alleges that Dr. Baxter, Mr. Brush, and Mr. Spaude unlawfully and maliciously interfered with his relationship with Borgess by facilitating the suspension of his rights at Borgess.

This allegation, coupled with the factual allegations made earlier in the

complaint, was enough to survive dismissal at the pleading stage, because it put the Defendants-Appellees on “fair notice” of the nature of the claim and of the grounds upon which it rests. *See, e.g., Tamayo v. Blagojevich*, 526 F.3d 1074, 1082–83 (7th Cir.2008) (“Although *Twombly* retooled federal pleading standards ... and retired the oft-quoted *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) motion to dismiss no set of facts standard, *Twombly* did not supplant the basic notice-pleading standard.”) (internal quotation marks omitted); *see also Hensley Manufacturing v. Propride, Inc.*, 579 F.3d 603, 609 (6th Cir.2009). Indeed, a “plaintiff still must provide only enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests....” *Tamayo*, 526 F.3d at 1083 (internal quotation marks and citation omitted). *Twombly* specifically provided that “a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations....” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Dr. Bhan alleged the elements of tortious interference with a business relationship in Claim 5, and the Second Amended Complaint contains enough facts to put the Defendants-Appellees on notice of the grounds upon which it rests. Claim 5 should not have been dismissed.

Finally, Claim 6 was also sufficiently pled. Claim 6 tracks the elements of a cause of action for tortious interference with a business relationship. Dr. Bhan identifies the business relationship subject to interference: his business relationship

with BCHS. R.E. 51; Page #1429. He alleges that Ms. Brooks-Williams knew of the relationship and unlawfully and maliciously interfered with by contributing to the suspension of his rights at BCHS. *Id.* The facts supporting his claim are provided earlier in the Second Amended Complaint. To wit, Dr. Bhan alleged that Ms. Brooks-Williams ignored conclusive reports that he was fully recovered from his stroke such that he could return to practice and ordered him to undergo more testing in a bad-faith effort to disrupt his practice at BCHS. (*Id.* at 1417, 1423).

The district court dismissed Claim 6 for two reasons. First, because Dr. Bhan failed to allege that Ms. Brooks-Williams, a corporate agent of BCHS, acted for her own benefit, as opposed to simply for the benefit of BCHS. In so ruling, the district court relied on *Cedroni Ass'n, Inc. v. Tomblinson, Harburn Associates, Architects & Planners Inc.*, 290 Mich. App 577, 606-608, 802 N.W. 2d 682, 698-699 (2010). This case is no longer good law, as it was overruled by the Michigan Supreme Court in July, 2012, in *Cedroni Ass'n, Inc. v. Tomblinson, Harburn Associates, Architects & Planners Inc.*, 492 Mich. 40, 45, 821 N.W.2d 1, 3 (2012). More importantly, *Cedroni* was a summary judgment case and is therefore inapplicable here.

Dr. Bhan pleaded the elements of a cause of action for tortious interference with his relationship with BCHS against Ms. Brooks-Williams. He alleged that she did so personally, and maliciously, and provided facts to show how she

interfered. That is enough at the pleading stage. Again, it put Ms. Brooks-Williams on notice of the claim, and of the grounds for it. *See, e.g., Tamayo* at 1082–83. If, after discovery, there was no genuine issue of material fact regarding Ms. Brooks-Williams’s intent or motive, then summary judgment would certainly be appropriate.

The district court’s second basis for dismissing Claim 6 was that Dr. Bhan failed to allege “any facts that [Ms. Brooks-Williams] committed a per se wrongful act,” or that she “acted with malice and without justification.” R.E. 64; Page# 1939. This is incorrect. Dr. Bhan alleged that Ms. Brooks-Williams unlawfully and maliciously interfered with his business interests by contributing to the suspension of his rights at BCHS. R.E. 51; Page# 1429. The facts supporting his claim are provided earlier in the Second Amended Complaint. To wit, Dr. Bhan alleged that Ms. Brooks-Williams interfered with his relationship with BCHS when his rights there were suspended because she ignored conclusive reports that he was fully recovered from his stroke and ordered him to undergo more testing in a bad-faith effort to disrupt his practice at BCHS, in violation of the ADA. (*Id.* at 1417, 1423). Thus, he alleged both that she committed a per se wrongful act (violated the ADA) and that she acted with malice and without justification (ordering more tests in bad-faith in an effort to disrupt his relationship with BCHS). Dr. Bhan pleaded Claim 6 sufficiently to survive a motion to dismiss under 12(b)(6).

II. THE DISTRICT COURT ERRED WHEN IT DISMISSED DR. BHAN'S DEFAMATION CLAIM AGAINST THE BCHS DEFENDANTS (COUNT 10) AND WHOLLY FAILED TO ADJUDICATE THE DEFAMATION CLAIM AGAINST THE BORGESS DEFENDANTS (CLAIM 7)

A. Standard of Review

When deciding a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, the district court must construe the complaint in the light most favorable to the plaintiff and must accept all the factual allegations contained in the complaint as true. *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). In order to survive a Rule 12(b)(6) motion to dismiss, Dr. Bahn's Second Amended Complaint only needed to contain "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). This court reviews *de novo* the district court's grant of a 12(b)(6) motion to dismiss. *Lambert*, 517 F.3d at 438–39.

B. Argument on the Merits

To state a cause of action for defamation in Michigan, a plaintiff must identify the particular defamatory words complained of, and allege the connection of the defamatory words with the plaintiff and the publication of the alleged defamatory words. *Ledl v. Quik Pik Food Stores, Inc.*, 133 Mich. App. 583, 589, 349 N.W. 2d 529, 532 (1984). Dr. Bhan fulfilled these requirements in Claim 10.

In Claim 10, Dr. Bhan alleged that he was defamed when “Mitchell and Garrett distributed and published to third parties orally and in writing numerous communications contending that the Plaintiff lacked sufficient cognitive and dexterity skills to adequately perform his functions as a critical care practitioner.” He also alleged that the communications were false and unprivileged under the peer review guidelines set out in 42 U.S.C. § 1112. R.E. 51; Page# 1436-7. Dr. Bhan also alleged he was defamed when Ms. Brooks-Williams submitted a falsified report to the National Practitioner Data Bank on January 26, 2010. *Id.* at 1437.

These allegations stated a sufficiently pleaded cause of action for defamation against Dr. Mitchell, Mr. Garrett, and Ms. Brooks-Williams. With each allegation, Dr. Bhan identified the defamatory words, identified their connection to him, and pleaded their publication. The district court dismissed the claim against Ms. Brooks-Williams because “by referring to [the report] only, which contains many statements that are undoubtedly true, the allegations fail to give BCHS fair notice upon which grounds Bhan’s defamation claim rests.” R.E. 64; Page# 1939. It dismissed the claims against Dr. Mitchell and Mr. Garrett because Dr. Bhan did not allege “to whom the statements were made, when they were made, or whether these statements were unprivileged.” *Id.*

The district court erred in dismissing the claims against Ms. Brooks-

Williams because Dr. Bhan specifically identified the report, alleged it was false, and attached the report as an exhibit to his complaint. BCHS was therefore on notice that Dr. Bhan was alleging the falsity of the entire report and BCHS was perfectly able to defend against his allegations. In addition, the district court's finding that the report contained statements that are true was an inappropriate line of inquiry at such an early stage in the pleadings. The question for the district court was not whether the statements were true, but whether Dr. Bhan sufficiently pleaded a cause of action for defamation.

Likewise, the district court used the wrong standard in assessing the allegations against Dr. Mitchell and Mr. Garrett. Both cases relied upon by the district court to dismiss the defamation claim, *Ledl v. Quik Pik Food Stores, Inc.*, 133 Mich. App. 583, 589, 349 N.W. 2d 529, 532 (1984), and *Hernden v. Consumers Power Co.*, 72 Mich. App. 349, 356, 1249 N.W. 2d 419, 422 (1976), are summary judgment cases. Dr. Bhan met the Michigan standard for pleading a cause of action for defamation against the BCHS defendants, and Claim 10 should not have been dismissed.

Finally, this case must be remanded back to the district court for resolution of Claim 7, because the district court never adjudicated the claim. In its dismissal order, the district court specifically found that the Borgess defendants did not join in the BCHS defendants' motion to dismiss the defamation claim. Therefore, the

court ruled, it would “not consider whether Count 7 survives the motion to dismiss.” R.E. 64; Page# 1940. The district court made the same acknowledgment at the beginning of its summary judgment order, recognizing that it had dismissed all claims against all parties except for, *inter alia*, Count 7. Nonetheless, its summary judgment order contains no discussion regarding Count 7. Because Claim 7 was never adjudicated, it must be remanded to the district court for resolution.

III. THE DISTRICT COURT ERRED WHEN IT DISMISSED DR. BHAN’S CLAIMS FOR BREACH OF CONTRACT (CLAIMS 11-13)

A. Standard of Review

When deciding a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, the district court must construe the complaint in the light most favorable to the plaintiff and must accept all the factual allegations contained in the complaint as true. *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). In order to survive a Rule 12(b)(6) motion to dismiss, Dr. Bahn’s Second Amended Complaint only needed to contain “enough facts to state a claim to relief that is plausible on its face.” *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). This court reviews *de novo* the district court’s grant of a 12(b)(6) motion to dismiss. *Lambert*, 517 F.3d at 438–39.

B. Argument on the Merits

In Counts 11-13, Dr. Bhan alleged that the medical bylaws promulgated by Borgess and BCHS constituted binding contracts. R.E. 51; Page# 1438-1443. In Counts 11 and 12, he alleged that Borgess breached the bylaws by failing to follow the proper procedures for the suspension and revocation of his privileges at Borgess. *Id.* at 1438-1441. In Count 13, he alleged BCHS failed to follow its bylaws for similar reasons. *Id.* at 1441-1443. The district court dismissed each claim for the same reason: “Each hospital’s medical staff bylaws, however, contains a release of legal liability...Therefore, taking Bhan’s allegations as true, he has granted a broad release of liability and immunity for breach of contract to BCHS, Borgess, and their representatives.” R.E. 64; Page# 1941.

As a starting point, it is worth noting that the district court did not identify the language contained in the bylaws it interpreted as granting such a “broad” release. It is also worth noting that Borgess never argued that its bylaws contained such a release, or that its bylaws entitled it to the relief granted by the district court. More importantly, the plain language of both hospitals’ bylaws does not support the district court’s interpretation.

Both sets of bylaws grant contractual immunity to the hospitals and its representatives for liability arising from communications and the provision of information by its representatives in the review process. Contrary to the district

court's interpretation, the bylaws do not grant immunity for liability arising from the hospitals' failure to follow the process outlined in the bylaws for suspending or revoking a physician's privileges. For instance, the "Professional Practice Review Functions" section of the Borgess bylaws provides:

Members of the Medical Staff, representatives of administration, and third parties shall be immune, to the fullest extent permitted by law, from liability to an applicant or member of the Medical Staff for damages or other relief for any action taken or statements or recommendations made within the scope of his duties as a member of the Medical Staff or representative of administration **by reason of providing information concerning such person who is, or has been, an applicant to or a member of the Medical Staff who did, or does, exercise clinical privileges or provided services at the hospital.**

R.E. 51-2; Page# 1533 (emphasis added). Nothing in this language suggests Dr. Bhan released Borgess from its duty to follow the protocol identified in the bylaws for suspension and revocation of privileges.

Similarly, the language BCHS cited in support of its claim that Dr. Bhan released the hospital from liability for his claims is a release for communications and the provision of information by its representatives in the review process:

"I extend absolute immunity to and release from liability, the hospital(s) to which I am applying, their authorized representatives...for any communications, reports, records, statements, documents, recommendations, or disclosures involving me, including otherwise privileged or confidential information, relating, but not limited to" the different stages of the review process. R.E. 54-3; Page# 1828. Again, this

may shield BCHS and its representatives from liability arising from the provision of information associated with the review process, but it does not provide blanket immunity for BCHS's failure to abide by the protocol established in the bylaws when it suspended Dr. Bhan's privileges. The language of the release provision in the Borgess bylaws and the language of the BCHS release signed by Dr. Bhan do not support the district court's ruling that Dr. Bhan granted a "broad release of liability" for all his claims arising under both sets of bylaws. As a result, the district court erred in dismissing his breach of contract claims on this basis.

CONCLUSION

For the aforementioned reasons, this case should be remanded back to the district court for further proceedings.

DATED this 19th day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was furnished to the Court and all counsel of record via electronic filing through the CM/ECF system on August 19, 2013.

/s/Michael M. Brownlee
Michael M. Brownlee, Esquire

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:
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Michael M. Brownlee, Esquire

DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

Pursuant to 6th Cir. R. 30(g), the Appellant hereby identifies the record entries that are most relevant to his position on appeal:

<u>Description of Entry</u>	<u>Date Filed</u>	<u>Record Entry No.</u>	<u>Page ID Range</u>
Second Amended Complaint	8/10/2011	51	1411-1449
Dismissal Order	2/14/2012	64	1933-1943