STATE OF MICHIGAN

COURT OF APPEALS

MARC S. MCKELLAR,

Plaintiff-Appellee,

v

BERGEN BRUNSWIG DRUG COMPANY, a California corporation, PAUL KOOP, DENNIS JIROUS and BRIAN BAARS, as individuals,

Defendant-Appellants.

UNPUBLISHED
January 21, 1997

No. 181946

Ingham Circuit Court
LC No. 93-76047-NZ

Before: McDonald, P.J., and White and P.J. Conlin*, JJ.

WHITE, J. (concurring in part, dissenting in part)

I concur in the reversal of the circuit court's denial of defendants' motion for summary disposition as to plaintiff's wrongful discharge claim.

I also agree with the majority that defendant's motion for summary disposition should have been granted as to the intentional interference with prospective advantageous economic relationships and false imprisonment claims. However, I dissent from the reversal of the circuit court's denial of summary disposition dismissing plaintiff's tortious interference with contractual relations and intentional infliction of emotional distress claims.

I

Defendants' motion for summary disposition argued that they were entitled to summary disposition under MCR 2.116(C)(8) because it was undisputed that at all times relevant to plaintiff's termination, defendants were acting within the scope of their authority. Defendants argued that corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the corporation, and that since plaintiff's complaint

* Circuit judge, sitting on the Court of Appeals by assignment.

stated that at all times the individual defendants acted as agents of BBDC, plaintiff could not show that their actions were for their personal benefit. Defendants further argued that personality conflicts are insufficient to constitute tortious interference and that any such personality conflict arose as a result of the working relationship between plaintiff and defendants and was not personal. Defendants attached to their motion a Termination Review form dated February 12, 1993, which stated under "Reasons for Termination": "Falsifing [sic] Space Manager Logs Falsifing [sic] the shelf tag promotions Claiming unearned P.___s.[1] Ignoring supervisory guidelines." The form indicated plaintiff had received two verbal warnings on June 12, 1992.

Plaintiff's affidavit, attached to his brief in response to defendants' motion for summary disposition, stated that from the date of his reassignment to the Williamston division around April 1992, a serious personality conflict developed between plaintiff and the individual defendants, who became his supervisors after his reassignment, and that defendants refused to accept him as a part of the Williamston team. Plaintiff's affidavit further stated that an obvious manifestation of the serious personality conflict was that defendants sought on several occasions to transfer him to different cities, and that defendants' efforts manifested their ardent desire to transfer him as soon as possible and disrupt his position with BBDC. Plaintiff's affidavit stated that throughout his employment with defendant he consistently received favorable performance reviews, and that he was therefore extremely troubled by the individual defendants' efforts to transfer him. Plaintiff stated that he had received many achievement awards and other honors in recognition of his job performance, including Outstanding Achievement Award, Regional Top Performing Merchandise [sic] (1988-1989); Outstanding Sales Achievement, Top Performing Merchandiser, (1989-1990); Outstanding Merchandising Performance Award, National Top Performing Merchandiser, (1991-1992); Appointment to Advisory Panel by Divisional Manager, Regional Vice President, National Sales Director and Group Vice President, August 1991 through February 1993, among others. Plaintiff's affidavit denied defendants ever criticized or corrected his method of calculating his incentive compensation. Plaintiff's affidavit described his duties and responsibilities as a retail merchandiser, and the incentive programs he participated in:

> 19. While employed as a retail merchandiser with Corporate Defendant, my employment duties and responsibilities included (i) maintaining various display shelves for health and beauty aides and over-the-counter drugs in Corporate Defendant's retail customers' stores within my territory, and (ii) setting up and maintaining display shelves for health and beauty aides and over-the-counter drugs.
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> 20. In performing my duties as a retail merchandiser, I participated in Corporate Defendant's incentive compensation programs which enabled me to earn points for the sale, labeling and placement of various health and beauty aide products and for setting up and maintaining shelves for health and beauty aides and over-the-counter drugs displayed in Corporate Defendant's retail customers' stores within my territory. The following incentive compensation programs relate to this case because the individual Defendants wrongfully accused me of falsifying records relating to such programs:

a. Shelf Tag Promotions. Each month a particular product or series of product were the subject of a monthly promotion. As part of the promotion, I received incentive compensation for (i) the sale of the designated product to customers within my territory, and (ii) the placement on such customers' display shelves of labels or "shelf tags" describing the designated product or series of products.

b. Space Manager Logs. Also on a monthly basis, a particular portion of the customers' retail store was designated to be rearranged, implemented or updated. For providing these "Space Management" services, I received bonus recognition points.

21. In connection with the incentive compensation programs, Corporate Defendant provided its retail merchandisers with a document entitled "Recognition Plan" which outlined the bonus point structure. However, neither the "Recognition Plan" nor any other document issued by Corporate Defendant specifically defined the nature and extent of the services a retail merchandiser was required to perform in order to receive incentive compensation.

22. As part of the incentive compensation program, I was required to complete documentation relating to the services I provided and the products I sold to my customers which generated bonus points. As to each specific service I provided and as to each product sold, the documentation required the written verification of the customer to confirm that I actually provided the services and/or sold the product to the customer.

23. Prior to my transfer to the Williamston division of Corporate Defendant, John Wright, my immediate supervisor and field sales manager for the Traverse City division of Corporate Defendant, reviewed and approved the documentation that I prepared and my customers verified in connection with the incentive compensation programs described above. Following the date of my transfer to the Williamston division through August, 1992, David Anthony, field sales manager of the Williamston division of Corporate Defendant, reviewed and approved the documentation that I prepared and my customers verified in connection with the incentive compensation program described above.

24. For fiscal year 1993 (September, 1992 through January 1993), Defendant Baars reviewed and approved the documentation that I prepared and my customers verified in connection with the incentive compensation programs described above. Accordingly, the documentation the individual Defendants wrongfully accused me of falsifying was (i) prepared and signed by me, (ii) reviewed and signed by an authorized representative of the customer, and (iii) reviewed, analyzed, and approved by one of my supervisors before the documentation was ultimately submitted to Corporate Defendant for the determination of the incentive compensation.

25. On February 10, 1993 (less than two weeks after a significant disagreement between me and the individual Defendants developed relating to Corporate Defendant's private label business), the individual Defendants contacted me to request my presence at a meeting in a Grand Rapids, Michigan Holiday Inn hotel suite scheduled for February 12, 1993. When I arrived at the hotel in Grand Rapids on February 12, 1993, Defendant Baars escorted me from the hotel lobby to the hotel suite. Defendants Koop and Jirous were in the hotel suite at that time. After Defendant Baars closed the door to the hotel suite, Defendant Baars accused me of falsifying my incentive compensation records and reports, and he stated that Corporate Defendant had paid me incentive compensation payments to which I was not entitled. Defendants Koop and Jirous agreed with such accusations. However, throughout the entire course of my employment with Corporate Defendant, my incentive compensation records and reports were (i) accurately prepared and signed by me, (ii) reviewed and signed by an authorized representative of the customer, and (iii) reviewed, analyzed , and approved by one of my supervisors before the incentive compensation records and reports were ultimately submitted to Corporate Defendant for the determination of my incentive compensation. In addition, prior to February 12, 1993, I never received a written or verbal warning regarding my incentive compensation record keeping. Accordingly, I was dumbfounded when I heard these accusations and I vehemently denied such accusations and, as of the date of this Affidavit, I am certain that the individual Defendants fabricated such accusations solely to accomplish the termination of my employment with Corporate Defendant.

26. After making these false accusations, the individual Defendants demanded that I sign a voluntary resignation form during the February 12, 1993 meeting, but I refused to sign such form because I knew that the individual Defendants' accusation against me were completely untrue.

* * *

28. Some time after the termination of my employment with Corporate Defendant, I learned that the individual Defendants completed and signed a termination review form dated February 12, 1993 relating to the termination of my employment with Corporate Defendant. Such form stated that I had falsified my incentive compensation documentation, that I had claimed unearned prize monies and that I had ignored supervisory guidelines.

29. The individual Defendants' accusations against me during the February 12, 1993 meeting as documented in the termination review form were completely untrue, were fabricated by the individual Defendants, and (when viewed in light of the individual Defendants' very recent successive efforts to transfer me) reflected the individual Defendants' ardent desire to disrupt my position with Corporate Defendant.

* * *

35. In the Affidavit of Brian Baars, Defendant Baars states that I claimed to have sold items of product that were not actually ordered by the customers.

My response. Based upon a customer's representation to me that the customer intended to order specific item(s) of product being promoted for that month, I would complete the incentive compensation documentation to reflect the customer's order. The customer would then verify the order by signing the incentive compensation documentation. To complete the order, the customer would have to place the order directly with Corporate Defendant through the use of an automated order entry device which each customer kept in the store as part of the customer's contract with Corporate Defendant. I did not use the automated order entry device to physically place an order, nor was I ever instructed by anyone on behalf of Corporate Defendant to physically place an order for the specific items of product. In fact, John Wright had specifically instructed me never to utilize a customer's automated order entry device for ordering product. Therefore, I had no control over whether a customer actually placed an order for the items of product listed on the incentive compensation documentation that I prepared and the customer signed. In this connection, Corporate Defendant could have based my incentive compensation upon data in its computer base indicating the number of items of product the customer actually ordered. Nevertheless, Corporate Defendant instead elected to base my incentive compensation on the documentation which (i) I prepared and signed based upon my customer's representations to me, (ii) the customer reviewed and signed, and (iii) my supervisor reviewed, analyzed and approved. Corporate Defendant's reliance on the incentive compensation documentation instead of the actual order information in Corporate Defendant's computer base left open the possibility that I could receive incentive compensation for items of product that the customer actually did not purchase (even though the customer represented to me in writing on the incentive compensation documentation that the product would be purchased). If that possibility occurred, it was not because I falsified the incentive compensation documentation; the occurrence in that event was solely attributable to the customer's failure to complete the order as agreed. I DID NOT FALSIFY ANY INCENTIVE COMPENSATION DOCUMENTATION – I MERELY ACCURATELY DOCUMENTED THE REPRESENTATIONS MY CUSTOMERS MADE TO ME ABOUT THE ITEMS OF PRODUCT MY CUSTOMERS INTENDED TO ORDER.

* * *

. . . I . . . confirm that I computed my incentive compensation recognition points in accordance with Corporate Defendant's Recognition Plan.

Plaintiff's affidavit further argued that Baars had admitted at deposition that no one had shown plaintiff the "Williamston way" of completing space manager logs.

The circuit court in its ruling from the bench referred to MCR 2.116(C)(10) and to plaintiff's affidavit and concluded:

> With respect to tortious interference counts, there are two counts, I believe, four and five, plaintiff in his affidavit has depicted the course of conduct by the individual defendants which could be construed by a jury as personally motivated. If this is believed by the jury to be their motivation, then under the case law, it would constitute tortious interference with an employment relationship in a contract with the corporation, so summary disposition is denied.

II

Tortious interference with an at-will employment contract is actionable where the at-will relationship will presumably continue in effect absent wrongful interference by a third party. *Feaheny v Caldwell*, 175 Mich App 291, 303-304; 437 NW2d 358 (1989). Where a fellow employee, supervisor or manager of a company induces the company to discharge the employee, if the defendant is acting on his or her own behalf and not on the employer's behalf, the plaintiff may maintain a claim of tortious interference with contractual relations. *Id.* at 305; *Lytle v Malady*, 209 Mich App 179; 530 NW2d 135 (1995). This requires proof that the defendant did per se wrongful acts or did lawful acts with malice and without justification, and also requires proof, with specificity, of affirmative acts by the defendant which corroborate the interference or the unlawful purpose. *Feaheny*, 175 Mich App at 304-305; *Lytle*, 209 Mich App at 199 (holding that the plaintiff's evidence that the individual defendant, who was the plaintiff's supervisor, concurred with the director of the plaintiff's department's reason to discharge the plaintiff, did not rise to the level of an affirmative act of interference with the plaintiff's contractual relations.)

Plaintiff asserts on appeal that defendants were not lawfully authorized to maliciously fabricate reasons for his termination that involve wrongful accusations of criminal conduct. In support of his argument that personal animosity may be the basis for a tortious interference claim against a corporate agent in connection with a termination of employment, plaintiff cites *Patillo v Equitable Life Assurance Society*, 199 Mich App 450; 502 NW2d 696 (1992). In *Patillo*, the plaintiff, a life insurance sales agent, alleged in his complaint that an individual defendant, Neal, recommended that the plaintiff's employment be terminated and defamed him by telling other agents he was terminated for insubordination, making racial remarks and selling fraudulent policies. *Id.* at 457-458. This Court reversed the circuit court's grant of summary disposition to the defendants on the tortious interference with contractual relations claim, stating:

> A review of the record indicates that Neal may have been motivated by animosity toward plaintiff or a personality conflict when he used his authority to recommend that plaintiff's employment be terminated. Plaintiff began working as an insurance agent for

> Equitable in 1972. In 1983, Neal was transferred to Michigan to manage the Detroit office. Plaintiff alleges that there was a longstanding animosity between Neal and himself. Pamela Bargon testified in a deposition that plaintiff had told her that Neal threatened to fire plaintiff the first day Neal arrived at the Detroit office. At his deposition, Neal characterized the alleged animosity as insubordination on the part of plaintiff. However, Bargon stated that she had never heard plaintiff yell, scream, or act inappropriate at the office. Furthermore there was no evidence indicating that plaintiff had a history of insubordination, particularly with respect to plaintiff's conduct before Neal's transfer to the Detroit office. Bargon also testified that at an agency meeting Neal said that plaintiff thought he was "better than the rest of us." Bargon elaborated by explaining that Neal was referring to black people when he said "us." Plaintiff testified that another employee, Mr. Slack, informed him that Neal intended to terminate plaintiff, and that he believed that Neal and plaintiff had a personality conflict.
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> Giving the benefit of reasonable doubt to plaintiff and drawing all inferences in his favor, this Court is persuaded that a record might be developed regarding tortious interference upon which reasonable minds could differ. [199 Mich App at 457-458. Citations omitted.]

Defendants counter that plaintiff has not shown that any individual defendant was acting for his own benefit and without benefit to the corporation, and argue that *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993), "instructs that any [personality] conflict arose as a result of the working relationship between Plaintiff and the Defendants, and was not personal."

The plaintiffs in *Reed* alleged that a camp would have been sold to them as the highest bidder had the individual defendant, Bailer, not made false and derogatory statements to the council regarding the plaintiff Reed. This Court affirmed the grant of summary disposition to the defendants on the tortious interference with economic relations claim, stating:

> . . . plaintiffs have not shown that Bailer was acting strictly for her own personal benefit when she allegedly persuaded the council not to sell Camp Holly to plaintiffs. Although plaintiffs allege that Bailer personally disliked Reed and was out to "punish" him, these allegations stem from a prior real estate transaction in which Reed ultimately sued the council. Bailer's motives therefore cannot be said to be strictly personal, and defendants were properly awarded summary disposition of count one of plaintiffs' complaint. [201 Mich App at 13.]

I do not read *Reed* as supporting defendants' argument. In *Reed*, the individual defendant was not acting strictly for her own benefit, but rather had the corporate defendant's interests in mind when she persuaded the council not to sell to the plaintiffs because, in a prior real estate transaction, the plaintiff had sued the corporate defendant.[2] In the instant case, the evidence could be viewed as supporting a finding that the individual defendants acted purely out of personal, and not corporate, motivation. To be sure, the jury should be carefully instructed to assure that the focus is not on the accuracy or fairness of

defendant's accusations, but, rather, on the questions whether defendants acted solely for their own purposes, and whether they did per se wrongful acts or lawful acts with malice and without justification.

I conclude that defendant is not entitled to summary disposition because genuine issues of fact remained whether defendants acted outside the scope of their authority and for their personal benefit when they terminated plaintiff by allegedly fabricating that he had falsified company documents and claimed unearned points in calculating his incentive compensation.

I disagree with the majority's determination regarding the intentional infliction of emotional distress claim. Plaintiff's claim in this regard is not based on breach of contract. Rather, plaintiff asserts that defendants wrongfully and recklessly fabricated false charges against him to justify getting rid of him, that this conduct was outrageous, and that he suffered extreme mental anguish as a result. Such allegations, if proven, are sufficient to establish intentional infliction of emotional distress.

I would affirm the circuit court's denial of defendants' motion for summary disposition on plaintiff's tortious interference with contractual relations claim, as well as the circuit court's denial of defendants' motion as to plaintiff's intentional infliction of emotional distress.

/s/ Helene N. White

[1] The last word is illegible, but presumably is "points."

[2] I find factually dissimilar another case defendants cite, *Bradley v Phillip Morris*, 194 Mich App 44, 50; 486 NW2d 48 (1992); 444 Mich 634 (1994). The plaintiffs in *Bradley*, a supervisor and a secretary employed by the defendant, were discharged for misconduct after several supervisors learned that another employee had observed the plaintiffs engage in sexual intercourse in one of the plaintiff's hotel rooms, which was paid for by Philip Morris, on a Detroit Grand Prix weekend. This Court held that the trial court erred in not granting judgment notwithstanding the verdict on the plaintiffs' claims of tortious interference with a contract:

> In this case, even viewing the evidence in a light most favorable to plaintiffs—the nonmoving party—we conclude that reasonable minds could not differ over whether [the supervisors] Graham and Hopkins were acting for the benefit of Philip Morris or for their own personal benefit with no benefit to Philip Morris. The evidence and the inferences to be drawn therefrom failed to show that Graham's and Hopkins' actions were based on personal motivation and that the actions were for their personal benefit. . . . [194 Mich App at 51.]

Another factually distinguishable case defendants cite is *Coleman-Nichols v Tixon Corp*, 203 Mich App 645; 513 NW2d 441 (1994), in which the strongest evidence the plaintiff presented of affirmative acts of the individual defendant that corroborated an unlawful interference was "the plaintiff's own hearsay statement that she was told by another employee that Armanda Herbert wanted plaintiff out of the company." This Court noted: "Even if this were considered sufficient evidence of Armanda Herbert's intent, it is not evidence of any affirmative acts by Armanda Herbert that interfered with plaintiff's employment relationship." *Id.* at 657.