

STATE OF MICHIGAN
COURT OF APPEALS

JAMES HARKEN,

Plaintiff/Counter-Defendant-
Appellant/Cross-Appellee,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee,

and

CONTROL SYSTEMS INTEGRATORS, INC,

Defendant/Counter-Plaintiff-
Appellee/Cross-Appellant.

UNPUBLISHED

April 15, 2004

No. 245715

Ingham Circuit Court

LC No. 99-090134-NZ

Before: O’Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order granting Control System Integrators, Inc. (CSII) partial summary disposition, and the order granting defendant General Motors (GM) summary disposition. CSII cross-appeals the trial court order to dismiss its counter-claim with prejudice. This case arises out of plaintiff’s alleged discriminatory removal from a GM project that he was assigned to by his employer, CSII, after he filed a negligence action against GM for an injury plaintiff sustained while working at a GM facility. We affirm.

Plaintiff’s first issue on appeal is that the trial court erred in granting CSII’s motion for summary disposition because plaintiff presented facts sufficient to support a claim under the Worker’s Disability Compensation Act (WDCA). We disagree.

We review de novo a trial court’s ruling on a motion for summary disposition under MCR 2.116(C)(8) de novo. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997); *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). Under MCR 2.116(C)(8), the legal basis of the complaint is tested by the pleadings alone; all factual allegations are taken as true, and any reasonable inferences or conclusions that can be drawn from the facts are construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Plaintiff contends that CSII discriminated against him for exercising his rights under the WDCA when it prevented him from working on any GM projects. There are really two questions posed here: (1) was plaintiff's negligence claim a "third party action" under MCL 418.827; and if so, (2) did CSII's conduct constitute discrimination under MCL 418.301(11)?

With respect to the first question regarding MCL 418.827, before the WDCA was amended in 1952, an injured employee, who was hurt on the job by the fault of some third party, had to elect to collect his statutory worker's compensation remedy or proceed under common law against the third party. *Pelkey v Elsea Realty & Investment Co*, 394 Mich 485, 493; 232 NW2d 154 (1975); see 1912 PA 10. The amended version now permits an employee to seek both remedies, conditioned on the employee's obligation to first reimburse the employer or insurer with the damages recovered from the third-party suit. *Pelkey, supra* at 485. Thus, an employee's choice to pursue a third party tort action is specifically provided for under the plain language of the act and controlled by the reimbursement directive of MCL 418.827(5). Moreover, case law further supports the interpretation that a tort claim against a third party is in fact an action authorized by MCL 418.827. See *Piper v Pettibone Corp*, 450 Mich 565, 566; 542 NW2d 269 (1995); *Beaudrie v Anchor Packing Co*, 231 Mich App 242, 246; 586 NW2d 96 (1998). Accordingly, the trial court erred in finding that plaintiff's negligence claim against GM was not a third party action authorized under the act when the plain language of the statute sets forth an employee's right to bring such a claim and case precedent has recognized similar actions as being specifically permitted under the terms of MCL 418.827(1).

Turning to the second question regarding MCL 418.301(11), to state a prima facie case of discrimination, plaintiff must show that: (1) he engaged in a protected activity, e.g., filed a claim under the worker's compensation act; (2) GM took an employment action adverse to plaintiff; (3) GM's stated reason for the adverse employment action was a pretext; and (4) GM's true reason for the adverse employment action was to retaliate against plaintiff for engaging in the protected activity. See *Chiles v Machine Shop, Inc*, 238 Mich App 462, 470; 606 NW2d 398 (1999); *DeFlaviis v. Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661(1997).

Regarding the first element for prima facie case of discrimination, under the plain language of the section, an employer shall not "in any manner discriminate against an employee . . . because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act." Applying the language to the facts of this case, an employer shall not discriminate against an employee because of the exercise by the employee of his right to bring a third party action. Therefore, plaintiff was engaged in a protected activity. Regarding the second element, although plaintiff was not discharged, we accept as true plaintiff's claims that his prohibition from working on any GM projects was an adverse action because as a result he was required to take a new position that not only paid substantially less than his GM position, but was also far away from his family's home requiring him to establish a second residence during the work week.

Regarding the third and fourth elements for prima facie case of discrimination, plaintiff failed to plead that CSII's reason for transferring defendant was a pretext and looking to the fourth element, there was no allegation that CSII's true reason for reassigning him was out of personal retaliation. Even assuming that GM's request was retaliatory, CSII's removal of plaintiff from the GM project was in mere compliance with its client's request. Moreover, although plaintiff's transfer to the new position was adverse to his interests, it was merely

dictated by the job opportunities available to the company at the time; it was not CSII's calculated effort to retaliate against him. Therefore, the trial court correctly found that CSII did not intentionally discriminate against plaintiff in retaliation for bringing the third party action.

Plaintiff's second issue on appeal is that the trial court erred in granting GM summary disposition based on its finding that plaintiff failed to show that GM intended to retaliate against him for bringing the negligence claim. We disagree.

We review de novo a trial court's ruling on a motion for summary disposition brought under MCR 2.116(C)(10). *UAW-GM Human Resources Center v KSL Recreation Corp*, 228 Mich App 486, 490; 579 NW2d 411 (1998). Under MCR 2.116(C)(10), a party may move for dismissal of a claim based on the assertion that considering the evidence in the light most favorable to the nonmoving party there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001).

The elements of a claim of tortious interference with business relations are: (1) the existence of a valid business relationship; (2) knowledge of the relationship on the part of the interferer; (3) an intentional interference inducing or causing a breach or termination of the relationship; and (4) resultant damage to the party whose relationship has been disrupted. *Lakeshore Community Hospital, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). There is no dispute that the first two elements are met. Plaintiff was CSII's employee, and GM had knowledge of plaintiff's employment with CSII.

The third element, for a tortious interference with business relations claim, requires allegations of the intentional doing of a per se wrongful act or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiff's business relationship. *Feldman v Green*, 138 Mich App 360, 369; 360 NW2d 881 (1984). When a defendant is motivated by a legitimate business reason, this Court has declined to find that the action was per se wrongful. *Formall, Inc v Community National Bank*, 166 Mich App 772, 780; 421 NW2d 289 (1988).

There is no dispute that plaintiff's removal from the GM project was prompted by him filing the negligence action against GM; however, the fact that GM requested that plaintiff not be assigned to work on any more GM projects was not done with the intent to terminate plaintiff's employment with CSII, or to limit his assignment to any other CSII clients. General Motors reasonably determined that it would have been adverse to its interests to endure the presence of an opposing party in litigation in its facilities. Therefore, the trial court did not err in finding that GM did not intentionally interfere with plaintiff's business relationship with CSII.

Lastly, we need not address CSII's issue on cross-appeal because CSII neither objected to nor moved for reconsideration of the trial court's decision to grant CSII's motion for voluntarily dismissal with prejudice. The final choice whether to accept conditions imposed by the trial court lies with the plaintiff, and a party may not claim error on appeal for something that his own counsel deemed proper at trial. *Hilgendorf v Saint John Hospital*, 245 Mich App 670, 683; 630 NW2d 356 (2001); *Mleczo v Stan's Trucking, Inc*, 193 Mich App 154, 156; 484 NW2d 5 (1992). Therefore, this issue has not been properly preserved. *Peterman v DNR*, 446 Mich 177,

183; 521 NW2d 499 (1994). Furthermore, failure to consider this issue will not result in manifest injustice. *Herald Co v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998).

Affirmed.

/s/ Peter D. O'Connell

/s/ Kathleen Jansen

/s/ Christopher M. Murray