STATE OF MICHIGAN

COURT OF APPEALS

VIOLET JONES and GREGORY D. RANDALL,

Plaintiffs-Appellees,

v

AMERITECH SERVICES, INC., and PAMELA COLTON,

Defendants-Appellants,

and

WILLIAM OLIVER and THOMAS YAMBASKY,

Defendants.

UNPUBLISHED
March 23, 1999

No. 198013
Wayne Circuit Court
LC No. 93-317724 CL

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

In this age and race discrimination case, defendants-appellants, Ameritech Services, Inc. (ASI) and Pamela Colton, appeal as of right from a judgment entered in favor of plaintiff Gregory Randall following a jury trial. ASI also appeals as of right from a judgment entered in favor of plaintiff Violent Jones. We affirm.

Plaintiffs' claims stem from a company-wide downsizing plan, known as the Company Resizing Plan (CRESP), that was implemented within Ameritech Corporation and ASI in 1992-1993. Plaintiffs lost their jobs as a result of CRESP in November 1993.

Defendants-appellants first argue that the trial court erred in admitting evidence of a statement made by trial witness, Jim Goetz. We disagree. We review a trial court's decision to admit evidence for abuse of discretion. *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991).

The statement at issue was made by Goetz during a September 1993 videoconference, during which Goetz said, "we want to get back and start bringing in some folks that are under 45 years old."

The record reveals that in November 1992, when plaintiffs were terminated from their positions, Goetz was employed by ASI as director for System Integration Services. Ten months later, in September 1993, when Goetz made the challenged statement, he was serving as vice-president for the information technology division of the newly-created Network Services Unit, which was apparently the successor to the entity that formerly employed plaintiffs. According to Goetz, the CRESP process that resulted in the loss of plaintiffs' jobs ended in November 1992. Although Goetz testified that he was not involved in decisionmaking in the CRESP process, he admitted that he served as "facilitator" in the process, which entailed ensuring that the right people were involved in CRESP sessions and that the sessions were conducted pursuant to CRESP guidelines. Even though Goetz's role as a facilitator did not directly involve plaintiffs' positions, we believe that Goetz was sufficiently involved in the CRESP process to justify the trial court's decision to admit the challenged statement, and thus, on this record, we cannot say that the trial court's decision to admit the statement constituted an abuse of discretion.

Defendants-appellants next argue that the trial court erred in instructing the jury with a modified version of SJI2d 6.01(d). We disagree. We review jury instructions for abuse of discretion. *Colbert v Primary Care Medical, PC*, 226 Mich App 99, 103; 574 NW2d 36 (1997). Jury instructions must accurately state the law, and must be warranted by the evidence presented. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 515; 556 NW2d 528 (1996), aff'd 458 Mich 582; 581 NW2d 272 (1998). We have reviewed the record and the jury instructions in their entirety, and we conclude that the challenged instruction was supported by the evidence and accurately stated the law and, therefore, did not constitute an abuse of discretion.

Defendants-appellants next argue that plaintiffs' attorney's closing argument deprived them of a fair trial. The manner in which an appellate court should review an allegation of improper conduct of an attorney was set forth in *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982):

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [Footnotes omitted.]

First, we agree with defendants-appellants' claim regarding the impropriety of plaintiffs' attorney's closing argument that a defense witness, Larry Coe, "was brought in here because he's black." However, because the trial court properly sustained the defense objection to the remark, and because the remark was isolated and there was no request for a curative instruction, we conclude that

defendants-appellants were not deprived of a fair trial because of the remark. Next, we find that plaintiffs' attorney's misstatement of the law concerning age discrimination during closing argument did not deprive defendants-appellants of a fair trial because the error was cured by plaintiffs' counsel's acknowledgment of the error before the jury and because the jury instructions ultimately given by the trial court were an accurate statement of the law. Finally, we have carefully reviewed the other remarks challenged by defendants-appellants and conclude that they provide no basis for disturbing the jury's verdict.

Defendants-appellants next argue that the trial court erred in denying their respective motions for a directed verdict, a new trial, and judgment notwithstanding the verdict (JNOV). However, we agree with plaintiffs that these issues should be deemed abandoned because they were insufficiently briefed by defendants-appellants. In their brief on appeal, defendants-appellants merely identify the appellate standards of review for the respective decisions of the trial court, and then proceed to discuss the evidence without addressing the trial court's reasoning for the decisions, citing or discussing any case law on discrimination, or relating any case law on the theories of liability to the evidence. A party may not merely announce a position or assert an error, and then leave it to this Court to discover and rationalize the basis of the arguments and search for authority to sustain or reject the position. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Moreover, we note that we have reviewed the trial court's reasoning for denying the respective motions and found record support for each of the trial court's decisions. Therefore, even if we were to review these issues, we would not disturb the jury's verdict.

Defendants-appellants next argue that the trial court erred in denying its motion for remittitur. When presented with a motion for remittitur, the trial court must determine whether the jury's award is supported by the evidence. *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997). This Court reviews a trial court's ruling on a motion for remittitur for an abuse of discretion. *Id*.

Although it is true that plaintiff Randall provided false information about his wages, this fact was brought out by defendants-appellants' attorney during cross-examination. Randall admitted that he provided false information on tax returns after he was discharged, and also that he provided false information when applying for unemployment benefits. Further, Randall admitted to providing false information during discovery when answering interrogatories and supplying a supporting affidavit, and that he did not supplement those answers or produce earnings records. However, defendants-appellants received the benefit of an instruction based on SJI2d 6.01, which permitted the jury to infer that the missing earnings records would have been adverse to Randall "if you believe that the evidence was under the control of plaintiff and could have been produced by him and no reasonable excuse for Mr. Randall's failure to produce evidence has been shown." Further, in denying remittitur, the trial court found no basis for punishing Randall for his alleged fraud committed with regard to others (e.g., the Internal Revenue Service) and that ASI should not benefit from that alleged fraud. The trial court also considered the skillfulness of the cross-examination that exposed Randall's failure to disclose income during discovery and the fact that the jury was charged based on SJI2d 6.01. The trial court ultimately concluded that remittitur should be denied because there was no showing that damages were,

as a matter of law, incorrect or beyond what a reasonable jury might do faced with this evidence. On this record, we cannot say that the trial court abused its discretion in denying remittitur.

Defendants-appellants next argue that the trial court erred in denying their motions for summary disposition. Specifically, defendants-appellants challenge two decisions in the trial court concerning motions for summary disposition. The first challenge concerns a motion for summary disposition filed by ASI and three ASI supervisors under MCR 2.116(C)(8) and (10). Defendants-appellants argued in the trial court that plaintiffs failed to support a prima facie case of race or age discrimination, and that plaintiffs' response to their motion was deceptive, untrue, and intended to mislead the court. On appeal, defendants-appellants argue that summary disposition under MCR 2.116(C)(10) should have been granted.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The court should consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in the action to determine whether a genuine issue of material fact exists to warrant a trial. *Id*. Our review of the trial court's decision is de novo. *Id*. First, we again note the cursory nature of defendants-appellants' argument on appeal, and we agree with plaintiffs that this issue should be considered abandoned. *Goolsby*, *supra*. However, we have nonetheless examined the record and found that the trial court did not err in denying the motion for summary disposition.

Defendants-appellants' second challenge concerns the trial court's denial of their partial motion for summary disposition on plaintiffs' disparate impact theory. The partial motion for summary disposition pertains only to ASI. Appellate review of a motion for summary disposition is de novo. *Spiek*, *supra*. MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. *Id*. The motion must be granted if no factual development could justify the plaintiff's claim for relief. *Id.*

The question whether a disparate impact theory should be recognized in Michigan under MCL 37.2202; MSA 3.548(202) has been previously addressed in *Farmington Education Ass'n v Farmington School Dist*, 133 Mich App 566, 573-574; 351 NW2d 242 (1984):

> Although there currently exist no holdings by the Michigan appellate courts which embrace the disparate impact theory, for several reasons we believe that this theory is available to litigants pressing claims under the Elliot-Larsen Civil Rights Act. First, while the Michigan courts are not compelled to construe the act in accord with the construction given Title VII, thus far, where they have failed to follow federal precedents under Title VII, they have concluded that the state act provides greater rights to aggrieved litigants. Second, there are indications that the Michigan Supreme Court will hold that a disparate impact theory may be advanced under the Elliott-Larsen Civil Rights Act. . . . . Third, the Michigan Civil Rights Commission adopted interpretive guidelines in 1972 which recognize the theory of disparate impact. Although these guidelines are not conclusive, this Court has recognized that they are entitled to careful consideration and has found them persuasive in the past. Fourth, defendant

> advances no compelling reasons, based either on policy or presumed legislative intent, to reject the disparate impact analysis. [Footnotes and citations omitted.]

Moreover, a disparate impact theory of liability for age discrimination has been recognized by this Court, at least in dicta, in more recent decisions. See *Meagher v Wayne State Univ*, 222 Mich App 700, 708-709; 565 NW2d 401 (1997) (discussing fact that age discrimination may be proven using different methods of proof); *Lytle v Malady*, 209 Mich App 179, 185; 530 NW2d 135 (1995) (recognizing the theory based by citation to *Farmington Ed Ass'n, supra,* but finding that only a disparate treatment theory was presented by competent evidence), aff'd in part and rev'd in part at 456 Mich 1; 566 NW2d 582 (1997) (without addressing a disparate impact theory), vacated in part by *Lytle v Malady (On Rehearing)*, 458 Mich 153; 579 NW2d 906 (1998). Also, in *Lytle (On Rehearing), supra* at 177 n 26, our Supreme Court quoted with approval from this Court's dicta in *Lytle, supra* at 185, on the availability of a disparate impact theory. Accordingly, based upon the cases cited herein, we conclude that the trial court did not err in denying defendants-appellants' partial motion for summary disposition with respect to their claim that plaintiffs should not be allowed to proceed on a disparate impact theory of age discrimination. Further, we find that plaintiffs' claims of disparate impact were supported by the evidence.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald