

STATE OF MICHIGAN
COURT OF APPEALS

L & W SERVICES, INC.,

Plaintiff/Counterdefendant-
Appellee,

v

CAMPBELL AVIATION, INC.,

Defendant/Counterplaintiff-
Appellant.

UNPUBLISHED

March 13, 2001

No. 217205

Oakland Circuit Court

LC No. 98-417022-AV

Before: Markey, P.J., and McDonald and K. F. Kelly, JJ.

PER CURIAM.

Defendant/counterplaintiff, Campbell Aviation (Campbell), appeals by leave granted from an order of the circuit court affirming in part, and reversing in part, the judgment of the district court. We affirm.

I. Facts and Procedural History

This case arises out of the parties' business activities at the Troy-Oakland Airport, sometimes as contract partners, sometimes as competitors. In June 1994 plaintiff/counterdefendant, L & W Services (L & W), filed a complaint against Campbell, alleging breach of contract and tortious interference with a business relationship or expectancy. Campbell filed a countercomplaint alleging business defamation and tortious interference with a business relationship or expectancy. Campbell maintained that it was unable to secure necessary financing due to the pendency of L & W's lawsuit.

In February 1995 the case was removed from circuit court to district court. A bench trial commenced in June 1996. The district court initially found for Campbell on L & W's claims, after which the case continued on Campbell's counterclaim. In August 1997, the district court found insufficient evidence to support Campbell's claim of business defamation and tortious interference with a business relationship, as those claims were pleaded. However, the court permitted Campbell to amend its complaint orally to include within its tortious interference claim an allegation that L & W's conduct in filing and maintaining the underlying cause of action constituted an improper act sufficient to support such a claim. On this basis, the court found for Campbell and entered judgment in Campbell's favor.

L & W appealed to the circuit court, which ruled that the filing and maintaining of a lawsuit could not itself constitute tortious interference with a business relationship, citing *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618; 403 NW2d 830 (1986), and, accordingly, reversed the district court's judgment for Campbell in the matter. This Court granted Campbell's application for leave to appeal.

II. Issues and Holding

Campbell argues that the circuit court erred in reversing the district court's decision to allow Campbell to amend the pleadings to claim tortious interference with a business relationship predicated on the "filing and maintaining" the underlying cause of action, and in awarding Campbell damages pursuant to that theory. We agree with the circuit court that the district court erred in these particulars.

A. The Circuit Court's Application of *Early Detection Center*

The circuit court held that prosecuting in good faith an ultimately groundless lawsuit is not illegal, fraudulent, or otherwise unethical conduct, and thus cannot support a claim of tortious interference with a business relationship. See *Early Detection Center, supra*, citing *Weitting v McFeeters*, 104 Mich App 188, 198; 304 NW2d 525 (1981). We agree.

Campbell's first argues that *Early Detection* concerned the mere "filing" of a lawsuit, as opposed to the "maintaining" of one. This is without merit. We read the incidental reference in *Early Detection* to "filing" a cause of action to include "maintaining" one. *Early Detection, supra* at 631. That case, like the instant one, involved underlying legal proceedings far beyond the mere commencement of a cause of action. *Id.* at 622. Further, in light of the underlying principles articulated in *Early Detection*, we would be loathe to suggest that at any moment in the course of litigation an ultimately successful defendant might use the litigation itself as the basis for a counterclaim of tortious interference with a business relationship.

Campbell insists that L & W prosecuted its claim in bad faith, for the primary purpose of driving Campbell out of business through the incidental consequences of being involved in litigation. However, various mechanisms exist for truncating frivolous actions, and for penalizing frivolous litigators and providing relief for those defending such actions. Meritless claims may be disposed of through summary disposition, MCR 2.116(C)(8) and (10); attorneys signing pleadings not based on good-faith arguments are subject to sanctions, MCR 2.114(D) and (E); and parties proceeding in bad faith may be required to pay costs and attorney fees, MCR 2.114(F) and 2.625(A)(2). See also MCL 600.2591; MSA 27A.2591. Further, the torts of malicious prosecution and abuse of process are available to parties alleging injury from the burdens of defending meritless suits prosecuted in bad faith. See *Early Detection, supra* at 627-630. To whatever extent Campbell wished to charge L & W with litigating in bad faith, various remedies were available that would properly have addressed the issue directly without having to bend the tort of tortious interference with a business relationship to those contours.

Campbell alternatively asserts that the district court found facts sufficient to substantiate the claim of tortious interference with a business relationship apart from the meritless litigation,

and argues that the circuit court failed to defer to the district court's findings of fact.¹ We disagree. Campbell relies on the following factual findings of the district court:

[Campbell's] claim . . . is that the underlying lawsuit which existed and remained on the Court's docket is what really caused them the damage. Their position is that because of that lawsuit, they were unable to obtain financing necessary to conduct their business. They needed substantial money to finance their operation. They testified that they could not obtain financing because all the investors knew about the lawsuit, and I believe that. I can't imagine that too many private investors or non-private investors, for that matter, are willing to either loan money or invest in a business that's trying to get off the ground that is in the middle of litigation.

So I'm satisfied, I'm convinced that that pending lawsuit was the death knell for Campbell, and ultimately did put them out of business, which, I'm sure, was the ultimate objective of L & W in the first place. They were successful and they accomplished what they set out to do.

So I'm satisfied that it was a tort, that there were damages that were caused.

The district court's statements clearly indicate that its findings concerning Campbell's damages all stemmed, directly or indirectly, from Campbell's having to defend the underlying suit. The district court stopped short of declaring that L & W knowingly brought a meritless suit solely for the purpose of damaging Campbell's business posture.

The strength of Campbell's argument lies in the district court's conclusion that putting Campbell out of business was the ultimate objective of L & W all along. Campbell characterizes this as an indication that the district court concluded that L & W did something illegal, unethical, or fraudulent in bringing suit, and argues that the circuit court's "tacit" ruling that L & W brought suit in good faith constitutes an improper substitution by the circuit court of its own factual findings for those of the district court.

However, Campbell reads the record artfully in order to come to make that argument. The district court did not state that it had found "illegal, unethical, or fraudulent" behavior on the part of L & W, and the circuit court neither expressly, nor necessarily impliedly, contradicted any factual finding of the district court. The latter's observation that L & W aspired to put Campbell out of business may be regarded as a finding that L & W wished to triumph over its competitor generally, by various proper means. The court's conclusion that the hampering of Campbell's business opportunities resulting from Campbell's need to defend itself in the underlying litigation are what finally drove Campbell out of business does not necessarily equal a conclusion that L & W proceeded unethically in bringing suit in the first instance.

¹ A trial court's findings of fact may not be set aside unless clearly erroneous. MCR 2.613(C).

Further, we note that the district court dismissed Campbell's claim of business defamation, and that Campbell did not choose to bring claims of abuse of process or malicious prosecution. Because the latter causes of action were always available for seeking redress for the burdens resulting from legal action prosecuted in bad faith, the circuit court properly ruled that the district court should not have allowed Campbell to seek a remedy for its allegations of bad-faith litigation through a claim of tortious interference with a business relationship.

B. Amendment of Pleadings

For the same reasons, we agree with the circuit court that the district court erred in allowing Campbell to amend the pleadings to revive its failed claim of tortious interference with a business relationship by referring to the underlying litigation as the cause of the damages. Leave to amend is properly denied where the amendment would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997), citing *Ben P Pyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). In this instance, the district court should have recognized Campbell's amendment as legally futile.

C. The Recreated Lower Court Record

Finally, Campbell takes issue of the circuit court's procedures in accepting a recreated lower-court record where the original was lost in transit, and in declining to rule on L & W's issue concerning whether the district court should have granted L & W's request for a jury trial. These arguments are without merit.

Campbell neither objected to, nor participated in, the production or reproduction of documents as requested by the circuit court for the purpose of recreating the missing record. Campbell's silent acquiescence in those procedures constituted the forfeiture of any issue on appeal relating to those procedures. See *Providence Hospital v National Labor Union Health & Welfare Fund*, 162 Mich App 191, 194; 412 NW2d 690 (1987). Further, Campbell neither describes any specific irregularities in the procedures used, nor explains how Campbell was prejudiced as the result. Additionally, Campbell nowhere asserts that any specific document from the recreated record was in any way inaccurate, or that the recreated record was incomplete in any particular and material way. Thus, even if the issue were preserved, it would have no merit as presented. As one court observed, "[a] party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *People v Green*, 235 Mich App 27, 45; 597 NW2d 176 (1999)(citations omitted). See also MCR 7.212(C)(7).

D. Jury Trial

Finally, Campbell claims error from the circuit court's decision not to reach L & W's issue concerning the right to a jury trial. One party may not claim another party's appellate opportunities. *Branch Co Bd of Comm'rs v Service Employees International Union, Local 586*, 168 Mich App 340, 346; 423 NW2d 658 (1988); *Winters v National Indemnity Co*, 120 Mich App 156, 159; 327 NW2d 423 (1982). Further, the only prejudice that Campbell alleges from the circuit court's decision is that the alleged error afforded either party a solid basis for persuading this Court to grant leave to appeal. This argument is peculiar and inapt. Having persuaded this Court to entertain Campbell's own issues on appeal, Campbell may not complain that the circuit

court committed error that invited the attention of this Court concerning L & W's issue, which L & W did not choose to pursue before this Court.

Affirmed.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ Kirsten Frank Kelly