

STATE OF MICHIGAN
COURT OF APPEALS

TONI DAVIS,

Plaintiff/Counterdefendant,

v

DEPARTMENT OF NATURAL RESOURCES,

Defendant/Counterplaintiff/Cross-
Defendant-Appellant,

and

J.D. SNYDER,

Defendant/Counterplaintiff/Cross-
Plaintiff-Appellee.

UNPUBLISHED

May 7, 2002

No. 223584

Ingham Circuit Court

LC No. 92-073575-NZ

Before: Cavanagh, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Appellant, Department of Natural Resources (DNR), appeals by delayed leave granted from an order denying its motion for reimbursement of attorney fees paid to appellee, J.D. Snyder, pursuant to a previous circuit court order. We reverse and remand for proceedings consistent with this opinion.

In a prior appeal, appellant DNR challenged the circuit court's order granting summary disposition to appellee Snyder on his cross-claim against the DNR for attorney fees. This Court vacated that order in an unpublished opinion per curiam, decided January 31, 1997 (Docket No. 180676). The circuit court's interpretation of this Court's prior opinion is the subject of this appeal.

In 1990, while still employed with the DNR, plaintiff Toni Davis lodged a complaint with the DNR's equal employment opportunity officer alleging sexual harassment by Snyder. Plaintiff also filed a grievance against Snyder. Following an investigation, the DNR took disciplinary action against Snyder. Plaintiff subsequently filed a complaint for sexual harassment, naming Snyder and the DNR as defendants. Snyder denied the allegations, filed a counterclaim against plaintiff for defamation, and filed a cross-claim against the DNR for legal representation or reimbursement of attorney fees. Snyder requested representation or attorney

fees pursuant to Civil Service Commission Rule 1-6.1, which requires that a state employee be provided with counsel in a tort action if the employee, at the time of the alleged conduct, was acting within the course of employment and had a reasonable basis for believing that the conduct was within the scope of the authority delegated to the employee.¹

Snyder moved for summary disposition of the cross-claim against the DNR. The court granted the motion, finding that Rule 1-6.1 was not discretionary and that there was no question of fact as to whether Snyder was acting in the course of his employment and had a reasonable belief that his conduct was within the scope of his authority. The court ordered the DNR to pay Snyder's attorney fees that had accrued to that point and to provide representation to Snyder in his defense of plaintiff's action thereafter. Pursuant to this order, the DNR paid approximately \$15,000 to Snyder's attorney. In the prior appeal in Docket No. 180676, this Court vacated the circuit court order granting Snyder summary disposition. In its opinion, this Court stated, in pertinent part:

While sexual assaults committed in the workplace are not per se outside the scope of an employee's employment, it is clear in this case that Snyder's conduct was committed for purely personal reasons and it was not alleged in the administrative proceeding that the agency ratified the conduct. . . . Thus, as a matter of law, Snyder's conduct was not committed in the course of employment and he could not have had a reasonable basis for believing that the conduct was within the scope of authority delegated to him by the DNR.

The final sentence of this Court's opinion states that the order granting summary disposition was "vacated" but did not state that the matter was remanded to the circuit court.

The DNR subsequently filed a motion in the circuit court requesting reimbursement from Snyder of the attorney fees it had paid on his behalf. The circuit court reasoned that this Court's opinion did not address the question of reimbursement, but merely vacated the grant of summary disposition to Snyder on the issue of attorney fees. The trial court entered an order stating that the DNR's motion was premature and was denied without prejudice. Because of court reorganization, the case was transferred to another judge who, following a status conference, ordered the DNR to file a motion regarding reimbursement so that the issue could be briefed and argued. The DNR again moved for reimbursement of the attorney fees paid to Snyder's counsel, arguing that this Court had ruled as a matter of law that the DNR was not responsible for Snyder's attorney fees, that Snyder's application for leave to appeal this decision to the Supreme Court had been denied and, therefore, this Court's ruling was the law of the case. While agreeing that this Court had found that the DNR had no liability for Snyder's attorney fees, the circuit court again denied the motion because this Court's opinion had not remanded the case for further proceedings and had not indicated that any future action should be taken.

The DNR now argues that the circuit court erred in denying its motion for reimbursement of the attorney fees previously paid because this Court had ruled that the DNR, as a matter of

¹ Plaintiff's claims against the DNR were resolved by mediation. Plaintiff's claim against Snyder and his counterclaim against plaintiff were dismissed by consent of the parties.

law, had no obligation to pay the fees. The circuit court's application of this Court's prior decision presents a question of law. Questions of law are reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991); *Sun Communities v Leroy Twp*, 241 Mich App 665, 668; 617 NW2d 42 (2000).

It is urged that this Court's opinion in Docket 180676, which by its terms vacated the order granting summary disposition to Snyder on his cross-claim for legal fees, returned the parties to the position they were in before summary disposition was granted. At that point, Snyder had not established that the DNR wrongfully denied him legal fees to defend the case against plaintiff, and Snyder therefore had no claim to the fees. The difficulty with this position is that this Court's prior opinion goes further than merely vacating the grant of summary disposition. In its opinion, this Court stated:

[A]s a matter of law, Snyder's conduct was not committed in the course of his employment and he could not have had a reasonable basis for believing that the conduct was within the scope of authority delegated to him by the DNR. Accordingly, the DNR had no liability under Rule 1-6.1 to pay for an attorney's services in plaintiff's civil action against Snyder.

Thus, this Court determined that, as a matter of law, the DNR had no liability to pay Snyder's attorney fees because the alleged conduct did not fall within the course of Snyder's employment and Snyder could not have had a reasonable basis for believing that his conduct was within the scope of his authority as plaintiff's supervisor.

Beyond the existence of an employment relationship and the fact that the conduct occurs within the temporal and spatial boundaries established by the employment relationship, inherent in the notion of "course of employment" is the notion that the act in question was undertaken in furtherance of the employer's purpose. *Backus v Kauffman*, 238 Mich App 402, 407-408; 605 NW2d 690 (1999). In the prior opinion, this Court found that "it is clear in this case that Snyder's conduct was committed for purely personal reasons." As such, this Court determined that the conduct alleged by plaintiff could not have been undertaken in furtherance of the DNR's purpose and Snyder "could not have had a reasonable basis for believing that the conduct was within the scope of authority delegated to him by the DNR." Therefore, Snyder had no entitlement to legal fees pursuant to Civil Service Commission Rule 1-6.1. Although the prior opinion did not state that the case was remanded for proceedings consistent with this determination, we now remand for such proceedings.

We note Snyder's extensive argument that the issue to be resolved in further proceedings is whether the DNR can establish that Snyder sexually harassed the plaintiff. However, sexual harassment is a legal term, and conduct that falls short of sexual harassment within the statutory definition could be outside Snyder's "course of employment" or outside the "scope of authority delegated to him by the DNR" as the plaintiff's supervisor. Following plaintiff's complaints to the DNR, Snyder received a letter of reprimand from the DNR based on plaintiff's allegations and the follow-up investigation. While Snyder correctly notes that the reprimand does not establish sexual harassment within the legal definition, it is uncontroverted evidence of conduct that occurred outside the scope of authority delegated to Snyder by the DNR as plaintiff's supervisor. The burden of proof on Snyder's cross-claim for attorney fees always remained with

Snyder. He did not meet this burden and, therefore, is not entitled to have the DNR pay his attorney fees.

Because summary disposition was improperly granted to Snyder and because Snyder has not proven his cross-claim, the trial court erred in denying the DNR's motion for reimbursement of attorney fees. On remand, Snyder may still have the opportunity to prove that his belief that his conduct was within the scope of authority granted to him by the DNR was reasonable. However, the DNR is entitled to reimbursement of attorney fees it was erroneously ordered to pay.

We will briefly address other issues raised by Snyder in this appeal. Snyder argues that this Court lacks jurisdiction over this appeal and should transfer the matter to the Court of Claims. Plaintiff's sexual harassment claim against Snyder and the DNR was properly filed in circuit court. In response, Snyder filed a counterclaim for defamation against plaintiff and a cross-claim against the DNR for representation or payment of attorney fees in circuit court. Therefore, Snyder's claim against the DNR was in the circuit court because of his own action. A party cannot contribute to error by plan or design and then argue error on appeal. *Munson Medical Center v Auto Club Ins Ass'n*, 218 Mich App 375, 388; 554 NW2d 49 (1996). Furthermore, the present action is before this Court on the DNR's application for leave to appeal the order entered by the Ingham Circuit Court, which is certainly within this Court's jurisdiction. MCR 7.203(B)(1).

Snyder also argues that the DNR has waived or abandoned the issue by failing to serve his counsel with a transcript of the status conference held after court reorganization and by voluntarily paying the judgment. Apparently, the status conference was not recorded and, therefore, no transcript is available. However, Snyder's current counsel, who did not join the case until after the conference, filed a memorandum of law before the DNR filed a renewed motion in which he acknowledged that the circuit court had requested further briefing. Counsel also failed to raise this issue at proceedings before the circuit court and did not object to the statement by DNR's counsel regarding the occurrences at the status conference. Thus, this argument is without merit.

Regarding the argument that the DNR waived the issue by voluntarily paying appellee's attorney fees, the DNR was ordered to pay Snyder all sums he had paid to his attorney as well as any unpaid attorney fees and expenses. Thus, payment of Snyder's attorney fees was not voluntary.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Peter D. O'Connell