UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Joseph CASIAS, Plaintiff,

v.

WAL-MART STORES, INC., and Troy ESTILL, Defendants.

No. 1:10-cv-781
Hon. Robert J. Jonker

ORAL ARGUMENT REQUESTED

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION TO REMAND

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In support of his Motion to Remand (dkt. # 9), filed August 16, 2010, Plaintiff Joseph Casias files this reply to Defendants' Brief in Opposition to Plaintiff's Motion to Remand (dkt. # 15), filed September 2, 2010 (hereinafter "Defs.' Br. in Opp.").

INTRODUCTION AND SUMMARY OF ARGUMENT

The fatal weakness of Defendants' opposition to remand is that their argument rests on a point of law that does not apply to wrongful discharge claims. Defendants acknowledge, as they must, the long-standing Michigan tort rule that employees are liable for the torts they commit. Defs.' Br. in Opp. at 6. To sidestep the application of this rule to Defendant Estill, who in fact carried out the discharge of which Plaintiff Casias complains, Defendants point to an exception to the above-cited Michigan tort principle: specifically, an employee cannot be liable for a claim of tortious interference with contractual relations (hereinafter "TICR") when the tortious act is carried out for the benefit of his employer. *See id.* Where Defendants err is in claiming that this exception extends to the completely separate tort of wrongful discharge – the tort at issue in this case. *See id.* As discussed in detail below, Michigan case law does not support this assumption. Defendants misread the one Michigan case they claim supports the extension of the TICR exception: the case in question discusses both TICR and wrongful discharge claims in the same opinion but goes on to dismiss each claim for different reasons. It does not apply the TICR exception to the wrongful discharge claim. Even if the extension of the TICR exception to the new context of wrongful discharge seems possible, the Sixth Circuit has admonished federal courts against taking such a step; rather, this Court is to resolve all ambiguities in the law in favor of remand, so as not to intrude upon Michigan's sovereign right to interpret its own laws.

This basic principle of federalism also disposes of all of Defendants' remaining arguments against remand: the extent of the MMMA and the wrongful discharge tort that may

arise from it are all novel questions of Michigan law that must be left to Michigan courts. This Court should therefore remand the case to state court.

ARGUMENT

I. The Principle Of Law Upon Which Defendants Rely Does Not Apply To Wrongful Discharge Claims And Is Therefore Inapposite Here.

"It is beyond question that a corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation." *Att'y Gen. v. Ankersen*, 385 N.W.2d 658, 673 (Mich. Ct. App. 1986). What Defendants have placed at issue is whether a narrowly drawn exception to this principle for claims of tortious interference with contractual relations ("TICR") applies to wrongful discharge claims as well. Contrary to Defendant's claim, no Michigan authority holds that it does.

Defendants correct state the substance of the exception they urge this court to apply: "a corporate officer is immune from liability for tortiously interfering with a contract when the officer, acting within the scope of his employment, allegedly interferes with a contract between his own employer and a third party." Defs.' Br. in Opp. at 6; *see also Reed v. Mich. Metro Girl Scout Council*, 506 N.W.2d 231, 233 (Mich. Ct. App. 1993).

Notably absent from this rule of law – and from other Michigan case law – is an indication that it applies beyond the context of a TICR claim. In fact, it does not. Michigan and federal courts have narrowly construed the TICR exception and repeatedly reaffirmed its limits. *See, e.g., Mickelson v. Haley*, No. 08-14059, 2009 WL 1505546, at *3-*4 (E.D. Mich. May 27, 2009) (refusing to extend TICR exception where defendant was alleged to have interfered with business relationships between another employee of her company and third parties in the industry); *Kubal v. Kelley*, No. 254205, 2005 WL 1540490, at *2 (Mich. Ct. App. June 30, 2005)

(refusing to extend TICR exception where defendant was an agent of a third party, not one of the parties whose contract was allegedly interfered with).

Nor does the existence of an exception for TICR claims imply an exception for wrongful discharge claims. Though the tort of wrongful discharge bears some superficial resemblance to TICR, the two claims are fundamentally different. First, the parties to a wrongful discharge claim are the employer and the employee: wrongful discharge refers to the termination of an employee by an employer under one of three sets of circumstances that violate public policy. *See, e.g.*, *McNeil v. Charlevoix County*, 772 N.W.2d 18, 24 (Mich. 2009). In a TICR claim, by contrast, the plaintiff must show that the defendant instigated a breach of a contract where, crucially, "the defendant was a 'third party' to the contract or business relationship." *Reed*, 506 N.W.2d at 233; *accord, e.g., Derderian v. Genesys Health Care Sys.*, 689 N.W.2d 145, 158 (Mich. Ct. App. 2004) ("A plaintiff, who is party to a contract, cannot maintain a cause of action for tortious interference against another party to the contract."). Second, the wrong committed in TICR is to cause the breach of a contract, *see Derderian*, 689 N.W.2d at 157, whereas the wrong committed in a wrongful discharge case is, specifically, the firing of an employee, *see McNeil*, 772 N.W.2d at 24. Thus, the two torts are different in nature and there is no reason to assume an exception that applies to one of them also applies to the other.

The only state-law authority Defendants cite for the application of the TICR exception to a wrongful discharge claim is *Covell v. Spengler*, 366 N.W.2d 76 (Mich. Ct. App. 1985), a case that happens to *discuss* both wrongful discharge and the TICR exception, without actually *applying* the TICR exception to the wrongful discharge claim. In *Covell*, an employee of a car wash sued the business and his supervisors for firing him, allegedly in retaliation for making a complaint to a state labor board. *See id.* at 77-78. The employee asserted statutory claims under

the Whistleblowers' Protection Act ("WPA") and common-law claims, including wrongful discharge, breach of the implied covenant of fair dealing, and TICR. *See id.* at 78 (WPA); *id.* at 79 (noting wrongful discharge and fair dealing claims); *id.* at 80 (discussing TICR); *see also* Ex. 1, Br. for Appellant, *Covell v. Spengler* (Mich. Ct. App. No. 75868, Aug. 29, 1984) [hereinafter "Ex. 1, *Covell* Br. for Appellant"], at 12-14 (discussing plaintiff's TICR claim); Ex. 2, Br. for Appellee, *Covell v. Spengler* (Mich. Ct. App. No. 75868, Oct. 10, 1984) [hereinafter "Ex. 2, *Covell* Br. for Appellee"], at 12-15 (same).

The wrongful discharge and TICR were entirely separate claims, and the Michigan Court of Appeals dismissed them on entirely separate grounds. After rejecting the WPA claim as untimely, *see Covell*, 366 N.W.2d at 78-79, the court in Part II of its opinion rejected the wrongful discharge claim because the WPA provided the exclusive remedy for the retaliation the plaintiff claimed he had suffered, *see id.* at 79-80. Only after these holdings did the court invoke the TICR exception to supervisor liability, in Part III of the opinion, to reject the plaintiff's TICR claim (the fourth count of his complaint):

> Plaintiff also claims that the trial court erred in granting summary judgment on Count IV of the complaint, finding that it failed to state a cause of action against defendants Wasson and Spengler, officers of defendant corporation. There is case law support for a cause of action in favor of a discharged employee against a corporate official for tortious interference with the employee's at-will employment with the corporation. However, the facts pled by plaintiff here do not establish such an action.

Id. at 80 (citation omitted). Although the court's discussion of Count IV is cursory and does not spell out the plaintiff's allegations, it is clear from the both sides' briefing that Count IV was a claim for TICR and not wrongful discharge. *See* Ex. 1, *Covell* Br. for Appellant, at 12 (presenting appellate issue as "Does Count IV of plaintiff's complaint state a valid cause of action against the individual defendants when it alleges interference with contractual

relations?"); Ex. 2, *Covell* Br. for Appellee, at 12 ("In count IV of the Complaint, Appellant attempted to state a cause of action against the individual Appellees for interference with contractual relations."); *see also id.* at vii (reciting procedural history of the case including the contents of count IV). And even if the object of the court's analysis were not made clear from the opinion itself or from the briefing, the one claim the court could *not* have been discussing in Part III of its opinion was common-law wrongful discharge, because the court had just explained at length in Part II why that very claim was entirely foreclosed by the WPA. *See Covell*, 366 N.W.2d at 79-80. Thus, contrary to Defendants' claims, *Covell* (the only Michigan case Defendants cite for this proposition) does *not* establish that the TICR exception to tort liability for corporate employees applies to wrongful discharge claims. Rather, *Covell* stands for the thoroughly unremarkable proposition that the TICR exception applies to claims of TICR. That the court discussed both wrongful discharge and the TICR exception in the same opinion is no more than happenstance.

Defendants' overreading of *Covell* is perhaps understandable in light of some contradictory statements in the federal case law that has attempted to interpret *Covell*. *Compare Smetts v. Whiteford Sys., Inc.*, No. K88-320CA8, 1990 WL 299250, at *7 (W.D. Mich. Apr. 11, 1990) ("In Michigan, a corporate officer or agent . . . is immune from suit in his or her individual capacity, when he or she is acting in the corporation's best interests."), *with Moellers N. Am., Inc. v. MSK Covertech, Inc.*, 912 F. Supp. 269, 271-72 (W.D. Mich. 1995) ("[O]ne's status as a corporate officer ordinarily does not serve as a shield to liability even when one acts for the good of the corporation. . . . *Covell* should not be read to stand for the general proposition that corporate officers can never be held liable for torts committed on behalf of their corporate employers."). Conflicting signals about the TICR exception appear even within a single federal

case. *Compare Moellers*, 912 F. Supp. at 272 (describing *Covell* as "a retaliatory discharge case involving a contract to which the corporate officer's employer was a party"), *with id.* at 271 ("When an officer interferes with a contract between his own employer and a third party for the benefit of his corporation, he may not be found liable for *tortious interference of contract or business expectancy*." (emphasis added)). Defendants cite these cases in support of their argument without noting the contradictions. *See* Defs.' Br. in Opp. at 6-7.

Ultimately, the federal case law is not determinative. Even if the odd federal case has overread *Covell* just as Defendants have, the fact remains that no Michigan authority supports the extension of the TICR exception to wrongful discharge claims. One or two overly broad statements by a federal court cannot stand in for an interpretation of Michigan law by a Michigan court. In the absence of Michigan authority supporting the expansion of the TICR exception, this Court should not rush into the breach, but rather should respect the Sixth Circuit's admonition that "[t]he district court must resolve all . . . ambiguities in the controlling . . . state law in favor of the non removing party." *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999) (second ellipsis in original; citation and quotation marks omitted); *see also Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994). This Court should therefore hew closely to Michigan case law as it now stands: employees are liable for the torts they commit in the course of their employment, except for the tort of interference with contractual relations.

II. Defendants' Remaining Arguments Cannot Serve As The Basis For Federal Jurisdiction, Because They Involve Ambiguities Of State Law That Must Be Left To State Courts.

The Sixth Circuit's instruction to resolve all doubts in favor of remand, *see Coyne*, 183 F.3d at 493; *see also Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 405 (6th Cir. 2007) (same), answers the remainder of Defendants' arguments, which boil down to an

exhortation for this Court to accept Defendants' questionable contentions about the scope of a brand-new state statute. Defendants argue at length that "business" in the MMMA cannot encompass agents of the business. *See* Defs.' Br. in Opp. at 4-5, 7-8. But Defendants ignore other expansive remedial language of the MMMA, which protects qualifying patients from being "*denied any right or privilege, including but not limited to* civil penalty or disciplinary action." Mich. Comp. Laws § 333.26424(a) (emphasis added). In light of the broad purpose of the MMMA not only to "allow under state law the medical use of marihuana," but also to "provide protections for the medical use of marihuana," *see* Initiated Law 1 of 2008 (Michigan Medical Marihuana Act),[1] a Michigan court could easily conclude that the statutory language provides a cause of action or an expression of public policy that applies both against a business (such as Defendant Walmart) and against an agent of the business (such as Defendant Estill). Moreover, Defendants' argument that "business" contains an implicit exception for its agents is founded on Defendants' mistaken belief that the general Michigan tort law principle holding employees liable for the torts in which they participate, does not apply to this case. *See supra* Part I. At best, Defendants have identified unsettled questions regarding a new state statute. Resolving state-law questions of first impression in favor of the removing party in the context of deciding a motion to remand is precisely what the Sixth Circuit has instructed district courts *not* to do. *See Coyne*, 183 F.3d at 493; *Alexander*, 13 F.3d at 949.

Instead, resolving all ambiguities of state law in favor of the non-removing party, *see Coyne*, 183 F.3d at 493, and respecting "the power reserved to the states under the Constitution to provide for the determination of controversies in their courts," *Baraga Tel. Co. v. Am. Cellular Corp.*, No. 2:05-CV-242, 2006 WL 1982637, at *2 (W.D. Mich. July 12, 2006) (citation omitted), this Court should hold that Defendants have failed to carry their burden to show there

[1] Available at: http://www.michigan.gov/mdch/0,1607,7-132-27417_51869_52138---,00.html.

is no "colorable basis for predicting that a plaintiff may recover" against Estill. *Coyne*, 183 F.3d at 493.[2] This Court should therefore remand the case to state court so that Michigan courts have the first opportunity to answer disputed questions of Michigan law.

CONCLUSION

For the foregoing reasons, in addition to those already adduced in Plaintiff's moving papers, this Court should hold that it lacks subject matter jurisdiction over this action and consequently remand the case to state court.

Dated: September 16, 2010

Respectfully Submitted,

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By: /s/ Scott Michelman

[2] This Court need not indulge Defendants' attempt to cloud the issue with minor semantic differences over the proper standard for remand. Specifically, Defendants wish to pit a phrasing this Court has employed – "the removing parties must demonstrate the *absence of any possibility* that the plaintiff could state a claim against the non-diverse defendant," *Wolf v. Bankers Life & Cas. Co.*, 519 F. Supp. 2d 674, 683 (W.D. Mich. 2007) (citation and internal quotation marks omitted; emphasis in original) – against the Sixth Circuit's explanation that remand is appropriate unless there is no "colorable basis for predicting that a plaintiff may recover" against that defendant, *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999). *See* Defs.' Br. in Opp. at 4 n.5. Whatever slight difference separates these two standards, it does not matter to the resolution of Plaintiff's motion, as Defendants have failed to carry their burden to show there is no "colorable basis" for recovery against Estill.