

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH P. KAVANAUGH,

Plaintiff-Appellee,

v

VMC INDUSTRIES, INC., and MNP
CORPORATION,

Defendants-Appellants,

and

QSN INDUSTRIES, INC., ARTHUR
WONDRASEK and GALE LAWSON,

Defendants.

UNPUBLISHED

November 21, 2000

No. 213219

Oakland Circuit Court

LC No. 94-487960-NZ

Before: Gribbs, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment for plaintiff following a jury trial in this breach of contract and tortious interference case. We affirm.

Plaintiff and VMC Industries, Inc. entered into an employment contract on April 13, 1994. Under the terms of the contract, plaintiff could only be terminated for cause and with ten days' written notice. At the time of the contract, VMC was owned by QSN Industries, Inc., which was owned by Art Wondrasek. On June 8, 1994, MNP Corporation purchased fifty percent of VMC's shares. According to plaintiff, the day after MNP's acquisition, plaintiff was fired by Wondrasek. Plaintiff filed a complaint against defendants, in which he alleged that VMC breached the contract and MNP intentionally interfered with the contract. Plaintiff claimed that MNP was the alter ego of VMC.

I

Defendants first argue that the trial court erred in denying MNP's motion for judgment notwithstanding the verdict because plaintiff failed to establish a prima facie case of tortious interference. We disagree. A trial court's ruling on a motion for judgment notwithstanding the

verdict is reviewed de novo. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000). The evidence and all legitimate inferences are viewed in the light most favorable to the nonmoving party. *Forge, supra* at 204; *Abke, supra* at 361. If the evidence fails to establish a claim as a matter of law, a motion for judgment notwithstanding the verdict should be granted. *Forge, supra* at 204. “If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury.” *Head v Phillips Camper Sales & Rental, Inc.*, 234 Mich App 94, 115; 593 NW2d 595 (1999), quoting *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

We agree with defendants’ assertion that liability for tortious interference generally occurs only where the interferor is a “third party” to the contract, i.e., an outsider to the contract or business relationship. See *Winiemko v Valenti*, 203 Mich App 411, 416-417; 513 NW2d 181 (1994); *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). Defendants contend that because MNP was a shareholder of VMC, it cannot be liable as a third party to the contract unless its actions were not for the benefit of the corporation, but instead for the benefit of MNP itself. See *id.* (“It is now settled law that corporate agents are not liable for tortious interference with the corporation’s contracts unless they acted solely for their own benefit with no benefit to the corporation.”) Assuming, without deciding, that defendants are correct that the rule governing corporate agents and officers is applicable, we find sufficient evidence from which reasonable jurors could infer that MNP was liable as a third party to the contract.

The evidence, viewed in the light most favorable to plaintiff, showed that MNP assumed an active role in VMC’s day-to-day operations immediately after its acquisition of fifty percent of VMC. MNP directly controlled VMC personnel, production, and finances. MNP acquired its interest in VMC on June 8, 1994; plaintiff was fired the next day. Soon after, various other VMC employees were discharged. Two MNP employees, Chuck Abbate and Gale Lawson, were involved in plaintiff’s termination by monitoring the removal of his personal belongings from his office and escorting him from the building. They also were directly responsible for firing at least one other VMC employee.

Other changes at VMC, following plaintiff’s termination from employment, reflect MNP’s influence and control. Abbate and Lawson began performing plaintiff’s job functions. MNP personnel were sent to work on engineering, accounting, and scheduling. MNP hired Linda Trombley, who had handled VMC’s accounting and offered a position to Mary Jane Duffy, whose position at VMC was filled by someone else.

VMC’s financial matters were shifted to MNP. MNP loaned money to VMC and purchased materials on VMC’s behalf. Eventually, MNP’s personnel manager became responsible for processing VMC’s payroll. MNP also installed a lease line to VMC so that VMC could operate from MNP’s computer system. Moreover, prior to becoming a shareholder, MNP had meetings with VMC’s previous owner (Wondrasek’s predecessor) concerning a partnership in VMC. Wondrasek eventually negotiated the purchase for QSN, but within two months sold a fifty-percent interest to MNP, whose majority owner was a longtime friend of Wondrasek.

Given this evidence, the court did not err in denying defendants' JNOV motion. While the evidence supports a conclusion that MNP's interference with plaintiff's employment benefited VMC, it also gives rise to an inference that MNP acquired VMC with the intention of benefiting MNP at VMC's expense, and thus, was a third party to the contract. Because reasonable jurors could have reached different conclusions, the trial court could not substitute its judgment for that of the jury.

II

MNP also argues that plaintiff failed to establish a prima facie case because he did not show that MNP intentionally and improperly interfered with the contract. We disagree.

To establish a tortious interference claim, a plaintiff must show that a defendant intentionally and improperly interfered with the plaintiff's contractual rights. *Michigan Podiatric Medical Ass'n v Nat'l Foot Care Program, Inc.*, 175 Mich App 723, 736; 438 NW2d 349 (1989). A plaintiff must allege that a per se wrongful act was intentionally committed or that a lawful act was committed with malice and without legal justification to avoid contractual rights. *Prysak v R L Polk Co.*, 193 Mich App 1, 12; 483 NW2d 629 (1992). "To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference." *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 699; 552 NW2d 919 (1996).

MNP contends that there was no evidence that it had any role in plaintiff's termination from employment, and even assuming such evidence, its actions were motivated by legitimate business interests in VMC and are, therefore, not actionable as tortious interference because there is no evidence of an improper purpose. See *Wood v Herndon & Herndon Investigations, Inc.*, 186 Mich App 495, 500-501; 465 NW2d 5 (1990). This Court has recognized that a defendant's legitimate business interests may shield it from liability in a tortious interference claim. *Prysak, supra* at 13; *Wood, supra* at 500-503. However, where a defendant's actions overreach the bounds of permissible interference and improperly sabotage the contractual agreements of others, a defendant is not immune from liability. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 96-97; 443 NW2d 451 (1989); *Feldman v Green*, 138 Mich App 360, 370 n 1; 360 NW2d 881 (1984).

Viewing the evidence and all legitimate inferences in a light most favorable to plaintiff, a reasonable factfinder could conclude that MNP improperly instigated the breach of plaintiff's contract by exceeding the bounds of permissible interference for its own benefit. As noted above, MNP acquired fifty percent interest in VMC, and several employees, including plaintiff, were fired or discharged shortly thereafter. MNP employees were directly involved. Plaintiff was not provided with an explanation for his termination. MNP brought its own employees into VMC. Although MNP portrayed VMC's financial condition as bleak, plaintiff testified that sales had increased significantly under his management. While the evidence may lead to a conclusion that MNP merely took action to stabilize VMC's ailing financial condition, the evidence also supports an inference that MNP acquired VMC and merged the companies' operations in self-interest, to the detriment of plaintiff. "Where there are two plausible conclusions that may be drawn from the evidence, this Court will not supplant its conclusion for that of a factfinder."

Mahrel v Danke, 216 Mich App 343, 351; 549 NW2d 56 (1996). The trial court properly denied MNP's JNOV motion.

III

Defendants next argue that the trial court's jury instruction regarding the tortious interference claim was not an accurate statement of the law because it did not include the third-party requirement discussed above. Jury instructions are reviewed for an abuse of discretion. *McPeak v McPeak (On Remand)*, 233 Mich App 483, 494; 593 NW2d 180 (1999). "Jury instructions are reviewed as a whole to determine whether the instructions adequately informed the jury of the applicable law, given the evidentiary claims of the case." *Id.* If the theories and applicable law were adequately and fairly presented to the jury, reversal is not required. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). This Court will not reverse a trial "court's decision regarding supplemental instructions unless failure to vacate the verdict would be inconsistent with substantial justice." *Grow v W A Thomas Co*, 236 Mich App 696, 702; 601 NW2d 426 (1999).

We conclude that reversal of the jury verdict is unwarranted. The trial court instructed the jury in accordance with the standard jury instructions regarding the elements of tortious interference. Plaintiff had the burden of proving that MNP's interference was improper, in accordance with the following instruction:

[I]mproper interference is conduct that is fraudulent, not lawful, not ethical, or not justified under any circumstances. If MNP's alleged conduct was lawful, it is still improper if it is done without justification and for the purpose of interfering with [plaintiff's] contractual rights. But [plaintiff] must specifically show affirmative acts by MNP that corroborate that MNP had the wrongful purpose of interfering with [plaintiff's] contractual rights. [See SJI2d 125.04.]

As noted above, the evidence supported a conclusion that MNP acted on its own behalf for its own benefit, and was a third party to the employment contract. Therefore, any instructional error was harmless. Moreover, the trial court presented MNP's theory, that it was not liable for tortious interference because it was not a third party to the employment contract,¹ to the jury. Reversal is not required.

IV

Defendants also argue that the trial court's findings regarding plaintiff's alter ego theory were not supported by the evidence. We disagree.

¹ MNP's theory presented to the jury stated in relevant part: "MNP did not instruct or do anything to cause Mr. Wondrasek to fire [plaintiff]. Even if it had, MNP had the right to participate as a shareholder in his [sic] management of VMC. Therefore, there is no improper interference, and MNP has no liability to [plaintiff]."

[T]here are three requisites to piercing the corporate veil and finding an identity between business entities. First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff. [*SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 381; 512 NW2d 86 (1994), quoting *Nogueras v Maisel & Associates of Michigan*, 142 Mich App 71, 86; 369 NW2d 492 (1985).]

While fraudulent or wrongful conduct must be established by clear and convincing evidence, it can be inferred from other evidence. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457-459; 559 NW2d 379 (1996).

The trial court's finding, that MNP was liable under the facts of the case, was supported by the evidence. The testimony supported a finding that VMC was a mere instrumentality of MNP. MNP purchased a fifty percent interest in VMC on June 8, 1994, at which time Abbate and Lawson became involved in VMC personnel decisions. The day after MNP acquired its interest in VMC, plaintiff's employment was terminated. Soon after plaintiff's termination, other employees were discharged, and the relationship with an independent manufacturer's representative was severed. The evidence also showed that MNP hired or attempted to hire some of VMC's employees. It could be reasonably inferred that MNP was displacing VMC's key employees for its own benefit. There was evidence that MNP was controlling VMC's expenditures. MNP purchased materials for VMC and Lawson decided what parts were produced and shipped, what materials were ordered, and the tooling that was needed.

The evidence also established that the corporate entity was used to commit a wrong. According to the terms of the employment agreement, plaintiff could only be fired for cause and with ten days' notice. Although Craig Stormer, MNP's vice president of finance, testified that he was not sure when he learned of plaintiff's employment agreement, Wondrasek testified that he had informed MNP of the agreement. The day after MNP acquired its interest in VMC, Wondrasek fired plaintiff without explanation. This evidence supports a conclusion that plaintiff was discharged in breach of his employment agreement, as a result of MNP's involvement, which unjustly injured plaintiff. In light of the above evidence, the trial court findings were proper with regard to the alter ego claim.

Defendant contends that VMC was a sinking ship. However, there was evidence that the financial situation of VMC was not as bleak as MNP portrayed. According to plaintiff, prior to QSN's involvement, VMC was looking for a partner that would inject cash into the business because it needed additional equipment to handle increased business. We conclude that, given the evidence of VMC's financial prospects, the evidence regarding MNP's injection of money into VMC does not undermine the trial court's findings concerning the alter ego theory.

V

Defendants' final argument is that alter ego evidence was improperly presented to the jury. Defendants failed to timely object to the evidence and, therefore, the issue is waived on appeal. See *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997); MRE 103(a)(1). Additionally, defense counsel conceded that the evidence was presented through questions that

were asked by the defense. A party cannot introduce evidence and then argue on appeal that the error requires reversal. *Bufford v Brent*, 115 Mich App 146, 149; 320 NW2d 323 (1982).

VI

Defendants also argue that they were prejudiced by the trial court's conduct during the trial. Upon review of the relevant portions of the transcript, we conclude that there is no basis for defendants' allegations. Accordingly, this argument is without merit.

Affirmed.

/s/ Roman S. Gibbs

/s/ Janet T. Neff

/s/ Peter D. O'Connell