STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA TOTH and MITCHELL TOTH,

Plaintiffs-Appellants,

v

TOYS "R" US-DELAWARE, INC. and PATRICK BORDEN,

Defendants-Appellees.

UNPUBLISHED
December 9, 2003

No. 242058
Macomb Circuit Court
LC No. 01-00289-NZ

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

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motions for summary disposition under MCR 2.116(C)(10). We affirm.

I. Standard of Review

Motions for summary disposition under MCR 2.116(C)(10) are reviewed de novo, considering the facts in the light most favorable to the nonmoving party. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "A motion under MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. The adverse party may not rest on mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial. All this supporting and opposing material must be considered by the court." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 7; 614 NW2d 169 (2000).

II. Retaliatory Termination

Plaintiffs' first issue on appeal is that the trial court erred in granting defendants' motions for summary disposition under MCR 2.116(C)(10) because a genuine issue of material fact existed regarding whether defendants violated the Elliott-Larsen Civil Rights Act ("CRA"),

MCL 37.2101 *et seq.*, by terminating plaintiff Patricia Toth's ("plaintiff")[1] employment with defendant Toys "R" Us-Delaware, Inc. ("TRU"). We disagree.

Plaintiff contends that the trial court improperly granted summary disposition to TRU with regard to her retaliation claim under the CRA. Plaintiff's employment with TRU, as the store director of its Roseville store was terminated after she admitted in writing to misusing approximately $160 of TRU petty cash funds to make personal purchases over the span of several months. Plaintiff argues that the misappropriation was a pretext, and that she was actually terminated as revenge for her sexual harassment complaints about a joke email sent by her direct supervisor, defendant Patrick Borden, a TRU district manager, as well as complaints by plaintiff regarding conduct by Borden during an interview that plaintiff alleges was discriminatory on the basis of sex and age.

To establish a prima facie case of retaliation under the CRA, a plaintiff must prove "(1) that [s]he was engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Peña v Ingham County Rd Comm*, 255 Mich App 299, 310-311; 660 NW2d 351 (2003). Once a prima facie case has been established, the burden of production shifts to defendants "to articulate a legitimate business reason for the discharge." *Roulston v Tendercare, Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000). If this burden is met, "plaintiff must have the opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge." *Id*. "A plaintiff can prove pretext either directly by persuading the court that a retaliatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id*.

At issue here is the fourth element, causation. To establish a causal connection, "the plaintiff must show that [her] participation in activity protected by the CRA was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001) quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 929 (CA 6, 1999); *Polk v Yellow Freight System, Inc*, 801 F2d 190, 199 (CA 6, 1986). Plaintiffs cite *McLemore v Detroit Receiving Hosp*, 196 Mich App 391; 493 NW2d 441 (1992), in support of the proposition that causation can be established through circumstantial evidence. In *McLemore, supra*, the plaintiff made a discrimination charge and subsequently began receiving unfavorable performance reviews before finally being laid off ostensibly due to economic necessity. *Id.* at 396-397. This Court held that the compilation of a paper record to support plaintiff's discharge supported an inference that the "economic necessity" reason was pretextual. *Id.* The plaintiff in *McLemore, supra*, was sent a number of memoranda criticizing her performance and blaming her for things that were beyond her control, and for failing to complete tasks she had not even been assigned. *Id.* at 397.

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[1] Plaintiff Mitchell Toth's claim is a derivative one for loss of consortium; therefore, whenever plaintiff is used singularly in this opinion, it will refer to plaintiff Patricia Toth.

Here, however, plaintiff was not the subject of vague, undeserved subjective performance criticism. To the contrary, plaintiff admitted, in writing, that she misused TRU funds to purchase personal items. Borden testified that, as far as he knew, TRU took a zero tolerance view toward misuse of petty cash. TRU produced evidence that other, male store directors were terminated for misusing petty cash in at least two other situations, including one where a male store director was terminated for misappropriating no more than $20. Plaintiffs, on the other hand, presented little evidence other than plaintiff's own speculation and unsupported allegations, along with the fact that her termination occurred within a few months of her complaints regarding Borden. We conclude, therefore, that plaintiffs failed to produce evidence tending to show that plaintiff's complaints were a substantial factor in her termination, and that there exists no genuine issue of material fact regarding this issue. We further conclude that the trial court properly granted TRU's motion for summary disposition on this issue.

Plaintiffs also contend that the trial court erred in granting summary disposition in favor of Borden on plaintiff's CRA claim. This Court has held that:

> Read as a whole, the CRA envisions, in our opinion, employer liability for civil rights violations. Further, had our Legislature intended individual, rather than employer, liability under the CRA, it could have explicitly stated so. Thus, we conclude that the CRA *provides solely for employer liability*, and a supervisor engaging in activity prohibited by the CRA *may not be held individually liable* for violating a plaintiff's civil rights. [*Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 485; 652 NW2d 503 (2002).]

Pursuant to *Jager, supra*, plaintiff cannot sustain a claim under the CRA against Borden as a matter of law.[2] Therefore, the trial court properly granted Borden's motion for summary disposition in this regard.

III. Defamation

Plaintiff next argues that the trial court erred in granting defendants' motions for summary disposition with regard to the defamation claim. We disagree.

In order to establish a defamation claim, plaintiffs must show the following:

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[2] Plaintiff argues that this Court is bound by its decision in *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 799; 369 NW2d 223 (1985), in which this Court refused to dismiss two individual defendants who argued that the CRA did not apply to individuals. This Court is required to follow decisions issued by a panel of this Court on or after November 1, 1990, MCR 7.215(J)(1), and we are not bound by decisions issued by a panel of this Court prior to that date. *People v Antkoviak*, 242 Mich App 424, 479 n 25; 619 NW2d 18 (2000); *Arnold v Department of Transp*, 235 Mich App 341, 346 n 5; 597 NW2d 261 (1999). Accordingly, *Jenkins, supra*, did not bind the *Jager* panel. We are bound, however, to follow *Jager, supra*.

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). [*Kevorkian v American Medical Ass'n*, 237 Mich App 1, 8-9; 602 NW2d 233 (1999).]

"[A]n accusation of the commission of a crime is defamatory per se." *Kevorkian*, *supra* at 8. A defendant cannot be held liable for making a defamatory statement that is substantially true. *Hawkins v Mercy Health Servs, Inc*, 230 Mich App 315, 332-333; 583 NW2d 725 (1998). "[T]he 'substantial truth doctrine' . . . states that a statement or defamatory implication need only be substantially accurate as opposed to being literally and absolutely accurate." *Kevorkian*, *supra* at 10, quoting *Hawkins*, *supra* at 332-333. A claim of a statement's falsity cannot be based upon a misuse of formal legal terminology by nonlawyers. *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 264; 487 NW2d 205 (1992); see also *Kevorkian*, *supra* at 10.

Plaintiff alleges that defendants defamed her when a member of TRU's loss prevention staff announced, at a meeting of TRU store management personnel in Niagara Falls, that a Michigan store director had recently been fired by TRU for theft of petty cash. With regard to plaintiff's claim against TRU, it contends that the statements were true. Plaintiffs argue that plaintiff has never admitted to being a thief; rather, she admitted to "accounting errors" when using TRU funds to purchase personal items. What plaintiff does not dispute, and what she admitted to doing, was using TRU funds inappropriately to purchase items for personal use. Moreover, plaintiff acknowledged, in writing, that what she did was wrong, and that she knew it was wrong.

We conclude that, even if one views the evidence in a light most favorable to plaintiff, and assumes that she does not meet the legal definition of a thief for want of evidence of malicious intent, a statement by a layperson characterizing plaintiff as someone who committed "theft" is, nevertheless, substantially true. Even accepting plaintiff's statements that she did not intend to defraud TRU, plaintiff has admitted to the unauthorized use of TRU petty cash to purchase personal items, and failure to meet the technical legal definition of "theft" or "thief" when such a term was employed by a nonlawyer does not establish falsity. See *Rouch*, *supra* at 264. We conclude, therefore, that there was no genuine issue of material fact regarding the substantial truth of the alleged statement, and that the trial court did not err in granting TRU's motion for summary disposition on this issue. See *Cole*, *supra* at 7; *Hawkins*, *supra* at 332-333.

With regard to plaintiffs' defamation claim against Borden, he argues that plaintiffs have produced no evidence linking him to any defamatory statements, and no evidence showing that he defamed plaintiff. Plaintiffs counter by stating "Borden's Appellate Brief presumes the only defamation occurred at the Niagara Falls TRU meeting." We agree that Borden so presumes, and rightfully so, insofar as the Niagara Falls allegation was the only allegation of defamation plaintiffs made until filing their brief in reply to Borden's brief on appeal. Moreover, plaintiff herself testified at her deposition that the alleged statement at the Niagara Falls Meeting was the only instance of defamation of which she was aware. Thus, plaintiffs raise this issue, of further defamatory statements, first on appeal, and more specifically, for the first time on appeal in a

reply brief. This Court will not address issues not raised before the trial court. *Mayor of the City of Lansing v Public Serv Comm*, 257 Mich App 1, 19; 666 NW2d 298 (2003).

Plaintiff has failed to present any evidence connecting Borden to the alleged defamatory statement made at the Niagara Falls meeting, thus, we conclude that there is no genuine issue of material fact regarding whether Borden defamed plaintiff, and that the trial court did not err in granting Borden's motion for summary disposition on this issue.

IV. Tortious Interference with a Business Relationship

Plaintiffs finally allege that Borden interfered with her business relationship with TRU. We disagree. To prove tortious interference with a business relationship, one must show:

> "[T]he existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. 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 or interference." [*Mino v Clio School District*, 255 Mich App 60, 78; 661 NW2d 586 (2003) quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996).]

Here, plaintiffs have not demonstrated with specificity, aside from her own unsupported allegations, that Borden was involved at all with any investigation or the decision to terminate her employment. Borden, on the other hand, has produced his own testimony, supported by the affidavits of the human resources manager and loss prevention manager who were involved in the investigation of plaintiff, and admissions by TRU below and on appeal to show that he was not involved in these actions at all. Plaintiffs counter that Borden happened to be in the Roseville store at the time TRU personnel were investigating plaintiff, but failed to offer any evidence connecting his mere presence at a store, for which he is responsible as a district manager, to an investigation with which TRU's loss prevention manager and human resources manager stated in affidavits that Borden had no involvement. For the above reasons, we conclude that there is no genuine issue of material fact regarding this issue, and that the trial court properly granted Borden's motion for summary disposition in this regard.

V. Conclusion

Upon a de novo review, viewing the facts in a light most favorable to plaintiffs, we conclude that the trial court did not err in granting defendants' motions for summary disposition.[3]

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[3] With regard to plaintiff Mitchell Toth's loss of consortium claim, summary disposition is also proper as "[a] derivative claim for loss of consortium stands or falls with the primary claims in the complaint. Because plaintiff's other claims failed, the loss of consortium claim must likewise
(continued…)

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

(…continued)

fail." *Long v Chelsea Community Hosp*, 219 Mich App 578, 589; 557 NW2d 157 (1996).