

STATE OF MICHIGAN
COURT OF APPEALS

CHERYL DEBANO-GRIFFIN,

Plaintiff-Appellant,

v

LAKE COUNTY and LAKE COUNTY BOARD
OF COMMISSIONERS,

Defendants-Appellees.

UNPUBLISHED

December 16, 2010

No. 282921

Lake Circuit Court

LC No. 05-006469-CZ

ON REMAND

Before: ZAHARA, P.J., and WHITBECK and M. J. KELLY, JJ.

M. J. KELLY, J. (*dissenting*).

Respectfully, and for the reasons I set forth in my previous dissent with regard to the issue of causation, I again must dissent.

Although we place into every opinion the standard of review under which we are bound to examine the various issues that are presented to us, it here bears repeating—hopefully in a non-rote manner—what that standard means. This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Nevertheless, we must do so by reference to the arguments and evidence actually proffered by the parties before the trial court. *Id.* at 380-381. Further, we must review the parties’ evidence in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Applying those standards to the evidence, in my view, demonstrates that Debano-Griffin plainly established a question of fact on the issue of causation.

Lake County and the Board contended, and the majority has held, that the only evidence that Debano-Griffin presented to support her theory that her position was eliminated in retaliation for her reporting a suspected violation of law was the fact that her position was eliminated after she raised the accounting irregularities. It is well-settled that a plaintiff may not establish the causation element of a Whistleblowers’ Protection Act (WPA) claim solely by showing that the adverse employment action occurred after the plaintiff engaged in protected activity under the WPA. *West v General Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003) (stating that “a temporal relationship, standing alone, does not demonstrate a causal

connection between the protected activity and any adverse employment action.”). If that had been all the evidence that Debano-Griffin had presented to the trial court in opposition to the motion, summary disposition would have been appropriate. But it was not. Debano-Griffin did not rely *solely* on the temporal relationship between her reports and the ultimate decision to eliminate her position. At the summary disposition phase, Debano-Griffin presented evidence that, if believed, established that the Board had already determined to retain her position for the next year shortly before she began to raise concerns about the ambulance service and the transfer of millage funds. There was also evidence that shortly after she raised her concerns and informed the Board that she had reported the accounting irregularity, the Board took two relevant actions: it eliminated her position and it returned the funds that Debano-Griffin had alleged were improperly transferred. From the evidence that Debano-Griffin’s position was funded, a reasonable jury could conclude that the Board had no intention of eliminating her position before she reported her concerns about the ambulances and transfer. Likewise, because the decision to eliminate Debano-Griffin’s position followed closely after her reports and was linked with the Board’s decision to reverse the transfer of funds, a reasonable jury could conclude (and apparently did) that the Board’s decisions to reverse the transfer and eliminate Debano-Griffin’s position were related and that the decision to eliminate her position was motivated by a desire to retaliate against her for publicly challenging the transfer. The majority, inexplicably, simply ignores this evidence.

Further, I would not consider any alternate bases for overturning the jury’s verdict in this case. Lake County and the Board did not properly raise the issue of notice before the trial court. Accordingly, I would not consider it. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) (explaining that Michigan follows a raise or waive rule for appellate review). In addition, although Lake County and the Board arguably made a limited burden-shifting argument in their motion for summary disposition, on appeal to this Court, they did not present a proper argument that the trial court erred when it denied their motion because they presented evidence that there was a legitimate business reason for the decision and Debano-Griffin failed to rebut that evidence. Indeed, they did not even address the evidence of pretext actually presented by Debano-Griffin in opposition to their motion for summary disposition. Consequently, I conclude that they abandoned any claim of error as to the burden-shifting approach. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). In any event, having reviewed the evidence of pretext actually proffered in opposition to Lake County and the Board’s motion for summary disposition, I conclude that Debano-Griffin presented evidence sufficient to establish a question of fact on the issue of pretext.

Because I believe Debano-Griffin presented sufficient evidence to survive summary disposition, I conclude that the trial court did not err when it declined to grant Lake County and the Board’s motion. MCR 2.116(C)(10). I would affirm.

/s/ Michael J. Kelly