[Cite as *Ratkosky v. CSX Transp., Inc.*, 2009-Ohio-5690.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92061

RONALD RATKOSKY

PLAINTIFF-APPELLANT

vs.

CSX TRANSPORTATION, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-617647

BEFORE: Sweeney, J., Cooney, A.J., and Dyke, J.

RELEASED: October 29, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff Ronald Ratkosky ("Ratkosky") appeals from the trial court's granting directed verdicts on his claims of defamation and tortious interference with a business relationship. After reviewing the facts of the case and the pertinent law, we affirm in part and reverse and remand in part.

{¶ 2} In March 2007, Ratkosky sued his employer, CSX Transportation, Inc. ("CSX"), for defamation and FirstEnergy Corporation ("FirstEnergy") for defamation and tortious interference with a business relationship. Ratkosky alleged that a FirstEnergy employee lied to his peers and supervisors, claiming that he urinated from a railyard balcony in front of a female FirstEnergy employee. The parties proceeded to a jury trial in August 2008. At the close of Ratkosky's case, the trial court granted directed verdicts in favor of both defendants.

{¶ 3} Ratkosky now appeals. In his sole assignment of error, he claims that the trial court erred in granting the directed verdicts. FirstEnergy argues that the trial court correctly granted a directed verdict in its favor because FirstEnergy does not employ any of the individuals involved in this case. Instead, it is a holding corporation that owns FirstEnergy Solutions, which owns FirstEnergy Generation Corporation ("GENCO"). GENCO

employees, rather than FirstEnergy employees, were involved in the incident that gave rise to this case.

{¶ 4} CSX argues that a directed verdict was properly granted in its favor because the trial court lacked jurisdiction to consider Ratkosky's defamation claim against it, which is preempted by the Railway Labor Act ("RLA").

{¶ 5} At trial, the jury heard the following evidence. GENCO owns the Eastlake Power Plant. CSX, a rail transportation company, delivers coal to the plant, and GENCO transforms the coal into electricity. Ratkosky is a train conductor for CSX, and a collective bargaining agreement ("CBA") between CSX and the United Transportation Union ("the Union") governs the terms and conditions of his employment.

{¶ 6} On May 24, 2006, Ratkosky was overseeing the delivery of coal to the Eastlake Power Plant. According to his usual practice, Ratkosky stood in a small control room called the "button room" or "pulpit," which was located in the middle of a catwalk overlooking the CSX train.

{¶ 7} David Genevie ("Genevie"), a production supervisor at the Eastlake Power Plant, was sitting at a picnic table approximately 200 feet away from the pulpit. Genevie observed Ratkosky standing on the catwalk near the pulpit. He later told Ratkosky's supervisor, Scott Kuhner ("Kuhner"), that he saw Ratkosky urinate off the catwalk in plain view, and

Ratkosky did not seem to care that others could see him. Genevie told Kuhner he wanted Ratkosky removed from the Eastlake Power Plant immediately. Genevie had a history of complaining about Ratkosky's performance. Kuhner advised Genevie to put his complaint about Ratkosky in writing.

{¶ 8} Genevie sent an e-mail complaining about Ratkosky's conduct to Kuhner at CSX. Additionally, Genevie copied this e-mail to Gary Yeager, Genevie's supervisor at GENCO, Robert Wigg, a manager in GENCO's fuels procurement section, James Melody, the director of GENCO's fuels procurement section, and Donald Ullom, GENCO's site director for the Eastlake Power Plant. In this e-mail, Genevie stated the following: "* * * I witnessed an appalling event. I observed the CSX conductor exit the south door of the control pulpit and urinate outside the building. * * * Because of the seriousness of this infraction, I have no choice but to demand that this person not be returned to our plant site. I'm not sure what this persons [sic] name is, but he is the conductor that we routinely see. I believe his first name is Ron. * * *."

{¶ 9} Genevie also apologized for the offensive behavior to Tracy Whitehead ("Whitehead"), the female GENCO employee who Genevie claimed witnessed the incident. He informed her that he asked CSX to remove

Ratkosky from the site. Whitehead replied that she did not see Ratkosky do anything unusual or offensive.

{¶ 10} Kuhner discussed the matter with his supervisor, Gary Bethel, and they decided to suspend Ratkosky without pay. Kuhner sent a written report detailing the allegations to CSX's field administration office in Florida. In this assessment, Kuhner exaggerated Genevie's accusations, writing that Genevie witnessed Ratkosky improperly expose his genitals while urinating directly outside of the pulpit and in the immediate vicinity of a female employee. Kuhner also sent an e-mail notifying other CSX employees that Ratkosky had been placed on leave.

{¶ 11} Based upon the allegations in the assessment, CSX sent Ratkosky a letter informing him of the charges against him. The CBA governing Ratkosky's employment with CSX dictated that after the charge letter was issued, CSX would hold a disciplinary hearing known as an investigation.

{¶ 12} During this investigation Genevie admitted that he lied. Genevie told a CSX representative that he did not see Ratkosky urinate nor did he see Ratkosky's genitals. The CSX representative told Genevie that he could leave the hearing as his testimony was no longer needed.

{¶ 13} Subsequently, CSX exonerated Ratkosky of the charges and allowed him to return to work. Ratkosky had been out of work for 42 days without pay, and upon his reinstatement, CSX provided back pay.

{¶ 14} At trial, Whitehead testified that Ratkosky's job performance was excellent and that she and her coworkers appreciated his work. They agreed that they experienced far fewer problems when he was on the property. She eventually learned that Ratkosky had been accused of urinating beside the pulpit. Ratkosky did not return to the Eastlake Power Plant after May 24, 2006, and Whitehead believed this was because of Genevie's accusations. The allegations about Ratkoksy became a topic of conversation in the coal yard.

{¶ 15} After the incident, Ray Bottles ("Bottles"), a trainman at CSX and Ratkosky's friend, overheard Clint Moore ("Moore"), a CSX yardmaster, come into the yard and say that Ratkosky was "shaking his cock at some female." Bottles also heard other trainmen and engineers in the yard discussing the matter. Bottles called Ratkosky to ask if the rumor was true, and Ratkosky denied it.

{¶ 16} Whitehead wrote a letter to CSX to show her support for Ratkosky because she did not agree with the way CSX was handling the allegations. In the letter, she stated, "If he was doing what he has been accused of, I knew nothing about what was going on." A number of GENCO employees signed and submitted another letter to CSX in support of Ratkosky.

{¶ 17} At trial, the next part of the evidence concerned FirstEnergy's responsibility for Genevie's acts. Both Genevie and Whitehead testified that they worked for GENCO. They admitted that at their depositions, they stated that they were employed by "FirstEnergy" but had been told to say that they worked for "FirstEnergy Generation Corporation." Whitehead testified that the sign in front of the Eastlake Power Plant read "FirstEnergy Generation Corporation," but that she called her employer "FirstEnergy" because that was easier to say. During Whitehead's testimony, a FirstEnergy attorney asked who her employer was, and she replied "FirstEnergy Generation Corporation," while rolling her eyes. When asked why she was rolling her eyes, she testified that this was because she was used to saying that she worked for "FirstEnergy."

{¶ 18} In Ratkosky's sole assignment of error, he argues as follows:

{¶ 19} "I. The trial court erred in granting the defendants' motions for directed verdict."

{¶ 20} Pursuant to Civ.R. 50(A)(4), a directed verdict may be granted when "the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party * * *." We review a trial court's ruling on a motion for directed verdict under a de

novo standard. *Steppe v. Kmart Stores* (1999), 136 Ohio App.3d 454; *O'Day v. Webb* (1972), 29 Ohio St.2d 215.

{¶ 21} Initially, we note that the court granted FirstEnergy's motion for a directed verdict on two grounds. First, that Ratkosky failed to present sufficient evidence as to the defamation and the tortious interference claims. Second, that Ratkosky "did name the wrong party. It should have been FirstEnergy Generation Corporation."

{¶ 22} Additionally, the court granted CSX's motion for a directed verdict on two grounds. First, that Ratkosky failed to present sufficient evidence to prove defamation. Second, that "[t]he activity of CSX was under a privileged format because of the collective bargaining agreement, coupled with rule 93."

{¶ 23} As to the "wrong party" issue, although Ratkosky identifies this as an erroneous directed verdict, we find the issue is best addressed sua sponte under the court's August 13, 2008 denial of Ratkosky's motion to amend his complaint. A detailed procedural history of this case follows.

{¶ 24} Ratkoksy filed his complaint against FirstEnergy on March 5, 2007. On May 10, 2007, FirstEnergy filed its answer. On appeal, FirstEnergy claims that this was the first occasion when it informed Ratkosky that he sued the wrong party. However, our review of FirstEnergy's answer shows otherwise. Nothing about FirstEnergy's answer

puts Ratkosky - or anyone else for that matter - on notice that GENCO, rather than FirstEnergy, was the correct defendant. FirstEnergy hangs its hat on the following sentence in its answer: "Plaintiff's claims against FirstEnergy should be dismissed because FirstEnergy is a holding company and not an operating company."

{¶ 25} Instead, we find that the first allegation in the record of an incorrect defendant is FirstEnergy's February 14, 2008 summary judgment motion. Ratkosky filed a response to FirstEnergy's summary judgment motion on March 31, 2008, requesting that "[i]f in fact FirstEnergy is the wrong party and GENCO is the correct party, then the issue can be easily corrected via Civ.R. 15, which allows parties to amend complaints to conform to the facts as developed during discovery." On May 8, 2008, the court denied FirstEnergy's summary judgment motion without addressing the discrepancy between FirstEnergy and GENCO.

{¶ 26} On August 12, 2008, which was the second day of trial, Ratkosky filed a motion to amend complaint and/or substitute defendant pursuant to Civ.R. 21 or Civ.R. 15. The next day, on August 13, 2008, the court denied Ratkosky's motion and granted a directed verdict in favor of the defendants. For the reasons discussed below, we find that the court abused its discretion when it denied Ratkosky's motion to amend.

{¶ 27} Pursuant to Civ.R. 15(A), a plaintiff may amend his or her complaint, after a responsive pleading has been filed, "only by leave of court or by written consent of the adverse party." Furthermore, "[l]eave of court shall be freely given when justice so requires." An amendment to a complaint may include "changing the party against whom a claim is asserted * * *." Civ.R. 15(C).[1]

{¶ 28} A careful review of the record shows various reasons why Ratkosky thought he sued the correct party in FirstEnergy. The documents that make up CSX's internal investigation into the allegations made against Ratkosky originated from FirstEnergy. For example, the May 24, 2006 email that Genevie sent to Kuhner complaining about Ratkosky's behavior was generated from a FirstEnergy email address: genevied@firstenergycorp.com. Furthermore, Genevie copied the email to four other employees, all with email addresses at "firstenergycorp.com." Genevie's signature line on the email lists his title as "Yard Supervisor Eastlake Plant FirstEnergy."

{¶ 29} In addition to these emails, the written charges, investigation reports, and ultimate exoneration letter from CSX to Ratkosky refer to the

[1] Civ.R. 15(C) governs whether an amendment relates back to the date the original pleading was filed. This is typically used in cases challenging the statute of limitations for a particular claim. Because neither party questions the statute of limitations in the instant case, Civ.R. 15(C) is not the focus of our analysis.

"First Energy Power Plant," "First Energy employees," and list Genevie as a "First Energy Supervisor."

{¶ 30} As noted earlier, FirstEnergy filed a timely response to Ratkoksy's complaint, noting that FirstEnergy was a "holding company." FirstEnergy did not file a motion to dismiss based on the theory of Ratkosky suing the wrong party. Rather, FirstEnergy, as the named defendant, filed motions and made arguments on behalf of GENCO, the intended defendant, as if FirstEnergy was the proper party.

{¶ 31} Whitehead and Genevie, who were deposed on December 17, 2007, represented themselves as being employees of "FirstEnergy." This was subsequently corrected in an errata sheet that changed FirstEnergy to GENCO. Additionally, during Whitehead's deposition, Ratkosky introduced two exhibits that support Ratkosky's belief that his defamer was employed by FirstEnergy. First, the June 3, 2006 letter to CSX from Whitehead, in which Whitehead identified herself as a FirstEnergy employee. Second, the other letter defending Ratkosky's behavior, which was signed by 11 people, all representing themselves as FirstEnergy employees.

{¶ 32} Even as late as the first day of trial there is evidence in the record that would lead Ratkoksy to believe FirstEnergy was the proper defendant. For example, asked if the people who signed Ratkosky's support letter were all FirstEnergy employees, Whitehead said, "Yes." Asked if anyone

interviewed her about the incident, Whitehead replied, "Two FirstEnergy lawyers." Counsel for FirstEnergy did not object or try to correct the misnomer.

{¶ 33} We find the instant case to be quite similar to *Reighard v. CEI*, Mahoning App. No. 05 MA 120, 2006-Ohio-1283. In *Reighard*, the plaintiff filed a motion to amend the complaint, wishing to change the defendant from Ohio Edison to CEI. It is interesting to note that both Ohio Edison and CEI are subsidiaries of the holding company FirstEnergy. Ohio Edison opposed the request to amend, which the plaintiff filed one week before trial. The trial court denied the plaintiff's motion for leave to amend the complaint and entered judgment for Ohio Edison, finding that it was not the proper defendant. Id. at ¶11, 17.

{¶ 34} The Seventh District Court of Appeals of Ohio reversed the trial court's denial of the plaintiff's motion to amend as being an abuse of discretion under Civ.R. 15(A):

{¶ 35} "* * * [W]e hold that amendment to name CEI and dismiss Ohio Edison should have been freely granted under the facts and circumstances presented in this case. The fact that the motion was filed so near the scheduled trial date and so long after the suit was filed does not prejudice Ohio Edison in any manner. This is not a case where the named defendant would remain as a defendant with the addition of a new defendant, [thus

requiring] reworking of the entire case strategy. Rather, appellants sought to dismiss Ohio Edison as a defendant and wholly substitute them with a new defendant. Considering their insistence that they are unrelated to CEI, their claims that they were not in any way involved in the electric lines at issue and appellants' failure to contest their lack of liability, Ohio Edison really has no standing to contest the motion to amend.

{¶ 36} "In fact, it is unlikely the trial court would have denied leave if Ohio Edison had not filed opposition to it. Ohio Edison was simultaneously filing memoranda defending their affiliate's position and claiming that they were not responsible for their affiliate's lines or for notifying their affiliate of the within suit.

{¶ 37} "* * *

{¶ 38} "The unusual facts and circumstances existing in this case establish that justice requires leave to be freely granted. Bad faith on the part of appellants' request is not apparent here. The reasons for the delay in seeking amendment revolve around the confusion as to the structure of the defendant entity, its affiliate and its parent company and the question as to why they all appeared to act in concert in the preliminary and post-filing stages of this claim. As outlined supra, Ohio Edison and its parent company engaged in a multitude of acts that gave the impression that the correct party had been named in one way or another.

{¶ 39} "Prejudice to Ohio Edison is lacking. The amendment sought to relieve them from liability. Prejudice to CEI is minimal and can be fully argued by that party in any subsequent relation back hearing. We thus hold that it was unreasonable to deny appellant's leave to amend the complaint to substitute CEI as the defendant in this case.

{¶ 40} "For the foregoing reasons, the judgment of the trial court is hereby reversed and this case is remanded for amendment of the complaint to name CEI as the sole defendant." *Reighard*, supra, 2006-Ohio-1283, at ¶68-72.

{¶ 41} In the instant case, FirstEnergy fully defended the claims against it, while at the same time asserting that it was the incorrect party. Considering that FirstEnergy claims it was not a proper party to the case, FirstEnergy has no reason to oppose Ratkosky's motion to amend, other than as an improper tactic to avoid liability on behalf of its subsidiary GENCO. Thus, neither FirstEnergy nor GENCO can show prejudice if Ratkosky's motion to amend is granted.

{¶ 42} Accordingly, the trial court erred when it denied Ratkosky's motion to amend the complaint. This defendant will be referred to as FirstEnergy/GENCO for the remainder of this opinion.

<u>Defamation claim against First Energy/GENCO</u>

{¶ 43} The essential elements of a defamation claim are as follows: (1) the defendant made a false statement; (2) that was defamatory in nature; (3) and published to a third party; (4) the publication of that statement caused injury to the plaintiff; and (5) the defendant acted with the requisite degree of fault. *Temethy v. Huntington Bancshares, Inc.*, Cuyahoga App. No. 83291, 2004-Ohio-1253.

{¶ 44} However, the elements of damages and fault are presumed if the statements in question qualify as defamation per se. "[F]or a statement to be defamatory per se, it must 'consist of words which import an indictable criminal offense involving moral turpitude or infamous punishment, imputes some loathsome or contagious disease which excludes one from society or tends to injure one in his trade or occupation.'" *Kanjuka v. MetroHealth Med. Ctr.*, 151 Ohio App.3d 183, 2002-Ohio-6803, at ¶16 (internal citations omitted). Furthermore, whether a statement is defamation per se is a question of law to be decided by the court. *Bryans v. English Nanny and Governess School, Inc.*, (1996), 117 Ohio App.3d 303, 316.

{¶ 45} In the instant case, Genevie, who is an employee of First Energy/GENCO, told Ratkosky's supervisor at CSX, as well as various management level employees at GENCO, that Ratkosky urinated outside where other employees could see during his work shift. It is undisputed that the statement was published. Additionally, Genevie admitted to a CSX

representative immediately prior to Ratkosky's investigative hearing that the statement was false and Genevie admitted in deposition and at trial that he knew the statement was false when he made it.

{¶ 46} We conclude that this statement is defamation per se, in that it "tends to injure one in his trade or occupation."[2] See *Knowles v. Ohio State Univ.*, Court of Claims App. No. 2001-03780, 2005-Ohio-3330, at ¶47 (finding that a statement made by a university official that the plaintiff-employee was fired from his previous position and lied on his employment application was defamation per se because it was "of a nature that would injure plaintiff's professional reputation"); *Isquick v. Dale Adams Enterprises, Inc.*, Summit

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[2] The dissent would find that this statement is not defamatory per se because "[t]he evidence failed to demonstrate any injury to Ratkosky's trade or occupation." However, defamation per se occurs when a statement *tends* to injure one in one's trade or occupation. According to Merriam-Webster's Collegiate Dictionary (11th Ed.), 1287, "tendency" is defined as "a proneness to a particular kind of thought or action." See, also, *Williams v. Gannett Satellite Information Network, Inc.*, 162 Ohio App.3d 596, 2005-Ohio-4141, at ¶10 (holding that "to be found defamatory per se, the statement needed only to *tend* to injure Williams in his trade or occupation. To require that he have alleged actual career harm would be to require the proof of special damages associated with defamation per quod") (emphasis in original); *Kanjuka*, supra, 151 Ohio App.3d at ¶17 (holding that "[a]n allegation that one has acted unprofessionally constitutes defamation per se").

The dissent points out that at least a dozen people at FirstEnergy supported Ratkosky, and concludes that this is evidence of Ratkosky's failure to demonstrate trade or occupational injury. However, Genevie's statement resulted in Ratkosky's suspension pending investigation. Subsequently, various co-workers gathered together to write a letter of support for Ratkosky, precisely because Ratkosky's livelihood and professional reputation were in jeopardy. Accordingly, we conclude that Genevie's statement is an example of tending to injure one in one's trade or occupation, and is defamatory per se.

App. No. 20839, 2002-Ohio-3988, at ¶4 (holding that the following statements uttered by the defendant damaged the plaintiff's "reputation in the close-knit circle of classic car collectors," thus rising to the level of defamation per se: "that [the plaintiff] is 'nuts,' he loses parts to the cars he restores, he pads his bills, and that he cannot make cars run"); *Shoemaker v. Community Action Org. of Scioto Cty., Inc.*, Scioto App. No. 06CA3121, 2007-Ohio-3708, (reversing a trial court's granting summary judgment to the defendant because false allegations of sexual harassment in the workplace amount to defamation per se).

{¶ 47} Accordingly, the court erred in directing a verdict against FirstEnergy/GENCO on the defamation claim.

Tortious interference claim against First Energy/GENCO

{¶ 48} The elements a plaintiff needs to show for a successful tortious interference with a business relationship are: (1) a business relationship; (2) the wrongdoer's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) resulting damages. See *Chandler & Assoc., Inc. v. America's Healthcare Alliance, Inc.* (1997), 125 Ohio App.3d 572.

{¶ 49} In other words, "[t]ortious interference with a business contract occurs when one party to a contract is induced to breach the contract by the malicious acts of a third person who is not a party to the contract." *Condon*

v. Body, Vickers & Daniels (1994), 99 Ohio App.3d 12, 22 (emphasis omitted). Furthermore, the tortious interference legal theory applies to an "employment" relationship, as well as a business relationship. *Lennon v. Cuyahoga Cty. Juvenile Court*, Cuyahoga App. No. 86651, 2006-Ohio-2587, at ¶19 (holding that "there are three players in a tortious interference claim: the plaintiff, the defendant, and a third-party employer").

{¶ 50} We find that the court erred by directing a verdict in favor of FirstEnergy/GENCO on this claim. The employment relationship between Ratkosky and CSX is undisputed; Genevie knew of this relationship; Genevie intentionally lied to CSX about Ratkosky for the purpose of removing Ratkosky from the Eastlake plant; CSX put Ratkosky on a 42-day unpaid leave of absence pending investigation; and, although he was eventually exonerated and reinstated at CSX, Ratkosky received only partial back pay.[3] Reasonable minds could conclude that Ratkosky put forth sufficient evidence to support a tortious interference with an employment relationship claim.

Jurisdiction of the defamation claim against CSX

{¶ 51} Ratkosky claims that CSX defamed him when: (1) Kuhner repeated Genevie's false statements and embellished them by claiming in the

[3] Ratkosky testified that although he ultimately received his standard daily rate for the 42 days CSX suspended him, he did not receive various benefits he was entitled to under the CBA, such as "short crew fund" at $28 per day; "productivity pay" at $75 per day; and approximately four hours per day of overtime pay, as CSX conductors at that time were "accustomed to [working] six days a week, 12 to 13 hours a day * * *."

assessment and during the investigation that Ratkosky had exposed his genitals, and (2) Moore shouted that Ratkosky was "shaking his cock at some female." CSX claims that the trial court lacked jurisdiction over the defamation claim because the RLA grants exclusive jurisdiction of labor disputes to the National Railroad Adjustment Board ("NRAB").

{¶ 52} The United States Supreme Court explained the RLA as follows:

{¶ 53} "Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes. To realize this goal, the RLA establishes a mandatory arbitral mechanism for 'the prompt and orderly settlement' of two classes of disputes. The first class, those concerning 'rates of pay, rules or working conditions,' are deemed 'major' disputes. Major disputes relate to "'the formation of collective [bargaining] agreements or efforts to secure them.'" The second class of disputes, known as 'minor' disputes, 'gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.' Minor disputes involve 'controversies over the meaning of an existing collective bargaining agreement in a particular fact situation.' Thus, 'major disputes seek to create contractual rights, minor disputes to enforce them.'" *Hawaiian Airlines, Inc. v. Norris* (1994), 512 U.S. 246, 252-53 (internal citations omitted).

{¶ 54} The NRAB's jurisdiction may preempt an employee's state law claim when the "'action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A[.]'" *Stephens v. Norfolk and Western Ry. Co.* (C.A.6, 1986), 792 F.2d 576, 580, quoting *Magnuson v. Burlington N., Inc.* (C.A.9, 1978), 576 F.2d 1367.

{¶ 55} In the instant case, CSX argues that Ratkosky's defamation claim is a "minor" dispute preempted by the RLA because it would require a court to interpret the CBA between the Union and CSX.

{¶ 56} At first glance, Kuhner's statements are defamatory because they are false allegations published to a third party that tend to damage Ratkosky's professional reputation. However, "[a] defendant in a defamation action can assert the defense of qualified privilege." *Davis v. Cleveland*, Cuyahoga App. No. 83665, 2004-Ohio-6621, at ¶40. See, also, *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 243. "[A] communication made in good faith on a matter of common interest between an employer and an employee, or between two employees concerning a third employee, is protected by qualified privilege." Id. at ¶43.

{¶ 57} It is this issue — whether Kuhner's statements were privileged and thus not subject to actionable defamation — that requires interpretation of the CBA, which, in turn, results in preemption of Ratkosky's state law

defamation claim. "Because of the overriding federal interests in labor relations, federal law preempts state defamation law to the extent that an absolute privilege exists to make an alleged defamatory statement if the statement is made by representatives of management or the Union during a 'conference and bargaining session having for its purpose the adjustment of a grievance of the employee or other disposition of such grievance.'" *Stiles v. Chrysler Motors Corp.* (1993), 89 Ohio App.3d 256, 262-63, quoting *General Motors Corp. v. Mendicki* (C.A.10, 1966), 367 F.2d 66, 70.

{¶ 58} As the issue of privilege concerning statements Kuhner made during the investigation is inextricably intertwined with the grievance procedure of the CBA, the NRAB's jurisdiction preempts Ratkosky litigating defamation by Kuhner in the state trial court.

{¶ 59} On the other hand, the NRAB does not preempt the trial court's jurisdiction as to Moore's allegedly defamatory statement because it was not inextricably intertwined with matters that the CBA covered.

{¶ 60} Nonetheless, the evidence does not show that CSX should be held liable for Moore's statement. An employer may be liable for an employee's intentional tort when the employee's act was "calculated to facilitate or promote the business for which that person is employed." *Corradi v. Emmco Corp.* (Feb. 15, 1996), Cuyahoga App. No. 67407. In other words, CSX

cannot be held liable for its employee's "independent, self-serving conduct." Id.

{¶ 61} In the instant case, Moore was a yardmaster who supervised the movement of trains and directed crews to switch cars. No evidence was presented demonstrating that Moore's statement was calculated to promote CSX's business or that it was his responsibility to inform other CSX employees of the reason for Ratkosky's absence.[4] Consequently, reasonable minds could not have concluded that CSX was liable for Moore's alleged defamatory statement.

{¶ 62} Based on the foregoing, we sustain Ratkosky's sole assignment of error inasmuch as the court erred by denying Ratkosky's motion to amend his complaint to change "FirstEnergy" to "GENCO," and by granting a directed verdict against First Energy/GENCO on the defamation and tortious interference claims. The assignment of error is overruled as to all claims against CSX.

{¶ 63} Judgment is affirmed in part and reversed and remanded in part.

It is ordered that appellees and appellant split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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JAMES J. SWEENEY, JUDGE

ANN DYKE, J., CONCURS;
COLLEEN CONWAY COONEY, A.J., CONCURS
IN PART AND DISSENTS IN PART

COLLEEN CONWAY COONEY, A.J., CONCURRING IN PART, DISSENTING IN PART:

{¶ 64} I concur in the affirmance of the directed verdict for CSX. However, I respectfully dissent as to the reversal of the directed verdict for FirstEnergy.

{¶ 65} I disagree with the majority's sua sponte raising an error not assigned by Ratkosky regarding the trial court's denial of his motion to amend his complaint on the second day of trial. The majority finds fault with FirstEnergy's merely including a sentence in its answer that Ratkosky's claims should be dismissed because it is a holding company and not an operating company. The majority finds that the first allegation of an incorrect defendant was the February 14 motion for summary judgment.

{¶ 66} Yet despite Ratkosky's knowing in February of the "wrong party" issue, he failed to move to amend his complaint for six months – until the second

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[4]Moore did not testify at trial.

day of trial. I strongly disagree with the majority's finding the trial court abused its discretion in denying Ratkosky's motion to amend.

{¶ 67} I also find no fault should be assigned FirstEnergy for fully defending the claims against it while asserting that it was the incorrect party. In a similar case involving a defect in service of process, the Ohio Supreme Court held that when the affirmative defense is properly raised and preserved, a party's active participation in the litigation does not constitute a waiver of that defense. *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, syllabus.

{¶ 68} In addition, I disagree with the majority's finding the statement to be defamation per se. The evidence failed to demonstrate any injury to Ratkosky's trade or occupation. As the majority correctly noted, Ratkosky had at least a dozen people "all representing themselves as FirstEnergy employees" supporting him. The last three lines of their support letter stated, "We all have felt Ron to be a true gentleman with a good-natured sense of humor."

{¶ 69} Therefore, I would affirm the trial court's granting a directed verdict for all the defendants.