STATE OF MICHIGAN

COURT OF APPEALS

MCDONALD FORD, INC, and THOMAS W. MCDONALD,

Plaintiffs/Counterdefendants-Appellants/Cross-Appellees,

v

ALL AMERICAN FORD, INC,

Defendant/Counterplaintiff-Appellee/Cross-Appellant,

and

LAVAL PERRY, JIM LEWIS, DANIEL KREBBS, and BRIAN ROUSSE,

Defendants/Counterplaintiffs-Appellees,

and

ALL AMERICAN LINCOLN MERCURY, INC,

Defendant-Appellee.

UNPUBLISHED
June 5, 2003

No. 239085
Saginaw Circuit Court
LC No. 99-030664-CZ

Before: Fitzgerald, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal by right and defendant All American Ford, Inc. (AAF) cross-appeals the circuit court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I.

This case arises out of a lawsuit filed by plaintiffs against defendants for tortious interference with a business relationship. Plaintiff McDonald Ford, Inc., is a new and used automobile dealership and servicing center of which plaintiff Thomas W. McDonald is the

principal. Essentially, plaintiff[1] accused the individually named defendants[2] of improperly inducing plaintiff's employees to leave plaintiff and accept employment with defendant AAF and defendant All American Lincoln Mercury, Inc. (AALM). The parties are competitors and plaintiff's business is half the size of AAF and about the same size as AALM. AAF and AALM are eight miles away from plaintiff.

Plaintiff asserted that defendants knew plaintiff had invested time and financial resources in training its experienced parts, service, and body shop employees. Specifically, plaintiff claimed that defendant Laval Perry – president of both defendant dealerships – along with the other individually named defendants, contacted plaintiff's parts and body department managers several times in August 1999 to persuade them to leave plaintiff. Plaintiff also contended that defendants solicited its managers to retain other employees of plaintiff for defendant dealerships, including two of plaintiff's service technicians. In September 1999, those two service technicians did leave plaintiff's employment for employment with AALM. Plaintiff further contended that defendants' conduct amounted to harassment of its employees and attempted sabotage of its business. According to plaintiff, the departure of the two service technicians caused plaintiff to lose the money they had spent in training the original technicians and retraining their replacements. Plaintiff also asserted losses in a reduced workforce, in customer goodwill, and in increased compensation to the remaining employees so that they would not leave plaintiff.

Defendants responded that they had merely had communications with plaintiff's employees about job openings with defendants, and that these communications did not qualify as tortious. Defendants argued that when plaintiff's employees became aware of job openings at defendants' dealerships, plaintiff's employees chose to leave plaintiff's employment and seek employment with defendants because they were unhappy with plaintiff. Specifically, AALM claimed that the two technicians initiated contact with AAF and AALM of their own volition. Defendants also pointed out that plaintiff's employees were at will, and, thus, were free to inquire about job opportunities elsewhere. AALM contended that in its suit, plaintiff was simply trying to recover losses it had experienced because of ordinary economic and market conditions. AALM also claimed that it is standard in the automobile sales and service industry to have employees frequently moving among different dealerships.

Following plaintiff's suit, AAF filed a counterclaim against plaintiff for two counts of tortious interference with a business relationship arising out of the same facts and circumstances. AAF alleged that plaintiffs had solicited twenty-eight of AAF's employees to leave AAF and obtain employment with plaintiff. AAF further alleged that plaintiffs "interfere[d] with the business operations of [AAF] and the expectancy of [AAF] concerning its employees in the following fashion: (a) Change in employment status by employees; (b) Increased compensation to certain employees." AAF contended it "suffered economic injury, loss of good will, harm to its business reputation and loss of business opportunities."

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[1] In this opinion, "plaintiff" will refer to plaintiff McDonald Ford, Inc., unless otherwise noted.

[2] Defendant Laval Perry is president of defendant AAF and defendant All American Lincoln Mercury, Inc. (AALM).

All parties filed motions for summary disposition. The trial court granted all the motions, which effectively dismissed both lawsuits. The court held that plaintiffs had not demonstrated a genuine issue of material fact pursuant to MCR 2.116(C)(10), and that AAF's counterclaim failed to state a cause of action pursuant to MCR 2.116(C)(8). Plaintiffs appealed and only AAF filed a cross-appeal.

II.

The central issue on appeal is whether tortious interference with a business relationship concerning an at-will employment contract is an actionable claim under the present facts.[3]

This Court reviews a decision on a summary disposition motion de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed to determine whether the affidavits, pleadings, depositions, or any other documentary evidence establish a genuine issue of material fact to warrant a trial. *Spiek, supra* at 337, citing *Singerman v Municipal Bureau, Inc*, 455 Mich 135, 138; 565 NW2d 383 (1997). This Court will give the nonmoving party the benefit of all reasonable inferences when determining whether summary disposition is appropriate. *Betrand v Alan Ford, Inc*, 449 Mich 606, 615; 537 NW2d 185 (1995).[4]

> "The elements of tortious interference with a business relationship are the 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. . . ." [*Mino v Clio School Dist*, ___ Mich App ___; ___ NW2d ___ (Docket No. 232279, issued January 14, 2003) slip op p 10, quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996) (citations omitted).]

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[3]The questions presented in the briefs on appeal and briefs on cross-appeal are substantially intertwined so that they may be addressed together. We note that in its cross-appeal, AAF only addresses the propriety of the trial court's order granting summary disposition against plaintiffs on plaintiffs' original complaint. See *Barnell v Taubman Co*, 203 Mich App 110, 123; 512 NW2d 13 (1993) (if an appellee files a cross-appeal, the appellee may raise issues in addition to those raised by the appellant). AAF has not raised an issue relating to the trial court's order granting summary disposition on *its* counterclaim for tortious interference. While plaintiffs address the dismissal of AAF's counterclaim in plaintiffs' reply brief as cross-appellees, dismissal of the counterclaim is not properly before us on appeal because AAF, the adverse party concerning that ruling, did not appeal that ruling. See *id*. (an appellee is limited to the issues raised by the appellant unless the appellee cross-appeals); *Dep't of Consumer & Industry Services v Shah*, 236 Mich App 381, 385; 600 NW2d 406 (1999) (a party may only appeal from an adverse order); MCR 7.212(G) (a reply brief may not raise additional issues for appeal).

[4] Summary disposition pursuant to MCR 2.116(C)(8) is proper when "[t]he opposing party has failed to state a claim on which relief can be granted."

The relationship or expectancy is not dependent on the existence of a contract. *Feaheny*, *supra* at 301; *Winiemko v Valenti*, 203 Mich App 411, 416; 513 NW2d 181 (1994).

This Court has held that, generally, a plaintiff can maintain a claim for tortious interference with an employment contract that is terminable at will. See *Prysak v R L Polk Co*, 193 Mich App 1, 12; 483 NW2d 629 (1992), citing *Feaheny*, *supra* at 304. However:

> At-will employment contracts have posed some analytical difficulties in tortious interference cases, particularly where an employee seeks damages caused by his discharge. When viewed under the tortious interference cause of action requiring a breach of contract[5], the courts have held that a discharge from employment is an insufficient basis upon which to establish the claim since no breach arises from the termination. *Dzierwa* [*v Michigan Oil Co*, 152 Mich App 281, 287; 393 NW2d 610 (1986)]; and see *Woody v Tamer*, 158 Mich App 764, 770; 405 NW2d 213 (1987). On the other hand, when viewed as a subsisting relationship that is of value to the employee and will presumably continue in effect absent wrongful interference by a third party, the majority opinion in *Tash v Houston*, 74 Mich App 566, 569-570; 254 NW2d 579 (1977), held that an at-will contract is the proper subject of an actionable tortious interference claim. Under this view, the employee has a manifest interest in the freedom of the employer to exercise his or her judgment without illegal interference or compulsion and it is the unjustified interference by third persons that is actionable. *Id*. at 570. . . .
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> 4 Restatement Torts, 2d, § 766, comment (g), pp 10-11, similarly takes the position that an at-will contract can be improperly interfered with, but that the fact that the contract is terminable at will makes it closely analogous to interference with prospective contractual relations claims and is a factor to be taken into account in determining the damages. . . .
>
> We agree with the rationale of the Restatement and *Tash* and, therefore, hold that an at-will employment contract is actionable under a tortious interference theory of liability. . . . Since we are here faced only with a question of defendants' liability, we express no view on what damages, if any, plaintiff could recover for tortious interference with the contract. . . . The basis of our holding is that an at-will employee who enjoys the confidence of his or her employer has the right to expect that a third party will not wrongfully undermine the existing favorable relationship. [*Feaheny v Caldwell*, 175 Mich App 291,

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[5] We note that none of the parties pleaded in its complaint the distinct claim of tortious interference with a contract, see *Feaheny*, *supra* at 301, also known as tortious interference with "economic relations," see *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 12-13; 506 NW2d 231 (1993). The elements of the distinct claim of tortious interference with a contract are: (1) the existence of a contract, (2) a breach of that contract, and (3) "an unjustified instigation of the breach by the defendant" (causation). *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996).

303-304; 437 NW2d 358 (1989),[6] cited in *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 294-295; 475 NW2d 366 (1991).[7]]

After establishing that a cause of action for tortious interference with an at-will employment contract is cognizable, this Court in *Feaheny*, *supra* at 304, then considered whether the plaintiff established a prima facie case. "[T]he type of relationship that existed is a threshold question that must be resolved before a plaintiff may proceed on any theory of tortious interference." *Environair*, *supra* at 294, citing *Feaheny*, *supra* at 302.

Clearly, the present "business relationship or expectancy" plaintiffs alleged defendants interfered with is one arising out of an at-will employment contract between plaintiffs and their employees. See *id*. Thus, "where the relationship was founded upon an at-will contract, there was no tortious interference cause of action independent of that contract. [*Feaheny*, *supra* at 302.] The . . . mere subjective expectation of continued employment could not justify an expectation of termination for cause only. *Id*." *Environair*, *supra* at 294-295. Defendants could not have tortiously interfered with plaintiff's business relationships or expectancy with its employees when those relationships contained no expectation of future employment. See *id*.; *Feaheny*, *supra* at 303-304. As a result, the first element of a tortious interference claim is not satisfied in this case.[8] See *Environair*, *supra* at 295; *Mino*, *supra*.

With regard to the third element of a prima facie tortious interference case, intentional interference, see *Mino*, *supra*, AAF contends that its contacts with plaintiff's employees announcing job openings with defendants was not tortious. Plaintiffs counter that the wrongful conduct element of the claim is satisfied by evidence that defendants' conduct was unethical. AAF further contends that there is no evidence that the individual defendants' contacts with plaintiff's employees were made for their own benefit and with no benefit to AAF. We agree with AAF.

> This Court recently clarified the types of conduct that are actionable in a tortious interference case in *Formall* [*Community Nat'l Bank of Pontiac*, 166 Mich App 772; 421 NW2d 289 (1988)]. [T]he third party must intentionally do an act that is per se wrongful or do a lawful act with malice and that is unjustified in law for the purpose of invading the contractual rights or business relationship of another. [*Id*.] at 779-780. . . . Improper conduct comes within the ambit of a wrongful act.

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[6] See also *Carlson v Westbrooke Services Corp*, 815 F Supp 1019, 1024 n 2 (ED Mich, 1992) (holding that *Feaheny*, *supra*, erroneously stated that a tortious interference claim could ever be predicated on an at-will employment contract, because there is never an expectation of continued employment under this type of contract).

[7] Note that the present case is somewhat unique in that the *employer* is bringing the cause of action against an outside party for tortious interference arising out of its at-will employment contract *with its employee*. However, "[a] defendant's actions may focus on either party to a business relationship and still result in the imposition of liability on the defendant for an intentional interference." *Winiemko*, *supra* at 417.

[8] It is likely that defendants knew of plaintiff's business relationship with its employees, satisfying the second element of a tortious interference claim. See *Mino*, *supra*.

> It means illegal, unethical or fraudulent conduct. [*Id*.] [*Feaheny*, *supra* at 303-304.]

"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*, *supra* at 699.

Defendants were free to publicize job openings and plaintiff's employees were free to leave their employment with plaintiff for nearly any reason, according to their at-will relationship with plaintiff. See, generally, *Environair*, *supra* at 293. This makes the causation element of this tortious interference claim suspect, given that the two technicians chose to terminate their at-will employment contract. See *Mino*, *supra*. Consequently, defendants' actions in publicizing their job openings were not tortious because they were "motivated by legitimate business reasons." *BPS Clinical Laboratories*, *supra*; *Winiemko*, *supra* at 13. Thus, defendants' actions do not amount to actionable "unethical" conduct. See *Formall*, *supra* at 779-780 (unethical conduct may constitute malicious intent for an interference claim); *Feaheny*, *supra* (malicious intent is required for an interference claim).[9] "Although the actions taken by defendants did amount to interference with his expectations under the at-will employment contract, their actions did not fit into the category of the wrongful interference that is required to maintain a tortious interference cause of action. Hence, there was no liability as a matter of law." *Feaheny*, *supra* at 307. Therefore, summary disposition was properly granted in this case. See *Spiek*, *supra* at 337, citing *Singerman*, *supra* at 138.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell

[9] We also note that "the employment relationship . . . could have been terminated at any time without consequence, thereby providing 'no tangible basis upon which damages may be assessed[.]'" *Environair*, *supra* at 294, quoting *Sepanske v Bendix Corp*, 147 Mich App 819, 829; 384 NW2d 54 (1985) (employee's claim for breach of contract for failure to restore him to his former position); see also *Feaheny*, *supra* at 303.