STATE OF MICHIGAN

COURT OF APPEALS

HOLD IT PRODUCTS CORPORATION,

Plaintiff-Counterdefendant-Appellant,

v

TEXTUS INTERNATIONAL, INC. and DAVID SMITH,

Defendants-Appellees,

and

TEXTUS USA, INC.,

Defendant-Counterplaintiff-Appellee.

UNPUBLISHED

No. 201847
Oakland Circuit Court
LC No. 95-507260 CZ

Before: Hood, P.J., and Markman and Talbot, JJ.

MARKMAN, J., (dissenting).

I respectfully dissent. In my judgment, the majority would impose liability upon defendants without evidence that defendants sought specifically to interfere with plaintiff's contract. Although I largely concur with the majority's description of Michigan law regarding the tort of tortious interference with contractual relations, the elements of such tort were not clearly established by plaintiff in this case. I would, therefore, affirm the trial court's grant of a directed verdict in favor of defendants. Because I believe that there is an ever-present risk of treating legitimately competitive business practices (as well as business practices that are merely unethical as opposed to unlawful) as falling within the scope of this tort, it is particularly important that this Court ensure that each of its traditional elements be clearly satisifed.

First, the following additional facts are critical to this case. Plaintiff's president, John Armaly ("Armaly"), testified that in 1992, plaintiff and Cubbison's entered into an oral "strategic partnership" agreement, whereby plaintiff gave Cubbison's exclusive distribution rights for its sacks in grocery stores in the fourteen western states in which Cubbison's distributed its products; and Cubbison's agreed "to

buy only Hold It Products stuffing sacks." Cubbison's continued to order sacks in June or July of each year but was not obligated to buy any particular number of sacks in any given year or any sacks at all. Indeed, Armaly testified that, under the terms of the agreement, Cubbison's could have purchased sacks from another supplier but then they would no longer have had exclusivity with regard to Hold It products in the western states. Either party could terminate the agreement at any time if they "let each other know if we weren't going to go any further."

In late 1992, defendants contacted Cubbison's to see if it would purchase the sacks that plaintiff had rejected. After defendants contacted Cubbison's, they became aware that plaintiffs supplied sacks to Cubbison's. Defendants' owner, David Smith ("Smith"), testified that he maintained a relationship with Cubbison's because he believed that there were difficulties between Cubbison's and plaintiff. Finally, in September 1993, defendants offered to sell sacks directly to Cubbison's. In early 1994, Cubbison's told plaintiff that "they were not going to be in a position to buy sacks." Plaintiff assumed that Cubbison's was getting out of the sack business altogether and began planning to distribute sacks on its own in the western states. On June 1, 1994, Cubbison's ordered sacks from defendants. On June 14, 1994, plaintiff wrote a letter to Cubbison's informing it that plaintiff was terminating their exclusivity contract. In October 1994, Armaly stated, Smith met with Armaly and explained the competition for Cubbison's business by saying, "you hurt me in 1992 and I was going to hurt you," referring to plaintiff's refusal to accept defendants' sacks in 1992. There was never any evidence introduced that showed that defendants knew that plaintiff had any contract with Cubbison's.

Second, before analyzing the facts of this case, I believe that the law regarding tortious interference with a contract must be clarified. The majority accurately set out the current and precise statement of the law, as follows:

> [O]ne who alleges tortious interference with a contractual . . . relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights . . . of another. [*Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1985).]

However, in order to be fully understood, these requirements must be read in conjunction with the definitions and explanations provided in earlier Michigan case law, from which this Court condensed the above version of the law in *Feldman, supra.* Based on this law, the tort of tortious interference with a contract can be established by the "intentional doing of a per se wrongful act." *Id.* "Wrongful" was defined by the Supreme Court in *Wilkinson v Powe*, 300 Mich 275, 1 NW2d 539 (1942), as an act "done to accomplish an unlawful purpose, i.e., to bring about a breach of contract." A "per se wrongful act" is that which is "inherently wrongful" or can never be "justified under any circumstances."[1] *Formall, Inc, v Community National Bank of Pontiac,* 166 Mich App 772, 780; 421 NW2d 289 (1988). Accordingly, the Supreme Court in *Meyering v Russell*, 393 Mich 770; 224 NW2d 280 (1974), adopted the dissenting opinion of Justice O'Hara (retired and sitting on the Court of Appeals by assignment) from this Court's decision, 53 Mich App 695, 710; 220 NW2d 121 (1974), which found no tortious interference where the defendant did not resort to "unlawful methods of competition" or "illegal means." This language refers to the requirement of an unlawful purpose for the

interference, and does not make "per se illegal acts" a prerequisite to liability. *Feldman*, *supra* at 369, 377.

Tortious interference with a contract can also be established by doing "a lawful act with malice and unjustified in law for the purpose of invading the contractual rights . . . of another." *Id.* This second option pertains to the Supreme Court's holding in *Bahr v Miller Brothers Creamery*, 365 Mich 415, 425; 112 NW2d 463 (1961), that "otherwise lawful acts may be actionable" if the defendant "intentionally and actively induced the breach." The Court in *Wilkinson*, *supra* at 282-85, held that an action is malicious if, "with the knowledge of [the plaintiff's] rights, [the defendant] intentionally and knowingly and for unworthy or selfish purposes, destroys them by inducing [plaintiff's contractor] to break his contract." Thus, based on these explanations, it is clear that neither an inherently tortious act nor a criminal act is a preliminary requirement to tortious interference with a contract; yet neither can liability be imposed where the defendant engages in outbidding or outmaneuvering a rival, where there is no unlawful purpose or malice, even where a breach of contract may result.

I next look to see whether all of the elements of the tort were established in this case. In my judgment, they were not. In regard to the first element, after viewing the evidence in the light most favorable to plaintiff, it does appear that plaintiff had a contract with Cubbison's and defendants do not dispute this finding. However, the second and third elements are more questionable. In regard to the second element, there appears to be no evidence that defendants ever knew that plaintiff and Cubbison's had an exclusive "strategic partnership" contract. Smith admitted that at some point in 1992, he became aware that plaintiff was supplying Cubbison's with sacks. However, this is only evidence that Smith knew that there was a business relationship.[2] Hypothetically, even knowledge of a contract to purchase sacks would not implicate defendants here, since plaintiff alleged that Cubbison's breached the exclusive contract by purchasing from someone other than its exclusive supplier. Although we must view the evidence in the light most favorable to the nonmoving party, this does not mean that we must blindly follow plaintiff's bare assertions. There must be some evidence from which to draw reasonable inferences. Here, there is no evidence that defendants knew of the exclusive contract.

The third element of this tort is that defendants intentionally and improperly interfered with the contract, in essence that defendants acted with an unlawful purpose or malice. Plaintiff argued that defendants knew about plaintiff's relationship with Cubbison's and that Smith told Armaly that he competed to get Cubbison's business because "you hurt me in 1992 and I was going to hurt you." Again, it would be impossible for defendants to act with an unlawful purpose, to induce the breach, when there was no evidence that defendants even knew that there was an exclusive contract. Although defendants may have tried to get Cubbison's to shift their business from plaintiff to defendants, this is not actionable under tortious interference with a contract. Defendants' alleged motive of hurting plaintiff may be circumstantial evidence of his intent to interfere with a relationship between plaintiff and Cubbison's, but here it does not show any intent to induce a *breach of contract*, as required.

The majority finds, without additional comment, that these three elements were established, seeming to assume that knowledge of a business relationship is the same as knowledge of a specific contract. In my judgment, this assumption is incorrect. Indeed, there are separate torts for interference with a contract and interference with a business relationship specifically because the status of a

contractor is different from that of a mere business associate with an expectation. As to the remaining elements of breach and damages, in my opinion there is no reason to reach these questions, since I find that plaintiff did not establish two preliminary elements.

Therefore, based upon the above facts, viewed in the light most favorable to plaintiff, I find that plaintiff did not establish a prima facie case of tortious interference with a contract. In my judgment, plaintiff did not put forth any evidence from which a court could conclude that a fact question existed upon which reasonable persons may differ. Plaintiff only made a showing that defendants knew of a business relationship between plaintiff and Cubbison's, which defendants admitted. This knowledge does not amount to knowledge of a specific or exclusive contract absent other evidence from which the trier of fact could reasonably infer knowledge of a contract. Nor could defendants have had the unlawful purpose of inducing a breach of contract when they did not know of a contract. Thus, I would find that the trial court appropriately granted defendants' motion for directed verdict.

/s/ Stephen J. Markman

[1] "No categorical answer can be made to the question of what will constitute justification," determined the Supreme Court in *Wilkinson, supra* at 283, "and it is usually held that this question is one for the jury."

[2] I note without deciding that plaintiff's claim of tortious interference with a business relationship may have been better served by the facts of this case. However, it also appears that the standard may be higher for this tort, requiring "illegal, unethical or fraudulent" behavior, since "[t]he social desirability of encouraging competition will justify some actions in an advantageous business relationship case which would be tortious if a contract existed." *Trepel v Pontiac Osteopathic Hospital*, 135 Mich App 361, 374-375; 354 NW2d 341 (1984). Since plaintiff did not appeal the dismissal of this count, however, I will not address it further.