

STATE OF MICHIGAN
COURT OF APPEALS

EXCELLACARE, INC.,

Plaintiff-Appellant,

v

ABINGTON MANOR, INC. and THE MEDICAL
TEAM,

Defendants-Appellees.

UNPUBLISHED

April 28, 2000

No. 210636

Oakland Circuit Court

LC No. 95-492300-CZ

Before: Doctoroff, P.J., and Holbrook, Jr. and Kelly, JJ.

KELLY, J. (dissenting)

I respectfully dissent. The majority opinion affirms the trial court's orders excluding certain evidence regarding damages. The majority reasons that, since the contractual relations with which defendants interfered were terminable at will, plaintiff's recovery is limited to nominal damages. I disagree.

In *Sepanske v Bendix Corp*, 147 Mich App 819, 829; 384 NW2d 54 (1985), this Court held that the plaintiff at-will employee was entitled to nominal damages only for the defendant employer's breach of the employment contract. In *Feaheny v Caldwell*, 175 Mich App 291, 301-303; 437 NW2d 358 (1989), we recognized a distinct cause of action where the alleged tortfeasor interferes with an advantageous relationship, whether or not based upon a contract, and that there can be interference with an at-will employment contract. We later stated that, while *Sepanske* involved an employment relationship, its holding regarding the speculative nature of damages was equally applicable to non-employment, at-will contractual relationship, i.e., exclusive sales contracts. *Environair, Inc v Steelcase, Inc*, 190 Mich App 289; 475 NW2d 366 (1991). The majority applies this reasoning to its holding limiting plaintiff's damages here.

To maintain a cause of action for tortious interference with contractual relations, a plaintiff must establish that the defendant was a third party to the relationship. *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 287; 393 NW2d 610 (1986). This tort is not dependent on the contract, per se, but on the third party's interference with it. *Northern Plumbing & Heating, Inc v Henderson Bros, Inc*,

83 Mich App 84, 93; 268 NW2d 296 (1978). Because this action sounds in tort, I disagree that the available damages are limited by principles controlling breach of at-will contracts.

While I recognize the speculative nature of damages in a breach of an at-will employment contract, this Court has held that such is not the case in a tort action. *Hord v Environmental Research Institute of Michigan*, 228 Mich App 638, 643-644; 579 NW2d 133 (1998), citing *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 241-242; 531 NW2d 144 (1995). The *Hord* Court made it clear that the holding in *Sepanske* would not be extended beyond breach of contract actions where at-will employees are only entitled to nominal damages. The *Hord* Court reasoned that nominal damages would not provide a meaningful remedy to an employee who is defrauded, nor would nominal damages sufficiently deter unscrupulous employers. *Hord, supra* at 644.

The *Hord* Court also recognized that “extending *Sepanske* to tort claims would allow a tortfeasor to avoid paying damages for future wage loss any time the injured party was an at-will employee.” *Id.* The Court allowed the plaintiff to present his future wage loss claim to the jury, regardless of the fact that the exact amount of future wage loss could not be fixed with mathematical certainty. *Id.* Similarly, in *Phillips, supra* at 239, the Supreme Court found *Sepanske* inapplicable where the plaintiff sued her employer in tort for retaliatory discharge. While the contractual relationship was at will, the contractual relationship was not the source of the plaintiff’s action for retaliatory discharge. *Id.*, 248. See also *Franzel v Kerr Mfg Co*, 234 Mich App 600, 608; 600 NW2d 66 (1999). Just as the *Hord* Court found the reasoning of *Phillips* applicable to a fraud claim arising from a contractual relationship, I find the reasoning applicable to this intentional interference claim, which, although arising out of a contractual relationship, is an action in tort.¹

I believe the trial court erred in applying the damages limitation for breach of at-will employment contract cases to this tort action and, consequently, I believe the trial court abused its discretion by precluding plaintiff from presenting any evidence regarding actual damages. I would reverse.

/s/ Michael J. Kelly

¹ The *Phillips* Court found that there was a public policy against retaliatory discharge, an action that sounded in tort. The *Hord* Court was not faced with a public policy issue, yet, nevertheless, ruled that actions sounding in tort were not subject to the same limitation on damages as were breach of at-will contract claims.