# STATE OF MICHIGAN

# COURT OF APPEALS

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| GERALD BROOKS and WANDA SELLA,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>May 1, 2008 |
| v | No. 277660<br>Kent Circuit Court |
| GILL INDUSTRIES, INC., and THURMAN RHODES,<br><br>Defendants-Appellees. | LC No. 06-012763-CZ |

Before: Bandstra, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs alleged that they were discharged from their employment with Gill Industries (Gill) after their coworker, defendant Rhodes, reported that he overheard a conversation between plaintiffs in which they used a racial epithet ("coon hunting"). Plaintiffs' complaint alleged that the words were mentioned in reference to an infestation of raccoons at an outdoor storage area of one of Gill's facilities. Plaintiffs alleged a breach of contract claim against Gill, asserting that the termination of their employment was unconscionable and that the prohibition on unconscionability is an implied provision of every contract. Plaintiffs alleged claims for "interference with contract" and slander against Rhodes.

The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8). This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint by the pleadings alone. *Id*. 119-120. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id*. 119.

With respect to the breach of contract claim, plaintiffs acknowledge that this Court has refused to recognize a cause of action for breach of an implied covenant of good faith and fair

dealing in cases involving employment relationships. See *Hammond v United of Oakland, Inc*, 193 Mich App 146, 152-153; 483 NW2d 652 (1992). Although plaintiffs assert that *Hammond* was wrongly decided, they have not offered any persuasive reason for us to depart from this binding precedent. MCR 7.215(J).

With respect to the tortious interference with a contract claim, plaintiffs argue that the trial court improperly ruled that Rhodes acted in good faith. Plaintiffs assert that the issue of good faith is a question of fact that could be proven by circumstantial evidence.

A plaintiff may maintain an action for tortious interference with an at-will employment contract. *Everton v Williams*, 270 Mich App 348, 349, 353; 715 NW2d 320 (2006); *Feaheny v Caldwell*, 175 Mich App 291, 303-304; 437 NW2d 358 (1989). For actionable tortious interference "the 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." *Feaheny, supra* at 303. A per se wrongful act is one that is "inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992).

An employee's report to management of a coworker's use of a phrase that has racial overtones is not a per se wrongful act. Plaintiffs' allegation that Rhodes "falsely and maliciously reported . . . that a racial epithet had been stated" may suffice as an allegation of doing a lawful act with malice, but there is no allegation that the report was "unjustified in law" or that the purpose was to interfere in plaintiffs' employment relationship with Gill. The trial court gave plaintiffs 21 days to "dredge up evidence" and amend their complaint to allege a wrongful purpose, but plaintiffs did not do so. We are not persuaded that the trial court erred in granting summary disposition with respect to the tortious interference claim.

Plaintiffs' argument with respect to the dismissal of the slander claim is unclear and blended with their argument challenging the dismissal of the tortious interference claim. The complaint alleges that Rhodes "falsely and maliciously reported to management personnel employed by the Defendant, Gill, that a racial epithet had been stated."

A defamation claim requires the making of a false and defamatory statement concerning the plaintiff. *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998). If Rhodes reported that the phrase "coon hunting" had been used, the report was true and not actionable. But even if Rhodes reported the use of "a racial epithet", the report is not actionable as defamation. A statement must be provable as false to be actionable. *Id*. at 616. For example, in *Ireland, supra*, the Court observed that statements that Ireland "was not a fit mother," *id*. at 617, and that her child suffered an injury "because of Ireland's neglect," *id*. at 620, were not provable as false, but rather were protected opinions. Similarly, whether the phrase "coon hunting" could be considered a racial epithet is a matter of opinion depending on whether one deems the phrase offensive. The characterization of language as offensive is subjective and cannot be provable as false. Therefore, inasmuch as plaintiffs concede the use of the phrase "coon hunting," a

statement by Rhodes that the phrase had been used or that a racial epithet had been used is not provable as false and is not actionable.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey