EXHIBIT 2

STATE OF MICHIGAN

IN THE COURT OF APPEALS

HARRY COVELL,

Plaintiff-Appellant,

v

BARRY SPENGLER, CLARENCE WASSON, and KWIK CAR WASH, INC.,

Defendants-Appellees.

Lower Court
File No. 83-50582-CK

Court of Appeals
File No. 75868

Michael J. Breczinski (P33705)
Attorney for Plaintiff-Appellant

Patrick R. Hogan (P28465)
Attorney for Defendants-Appellees

DEFENDANT-APPELLEES' BRIEF IN OPPOSITION TO CLAIM OF APPEAL

ORAL ARGUMENT REQUESTED

Drafted By:

Patrick R. Hogan
REID, REID, PERRY, LASKY,
HOLLANDER & CHALMERS, P.C.
One Business & Trade Center
200 Washington Square North
Lansing, Michigan 48933-1384
(517) 487-6566

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUES AND RULES

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE 90-DAY LIMITIATION PERIOD CONTAINED IN THE WHISTLEBLOWERS'PROTECTION ACT IS A STATUTE OF LIMITATIONS WHICH MUST BE COMPLIED WITH IN ORDER FOR A PERSON TO OBTAIN ANY RELIEF HE OR SHE MAY BE ENTITLED TO UNDER THE ACT?

The lower court answered: "YES"
The Appellant answeres: "NO"
The Appellee answeres: "YES"

II. WHETHER THE RIGHT TO ANY RELIEF OTHERWISE AVAILABLE UNDER THE WHISTLEBLOWERS' PROTECTION ACT IS BARRED WHERE NO ACTION IN ACCORDANCE WITH THE ACT IS BROUGHT WITHIN THE 90-DAY STATUTE OF LIMITATIONS CONTAINED IN THE ACT?

The lower court answered: "YES"
The Appellant answers: "NO"
The Appellee answers: "YES"

III. WHETHER THE 90-DAY STATUTE OF LIMITATION CONTAINED IN THE WHISTLEBLOWERS'PROTECTION ACT IS REASONABLE AND SUBJECT TO ENFORCEMENT BY THE COURTS?

The lower court answered: "YES"
The Appellant answers: "NO"
The Appellee answers: "YES"

IV. WHETHER THE REMEDY CONTAINED WITHIN THE WHISTLE-BLOWERS'PROTECTION ACT IS EXCLUSIVE WHERE RIGHTS CREATED BY THE ACT ARE INVOLVED?

The lower court answered: "YES"
The Appellant answers: "NO"
The Appellee answers: "YES"

V. WHETHER THE LOWER COURT CORRECTLY DISMISSED COUNT III OF THE COMPLAINT, WHICH ATTEMPTS TO ALLEGE A CAUSE OF ACTION FOR BREACH OF AN IMPLIED CONVENANT OF FAIR DEALING?

The lower court answered: "YES"
The Appellant answers: "NO"
The Appellee answers: "YES"

VI. WHETHER THE LOWER COURT CORRECTLY DISMISSED COUNT III OF THE COMPLAINT, WHICH ATTEMPTED TO STATE A CAUSE OF ACTION FOR WRONGFUL DISCHARGE?

The lower court answered: "YES"
The Appellant answers: "NO"
The Appellee answers: "YES"

VII. WHETHER THE LOWER COURT CORRECTLY DISMISSED COUNT IV OF THE COMPLAINT WHICH ATTEMPTED TO STATE A CAUSE OF ACTION FOR INTERFERENCE WITH CONTRACTUAL RELATIONS AGAINST THE INDIVIDUAL APPELLEES?

The lower court answered: "YES"
The Appellant answers: "NO"
The Appellee answers: "YES"

COUNTER-STATEMENT OF FACTS

The "Statement of Facts" contained in Plaintiff-Appellant's, Harry Covell's (hereinafter "Appellant") "Brief in Support of Claim of Appeal" does not comply with the requirements of GCR 1963, 813.2. It is presented with argument and bias, not in a manner as to fairly present the facts, and does not give indication of facts which are favorable to, or contested by, the Defendants-Appellees, Kwik Kar Wash, Inc., Clarence Wasson and Barry Spengler (hereinafter "Appellees"). This Court is therefore requested to consider this Counter-Statement of Facts.

The dispute arises out of the employment of Appellant by Appellee, Kwik Kar Wash, Inc. Although not indicated in Appellant's "Statement of Facts", there has been a dispute during the course of these proceedings regarding the reasons for, and the date of, Appellant's discharge.

Appellant has alleged that he was originally suspended for one week on October 8, 1982, because he had an argument with Appellee, Mr. Wasson, over an incident at the car wash involving a customer's pick-up truck. Appellant has further asserted that he then went to the Labor Board to complain about not receiving overtime pay. Thereafter, he went to the car wash on October 12, 1982, and was allegedly told by Appellee, Mr. Wasson, that "'(t)hey didn't like people who went to the Labor Board'" and that Appellant was being "'laid off for lack of work since they couldn't fire"' him. The foregoing assertions of fact are contained in an Affidavit filed with the Lower Court along with Appellant's "Brief in Opposition to Defendants' Motion for Accelerated Judgement and Summary Judgement."

The Appellant also testified to certain facts during his deposition taken on November 8, 1983. He testified that he told Appellee, Mr. Wasson, on October 8, 1982, that he was going to go to the Labor Board and was in turn told to do whatever he thought he had to do (Deposition Transcript, p. 10). Appellant also testified that he informed Mr. Wasson on October 8, 1982, that they could fire him for "messing up" the customer's motor vehicle but it

was "kid stuff" to do it for yelling at, and arguing with, Mr. Wasson (Deposition Transcript, p. 10). The Appellant testified that on October 15, 1982, he filled out an application for unemployment benefits, upon which he stated he did not expect to return to work for Appellee, Kwik Kar Wash, Inc. (Deposition Transcript pp. 14-16). The Appellant knew at least within three or four weeks of October 8, 1982, that he had been discharged. (Deposition Transcript p. 12). He knew this because new employees were working with Defendant, Kwik Kar Wash, Inc.; therefore, he could not have been laid off for lack of work. (Deposition Transcript, pp 12-14).

Throughout the proceedings, the position of the Appellees has remained the same regarding the facts. The Affidavits of Appellees, Wasson and Spengler, were filed with the Lower Court in support of the "Motion for Accelerated Judgement and Summary Judgement", and are attached to this Brief as Exhibits "1" and "2", respectively. As is stated in the Affidavits, the Appellant was unequivocally discharged on October 8, 1982, for reasons including, but not necessarily limited to: "unnecessarily and negligently causing approximately $150 in damage to a customer's pick-up truck, which damage (Appellee), Kwik Kar Wash, Inc., was liable to pay; causing frequent disruption among employees by his actions; not performing his functions properly; not working, but rather taking unauthorized break periods while other employees were working and while he had work to be done; and frequently arguing in a raised voice with the managers of (Appellee) Kwik Kar Wash, Inc." (Affidavits of Appellees', Wasson and Spengler, pars. 3-4). The Appellant was not discharged because he allegedly reported a violation, or a suspected violation, of a law to a public body but, in fact, was discharged prior to the date he reportedly made any such report. (Affidavits of Appellees', Wasson and Spengler, par. 5).

On or about April 8, 1983, a Complaint was originally filed against the Appellees in the 54-A District Court for the City of Lansing. The Complaint filed in the District Court alleged only

a violation of the Whistleblowers' Protection Act, MCL 15.361, et seq.; MSA 17.428(1), et seq. The District Court Complaint alleged a loss of in excess of $6,000.

On or about May 6, 1983, a "Motion for Accelerated Judgement and Summary Judgement" was filed on behalf of Appellees, oral argument was held and briefs were submitted. The Court, through the Honorable Terrance A. Clem, ordered dismissal of the cause. A copy of the Opinion ordering the dismissal, dated July 5, 1983, is attached hereto as Exhibit "3". The District Court found that Appellant admitted he knew he would "not be called back to work and the reason on October 12, 1982," (Exhibit "3", p. 2).

Following dismissal of the cause by the District Court, no appeal was taken on behalf of Appellant. Rather a new Complaint was filed in the Circuit Court for the County of Ingham on or about August 16, 1983. The Circuit Court Complaint contained four counts alleging lost wages in excess of $10,000 and requesting an award of exemplary damages in the amount of $200,000. The first count of the Circuit Court Complaint again alleged a violation of the Whistleblowers' Protection Act and further alleged a fraudulent concealment by Appellees of Appellant's right of action under the act. Count II alleged the breach of an implied convenant of fair dealing, and count III sought to allege an action for a tort for wrongful discharge. Finally, count IV alleged that Appellees, Wasson and Spengler, wrongfully interfered with Appellant's contractual relations with Appellee, Kwik Kar Wash, Inc.

On or about October 10, 1983, a "Motion for Accelerated Judgement and Summary Judgement" was filed on behalf of Appellees, and briefs setting forth the position of the parties were thereafter submitted. Oral Argument was held upon the Motion before the Honorable Robert Holmes Bell of the Ingham County Circuit Court on December 7, 1983.

In support of the Motion, was argued that Count I of the Complaint should be dismissed upon various grounds. It was first noted that the Whistleblowers' Protection Act contains its own Statute of Limitations, found at MCL 15.363(1); MSA 17.428(3)(1).

That provision states that an individual that deems himself aggrieved under the Act "may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of" the Act. By Appellant's own omission, 90 days had clearly elapsed between his discharge in October of 1982, and the filing of the Complaint in the Circuit Court in August of 1983. (Transcript 12/7/83 pp. 4-5).

It was pointed out to the Lower Court that, while the Appellant alleged a fraudulent concealment by Appellees of his cause of action under the Whistleblowers' Protection Act, the facts he admitted to demonstrated the lack of basis of the allegations. Specifically, the Lower Court was referred to the Transcript of Appellant's deposition, pages 28-29, where the Appellant admits that in November of 1982, a person from the Labor Board informed him of the possibility of his filing an action under the Whistleblowers' Protection Act. (12/7/83, p. 6). Therefore, it was argued that, regardless of anything the Appellees did or did not do to inform Appellant of a potential cause of action, the Appellant knew of such a cause of action in November of 1982. He still did not comply with the 90-day statute of limitations contained within the Act.

It was further argued that count I of the Circuit Court Complaint should be dismissed because of the prior decision by the Honorable Terrance A. Clem of the 54-A District Court for the City of Lansing. (See Exhibit "3", attached hereto and incorporated herein by reference). It was argued that, because of the decision, Count I was barred under the doctrines of res judicata and collateral estoppel. (Transcript 12/7/83 pp. 6-7). Finally, it was argued that Count I of the Complaint should be dismissed because, at the time the Appellant allegedly reported a violation of the law to the Labor Board, he was not employed by the Appellee, Kwik Kar Wash, Inc., and thus did not meet one of the requirements for the bringing of a cause of action under the Whistleblowers' Protection Act. (See "Brief in Support of Motion for Accelerated Judgement and Summary Judgement", page 6).

The Lower Court was also urged to dismiss count II of the Complaint for the reason that it did not state a cause of action. GCR 1963, 117.2(1). In support it was argued that the Whistleblowers' Protection Act provides the exclusive means under which the Appellant might seek and obtain recovery. (Transcript, 12/7/83, pp. 7-8). Further, it was argued that, in count II of the Complaint, the Appellant had not alleged facts which in any way took the case outside the general rule that either party to an employment contract for an indefinite term may terminate it at any time and for any or no reason. (Transcript, 12/7/83, p. 8).

The basis for summarily dismissing count III of the Complaint was argued to be the same as that supporting dismissal of count II. In addition, it was argued that count IV of the Complaint, alleging an interference with contractural relations, should be dismissed because all of the elements necessary to sustain such an action had not been alleged. (Transcript 12/7/83, pp. 8-9).

In response, it was argued on behalf of Appellant that count I should not be dismissed because the provision stating a 90-day statute of limitations for actions under the Whistleblowers' Protection Act is not actually a statute of limitations. (Transcript, 12/7/83, pp. 9-10). Further, even if it is a statute of limitations, it should apply only to those forms of relief which are specifically mentioned in MCL 15.363(1); MSA 17.428(3)(1). (Transcript, 12/7/83, p. 11).

It was also argued on behalf of Appellant that the 90-day statute of limitations should not be applied because it is harsh and unreasonable and effectively divests individuals of access to the courts. (Transcript, 12/7/83, pp. 11-12). It was also asserted that count I should not be dismissed either under the doctrine of res judicata or collateral estopple. The prior district court decision which might support application of the doctrines was said to be void, because that court initially held that it was not the proper forum in which to file an action under the Whistleblowers' Protection Act. (Transcript, 12/7/83, p. 13).

Regarding the request that the Court dismiss count II of the Complaint, it was argued on behalf of Appellant that the implied convenant of fair dealing exists in every contract and the convenant is breached, and an employee is wrongfully discharged, where he or she is allegedly fired for reporting a violation of law to a governmental entity. (Transcript, 12/7/73, pp. 13-15). Finally, in arguing against the dismissal of Count IV, it was asserted that all elements necessary to establish an interference with contractural relations had been alleged in the Complaint. (Transcript, 12/7/83, p. 16).

The Ingham County Circuit Court granted the Motion and dismissed each count. The Court explained its rationale for dismissing the Complaint as follows (Transcript, 12/7/83, pp. 18-20):

> "Defendants' Motion for Accelerated Judgement is granted in this matter as it pertains to those counts and provisions of the complaint which deal with what is hereby been called the Whistleblowers' Act. There is a 90-day Statute of Limitations or provision which requires that from the time of notice of the particular violation, one has 90 days within which to take legal action. Now, public policy may dictate that that's an extremely short period of time. However, it appears that the Legislature is speaking and setting public policy has set this as the appropriate policy. If one takes at the very latest the time in mid-November, according to the deposition, when the Labor Department was so informed of the violation and the time of April 9, when the case was filed in District Court, one finds certainly that the 90-day Statute of Limitations certainly has expired all told.
>
> "It appears that a contract here was what has been referred as terminable at will. Now, a terminable at will contract is one which the employer can terminate the employee and/or the employee may decide to leave the employer's place at any time under any conditions one would want, and certainly a cause of action for wrongful discharge -- that is termination against one's will -- may only lie in a particular number of circumstances that have been set forth by the Legislature and by the Courts of this State. One of them is the Toussaint versus Blue Cross case, which is a very narrow exception again carved out for those cases where the employment can be terminated for good cause. Another one that has been set foth is where there is a violation of this, quote, "Whistleblowers' Act" end of quote. That is where the person has legitimately made a complaint to the government about the employer's actions which are unlawful or illegal. None of these are here applicable by virtue of the fact that the Whistleblowers' Act Statute of limitations has expired.

> "The Court, therefore, grants in the alternative, and in addition, Summary Judgement, finding that as to the causes of action of wrongful discharge and/or retaliatory firing and for breach of implied convenant of fair dealing, and as to the cause of action against individual Defendants as officiers of the corporatio, that the Plaintiff has failed to state a cause of action under law in the State of Michigan upon which relief can be granted. Accordingly then, the Motions are both granted for the reasons specificied by this court."

The Order Granting Accelerated Judgement and Summary Judgement was entered by the Court on December to 19, 1983. A copy of that Order is attached hereto and incorporated herein by reference as Exhibit "4". From this Order, the Appellant has filed his of claim of appeal.

Further facts may be stated as they become relevant to the argument made.

ARGUMENT

I. THE 90-DAY LIMITATION PERIOD CONTAINED IN MCL 15.363(1); MSA 17.428(3)(1), IS A STATUTE OF LIMITATIONS AND MUST BE COMPLIED WITH IN ORDER FOR A PERSON TO OBTAIN ANY RELIEF HE OR SHE MAY BE ENTITLED TO UNDER THE WHISTLE-BLOWERS' PROTECTION ACT.

The Lower Court dismissed count I of the Complaint under GCR 1963, 116.1(5), for the reason that the Appellant did not file his Complaint within 90 days of any alleged violation of the Whistleblowers' Protection Act (hereinafter "Act"), MCL 15.361, et seq; 17.428(1), et seq. The dismissal was based upon the following provision contained within the Act:

> "A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief or actual damages or both within 90 days after the occurrence of the alleged violation of this act." MCL 15.363(1); MSA 17.428(3)(1).

The Appellant asserts that the dismissal was improper because the 90-day limitation is something other then a statue of limitations. The argument is completely without merit.

The language contained in MCL 15.363(1); MSA 17.428(3)(1) is strickingly similar to that which was contained in Section 7(b) of the now-repealed Michigan State Fair Employment Practices Act, MCL 423.307(b); MSA 17.458(7)(b):

> "Any individual claiming to be aggrieved by an alleged unlawful employment practice may, by himself or his agent, make, sign and file with the board, within 90 days after the alleged of discrimination, a verified complaint in writing***."

As is manifestly evident, the limitations period contained within the Michigan State Fair Employment Practices Act is very similiar to that contained to the limitations provision of the Whistleblowers' Protection Act. It has been previously held that the 90-day limitation period contained within the Fair Employment Practices Act barred complaints filed after the 90-day limitations period had run. Department of Civil Rights v City of Muskegon, 100 Mich App 557, 559; 298 NW2d 760 (1980); Chrysler v Civil Rights Commission 68 Mich App 283, 288; 242 NW2d 556 (1976).

The 90-Day limitations provision is, therefore, obviously a statute of limitations. The Appellant did not comply with it.

While Appellant disputes that he was discharged on October 8, 1982, he, nevertheless, has admitted that the very latest date upon which he knew he was not going back to work was three to four weeks after October 8, 1982. (Deposition Transcript, pp 12-13). Therefore, the 90-day period contained in MCL 15.363(1); MSA 17.428(3)(1) commenced to run by mid-November, 1982. His original complaint in district court was filed on or about April 6, 1983, and dismissed July 5, 1983. Over 90 days had passed, therefore, between the date of discharge and the date of even the initial filing.

It should be noted that Appellant alleged in his Complaint that the appellees fraudulently concealed his cause of action under the Whistleblowers' Protection Act. That is not argued on appeal and, therefore, any such argument must be considered to be abandoned. Glass v Drieborg, 296 Mich 30, 33; 295 NW 547 (1941).

The Ingham County Circuit Court has correctly dismissed Count I of the Complaint under GCR 1963, 116.1(5), for the reason that it is barred under the statute of limitations contained in the Act. The decision should be affirmed.

ARGUMENT

II. WHERE NO ACTION UNDER THE WHISTLEBLOWERS' PROTECTION ACT IS BROUGHT WITHIN THE 90-DAY STATUTE OF LIMITATIONS CONTAINED IN IT, THE RIGHT TO ANY RELIEF IS BARRED.

The Appellant argues that, if violated by him, the 90-day statute of limitations contained within the Whistleblowers' Protection Act nevertheless does not bar an action for all relief under the Act. No authority for the proposition is cited in support of it. Therefore, it should not be considered. Cramer v Metropolian Saving Association, 125 Mich App 664, 677; 337 NW2d 264 (1983); Kucken v Hygrade Food Products, 51 Mich App 471, 473; 215 NW2d 772 (1974).

Furthermore, even if this Court should reach the merits of the argument despite the lack of citation of authority, it should not be upheld. The Appellant is requesting this Court to hold that, because not all forms of relief stated in MCL 15.364; MSA 17.428(4) are also stated in MCL 15.363(1); MSA 17.428(3)(1), the 90-day limitation period should apply only to those remedies or damages mentioned in the latter provision. Such a construction of the statute would not give effect to the intent of the Legislature and would lead to absurd results. Therefore, it should not be accepted. Lamphere Schools v Lamphere Federation of Teachers, 400 Mich 104, 114 n. 4; 252 NW2d 818 (1977).

Moreover, the argument ignores the statutory definition of "damages", as that term is employed in MCL 15.363(1); MSA 17.482(3)(1). That definition is set forth in MCL 15.363(3); MSA 17.482(3)(3):

> "As used in subsection (1), 'damages' means damages for injury or loss caused by each violation of this act, including reasonable attorney fees."

Thus, the Legislature clearly intended the 90-day limitations period to apply to claims for all damages, be they in the nature of back wages, or otherwise. Furthermore, the language of "appropriate injunctive relief," as used in MCL 15.363(1); MSA 17.482(3)(1), contemplates mandatory injunctions such as ordering

the reinstatement of an employee and ordering full reinstatement of fringe benefits and seniority rights, as those phrases are used in MCL 15.364; MSA 17.428(4).

The decision of the Ingham County Circuit Court was correct, and should be affirmed.

ARGUMENT

III. THE 90-DAY STATUTE OF LIMITATIONS CONTAINED IN MCL 15.363(1); MSA 17.428(3)(1) IS A LIMITATION IMPOSED BY THE LEGISLATURE UPON THE ENFORCEMENT OF A RIGHT CREATED BY THE LEGISLATURE, AND IS REASONABLE AND SUBJECT TO ENFORCEMENT BY THE COURTS.

The 90-day time limitation for bringing actions under the Whistleblowers' Protection Act is part of the definition of the rights protected by the Act. In Pompey v General Motors Corporation, 385 Mich 537, 550; 189 NW2d 243 (1971), the Michigan Supreme Court stated the general rule which applies:

> "(O)ne who sues to enforce the statutory right is restricted by this statutory limitation of time within which suit must be brought."

In seeking to avoid the general rule, the Appellant argues that the 90-day limitation period is so short that it effectively divests him of that access to the Courts which was intended by the grant of the substantive right. Again, however, the Appellant cites no authority which supports his argument, except to the extent that the decision in Forest v Parmalee, 402 Mich 348, 359; 262 NW2d 653 (1978), contains helpful dicta.

The 90-day limitation has been specifically set by the legislature, and is reasonable. The limitation compares favorably, for instance, to the 30-day limitation contained in the Michigan Occupational Safety and Health Act, MCL 408.1065(2); MSA 17.50(65)(2). This Court has already determined that, unless the administrative remedies are timely sought under the Occupational Safety and Health Act, claims based upon them are barred. Schwartz v Michigan Sugar Company, 106 Mich App 471; 308 NW2d 459 (1981).

The decision of the Ingham County Circuit Court should, therefore, be affirmed.

ARGUMENT

IV. THE WHISTLEBLOWERS' PROTECTION ACT CREATED A NEW RIGHT AND A NEW DUTY, AND THE REMEDY PROVIDED FOR ENFORCEMENT OF THE RIGHT BY THE STATUTE IS EXCLUSIVE.

The exclusive remedy, if any, of the Appellant lies under the Whistleblowers' Protection Act. As stated in Pompey, supra, 385 Mich App 552:

> "The general rule, in which Michigan is aligned with a strong majority of jurisdictions is that where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by the statute for violation and nonperformance is exclusive. (Citations omitted). Correlatively, a statutory remedy for enforcement of a common-law right is deemed only cumulative."

The Whistleblowers' Protection Act created a new duty for employers not to discharge someone solely for reporting a violation of law. The Act provides Appellant's exclusive remedy, and his right of action and recovery must be addressed by reference only to the statute. Lamphere Schools, supra, 400 Mich at 124-129.

The Appellant has cited no authority for the proposition that there exists a right at common law to be free from discharge from employment for reporting an employer's violation of a law. Rather, the general common law rule was that either party to an employment contract for an indefinite term may any terminate it at any time for any, or no, reason. Toussaint v Blue Cross and Blue Shield of Michigan, 480 Mich 579; 292 NW2d 880 (1980). Exceptions to that general rule have been forged by the courts in limited circumstances where grounds for discharging an employe are so contrary to public policy as to be actionable. Suchodolski v Michigan Consolidated Gas Company, 412 Mich 692, 695; 316 NW2d 710 (1982). Further,

> "(m)ost often these proscriptions are found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty." Suchodolski, 412 Mich App. 695.

Thus, the Legislature, in enacting the Whistleblowers' Protection Act, provided the exception to the general rule that an "at will" employee may be terminated with or without cause. The

Legislature has stated the public policy of this State that, if employees are terminated because of their reporting of a violation of law by their employer, they may not be discharged and they may sue to enforce the right. The Legislature has spoken, therefore, and there is no room for a court to create a common law right of action in the same subject area. It is on this basis that the case of Trombetta v Detroit, T&RI Co., 81 Mich App 49; 265 NW2d 385 (1978) is distinguishable.

In Trombetta, the Plaintiff alleged that he was fired because he refused to alter pollution control reports. In holding that the Plaintiff had a right of action, the Court noted that the manipulation and adjustment of sampling results used for pollution control reports filed with the State would clearly violate the law. 81 Mich App at 496. However, there was no statute specifically prohibiting retaliatory discharges following a resusal by an employee to alter pollution control reports. In this case, the Whistleblowers' Protection Statute does specifically prohibit a discharge of an employee for the report by the employee of a violation of law.

The existence of the specific statutory prohibition against an alleged retaliatory discharge is critical in determining whether a right of action created by statute is exclusive or cummulative. In Ohlsen v DST Industries, Inc., 111 Mich App 580; 314 NW2d 699 (1981), the court considered whether the Plaintif had an action in tort for retaliatory discharge where a specific provision of the Michigan Occupational Safety and Health Act prohibited retaliatory discharges. The Court stated, 111 Mich App at 585-586:

> "The Plaintiff cites Sventko v Kroger Company, 69 Mich App 644; 245 NW2d 151 (1976), to support his argument that when an employer terminates the employment of an 'at-will employee for purposes of circumventing the statutorily established public policy, the employee-victim of such conduct does have a cause of action (in tort for retaliatory discharge).
>
> "We adopt the rationale of the trial court:
>
> 'Sventko can be distinguished from the present case by the fact that the workmen's compensation statute does not prohibit retaliatory discharges of employees who file claims under the Act, while

MIOSHA specifically prohibits such actions. See MCL 408.1065; MSA 17.50(65). Since the workmen's compensation statute does not directly prohibit retaliatory discharges by employers, the Court carved out an exception to the general rule that either party may terminate an employment at will for any reason or no reason by providing the discharged employee a remedy where none is provided under the statute.

'In the present case, however, retaliatory discharges are expressly prohibited under the MIOSHA statute, and, in addition, a remedy is provided to an employee who claims a violation of the statute. Therefore, unlike the Plaintiff in Sventko, the Plaintiff in the present case has a remedy provided by the statute under which he is suing.'

"The Sventko decision does not extend to this case where the statute involved prohibits retaliatory discharge and provides; an exclusive remedy. Therefore, the trial court's summary judgement was proper as there is no common-law tort cause of action applicable in this case."

As the statute in Ohlsen, the Whistleblowers' Protection Act prohibits retaliatory discharge and provides an exclusive remedy. The summary judgement granted by the trial court should be affirmed, the Appellant's claim that the remedies of the Act are cumulative being "so clearly unenforceable as a matter of law that no factual development can permit recovery," Rubino v Sterling Heights, 94 Mich App 494, 497; 290 NW2d 43 (1979); GCR 1963, 117.2(1).

ARGUMENT

V. THE TRIAL COURT CORRECTLY DISMISSED COUNT II OF THE COMPLAINT BECAUSE, UNDER THE CIRCUMSTANCES OF THIS CASE, THE WHISTLEBLOWERS' PROTECTION ACT IS APPELLANT'S EXCLUSIVE REMEDY, IF ANY, AND NO CAUSE OF ACTION FOR BREACH OF THE IMPLIED CONVENANT OF FAIR DEALING EXISTS.

As previously stated, it is the general rule in Michigan that an employee at will may be discharged for any, or no, reason. Toussaint, supra. The general rule is, of course, subject to certain exceptions. One of those exceptions is contained in the Whistleblowers' Protection Act, i.e., an at-will employee may not be discharged for reporting a violation of a law. MCL 15.362; MSA 17.428(2).

The exception to the general rule of freedom to discharge that would be available to Appellant, if he could prove it, is that contained in the Whistleblowers' Protection Act. Appellant, however, did not comply with the requirements of the Act, in that he did not file suit in the appropriate forum within 90 days of any alleged violation. MCL 15.363.(1); MSA 17.428(3)(1). There is no other cause of action available to the Appellant, because he has failed to preserve his exclusive remedy. Ohlsen, supra; Schwartz, supra.

The Appellant seeks to avoid the effects of the application of the clear law of this state by alleging a breach of an implied convenant of fair dealing. Such an implied convenant does not, however, exist in a vacuum; it exists as part of a contract. But the contracural relationship existing between an at-will employer and employee, absent the existence of an established exception to the rule, is one which can be terminated by either for absolutely no reason. There is no free-standing fair dealing exception to the terminable-at-will doctrine.

The only authority cited by Appellant to support count II of the Complaint is Sventko, supra. At no point in that opinion does the Court even mention an implied convenant of fair dealing. Rather, that opinion is based upon the theory that "an employer at will is not free to discharge an employee when the reason for the

discharge is an intention on the part of the employer to contravene the public policy of this state." Sventko, 69 of Mich App at 647.

Sventko simply does not apply under the facts of this case.

The precedent of this Court which does apply is Schwartz, supra. In Schwartz, this Court refused to adopt any rule that even when an employment contract is terminable-at-will, any discharge must be in good faith. Schwartz, 106 Mich App at 841. The Court recognized that any such rule would be a "radical departure from the common law and Michigan precedent", and affirmed the trial court's grant of summary judgement in that case. Schwartz, 106 Mich App at 481.

The Lower Court in the instant case was clearly correct in granting summary judgement upon count II under GCR 1963, 117.2(1), and the decision should be affirmed. Rubino, supra.

ARGUMENT

VI. THE TRIAL COURT WAS CORRECT IN HOLDING THAT APPELLANT DID NOT STATE A CAUSE OF ACTION IN TORT FOR WRONGFUL DISCHARGE.

The analysis regarding Appellant's attempt to state a cause of action for a tort of wrongful discharge is essentially the same as that regarding the breach of an implied convenant of fair dealing. (See Argument V, supra). The only case cited by Appellant in support of his argument that there is such a tort is a New Hampshire decision, Monge v Beebe Rubber Company, 114 NH 130; 316 A2d 549 (1974).

This court has already considered the proposition advanced by Appellant, and has refused to make the rule of Monge the law of this state. Schwartz, 106 Mich App at 480-481.

The trial court was clearly correct in granting summary judgement upon count III of the Complaint under GCR 1963, 117.2(1), and the decision should be affirmed, Rubino, supra.

ARGUMENT

VII. THE INGHAM COUNTY CIRCUIT COURT DID NOT ERR IN GRANTING SUMMARY JUDGEMENT UPON COUNT IV OF APPELLANT'S COMPLAINT.

In count IV of the Complaint, Appellant attempted to state a cause of action against the individual Appellees for interference with contractual relations. The Ingham County Circuit Court granted the individual Appellees Motion for Summary Judgement upon that Count. That determination should be affirmed.

Affidavits signed by each of the individual defendants were filed with the Lower Court prior to the hearing upon the Motion for Accelerated Judgement and Summary Judgement, and are attached hereto as Exhibits "1" and "2". Those Affidavits each state that Appellant was discharged from the employ of Appellee, Kwik Kar Wash, Inc., on October 8, 1982, and that he was not discharged for any reason relating to his allegedly reporting a violation, or a suspected violation, of a law to a public body. (Exhibits "1" and "2", pars. 3 and 5). Indeed, the Appellant was discharged prior to any date he purportedly made any such report. (Exhibit "1" and "2", par. 5). The reasons set forth in the Affidavits of the individual Appellees for which the Appellant was discharged included, but were not necessarily limited to: unnecessarily and negligently causing approximately $150 in damage to a customer's pick-up truck, which damage Appellee, Kwik Kar Wash, Inc., was liable to pay; causing frequent disruption among employee by his actions; not performing his functions properly; not working, but rather taking unauthorized break periods while other employees were working and while he had work to be done; and frequently arguing in a raised voice with the managers of Appellee, Kwik Kar Wash, Inc. (Exhibits "1" and "2", par. 4).

During his deposition, Appellant admitted that at the time of the damage to the customer's pick-up truck, he did not carry out his work responsiblies and, therefore, the truck was damaged. (Deposition Transcript, pp. 7-9). He also admitted arguing with Mr. Wasson after the truck was damaged and that he told Mr. Wasson that he thought he could be fired for damaging the

truck but not for yelling at Mr. Wasson. (Deposition Transcript, p. 10). The Appellant acknowledge that it would be good cause to fire him for damaging the truck. (Deposition Transcript, p. 11). Finally, he admitted rebelliously arguing with Mr. Wasson and Mr. Spengler when other employees and customers were in the vicinity. (Deposition Transcript pp. 22-23). He was aware of a prior employee who had been terminated for loudly arguing with Mr. Wasson in front of customers. (Deposition Transcript, p. 25

Despite these admissions, which show good grounds for the firing, Appellant attempts to hold the individual defendants liable for interference with contractual relations. The cause of action is said to be based upon the decision in Tash v Houston, 74 Mich App 566; 254 NW2d 579 (1977). But in Tash, the Plaintiff was allegely discharged by the defendant solely because she refused his sexual advances. The instant case is clearly distinguishable from Tash.

In this case, the Appellant's Complaint alleges that he was terminated because he reported a violation of law, in that the corporation was not paying time and a half for overtime. This action, then, was a complaint against the corporation. It was not, as in Tash, a complaint specifically against the individual(s) who had the authority to, and did, terminate the employee.

This distinction is critical. Even accepting the allegations in the complaint as true, there are no allegations in it showing that the termination was for a "strictly personal motive" of the individual defendants or that the termination was accomplished out of any other duty of the defendants then that "to advance the interests of the organization(s) they represent." Tash, 74 Mich App at 574. There is a privilege to "interfere" with employment contracts if the official acts "with an honest belief that his action will benefit" the corporation. Tash, 74 Mich App at 574. There is no allegation in the Complaint that the individual defendants did not hold any such honest belief.

Further, there is no allegation in the Complaint that the termination was not justified. A lack of justification is necessary to show any actionable interference with contractural relations. Northern Plumbing v Henderson Brothers, 83 Mich App 83, 92; 268 NW2d 296 (1978). Even if the termination was because the Appellant reported a violation of law by the corporation, his termination still could be in the best interest of the coporation. Moreover, even if the allegations are true, his exclusive recourse would be against the corporation and, conceivably, the individual defendants under the Whistleblowers' Protection Act. MCL 15.362; MSA 17.428(2); Ohlsen, supra.

The Appellant has, therefore, failed to state a cause of action against the individual Appellees. GCR 1963, 117.2(1) Rubino, supra. The decision of the Ingham County Circuit Court to dismiss Count IV of the Complaint should be affirmed.

An additional justification for dismissal Count IV of the Complaint also exists. Although the trial court granted the Motion under GCR 1963 117.2(1), this Court is in a position to consider the Motion also under GCR 1963, 117.2(3). Health Department v T. M. Chevrolet, 406 Mich 518, 520 n 1; 280 NW2d 822 (1979) ("We will uphold an order of a lower court found to be correct although for the wrong reason.")

In this case, the Appellant has made admissions which demonstrate that there were absolutely no questions of fact regarding the justification for firing him. He admitted engaging in acts and ommissions which, by his own acknowledgment, would justify his termination for cause. The Affidavits of the individual Appellees were filed in support of the Motion before the lower court.

In spite of the fact that the Appellant made the admissions and acknowledged justification for his termination, he came forward with no proof to establish the existence of a geniune issue of material fact. Such proof is necessary to avoid the granting of a Motion under GCR 1963, 117.2(3). Bob v Holmes, 78 Mich App 205, 212; 259 NW2d 427 (1978). His prior deposition had been taken, and

the statements of fact contained in it are to be "considered as conclusively binding against him in the absence of any explanation or modification, or of the showing of mistake or improvidence." Gamet v Jenks, 38 Mich App 719, 726; 197 NW2d 1960 (1972).

The decision of the Ingham County Circuit Court in granting Summary Judgement upon Count IV of the Complaint is, therefore, justifiable under GCR 1963, 117.2(3). The record discloses that Appellant was clearly familiar with the factural position of the Appellees, he made admissions during his deposition supporting the factual position of the Appellees and, therefore, was clearly not mislead. NAG Enterprises v All State Ind., 83 Mich App 194, 198; 270 NW2d 738 (1978), rev on other grds., 407 Mich 407; 285 NW2d 770.

For the above reasons, it is therefore requested that this court affirm the granting of Summary Judgement upon Count IV of the Complaint.

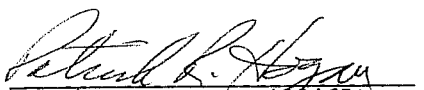
RELIEF

For the reasons stated in this Brief in Opposition to the Claim of Appeal, Appellees respectfully request this Honorable Court to enter an Order summarily dismissing the claim or, in the alternative, affirming the decision of the Ingham County Circuit Court following plenary review.

Respectively submitted

REID, REID, PERRY, LASKY

HOLLANDER & CHALMERS, P.C.



By: Patrick R. Hogan (28465)
One Business & Trade Center
200 Washington Square North
Lansing, MI 48933-1384
(517) 487-6566

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