STATE OF MICHIGAN

COURT OF APPEALS

ALVIN BLANCHARD, DAVID CASAREZ, KEVIN KNOBLOCK and ALLEN O'BRYANT,

Plaintiffs-Appellees,

v

SIMPSON PLAINWELL PAPER COMPANY,

Defendant-Appellant.

UNPUBLISHED
February 11, 1997

No. 189949
Allegan Circuit Court
LC No. 94-016690-NZ

Before: Hood, P.J., and Neff and M.A. Chrzanowski*, JJ.

PER CURIAM.

Plaintiffs brought this action against defendant alleging fraud and intentional infliction of emotional distress stemming from incidents that led to the termination of their employment with defendant. The trial court denied defendant's motion for summary disposition, which was brought pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10). Defendant appeals by leave granted. We reverse.

Suspecting that some of its employees were under the influence of and used, sold or purchased controlled substances and alcohol while on its premises, defendant retained an independent investigation firm to investigate the situation. An investigator posed as an employee for a period of months and apparently made a list of the names of employees suspected of engaging in the conduct at issue. Plaintiffs were some of the employees targeted for inquiry. Eventually, each of them was called into an office for an interview. Plaintiffs claim that they were told that if they cooperated and admitted to using, selling or purchasing drugs and alcohol they would not be terminated, but if they did not do so they would lose their jobs. They also claim that the investigator who conducted the interview implied to them that strong evidence, through photographs or videotape, had been obtained and implicated them in the conduct. In their interviews, plaintiffs admitted to the use or purchase of drugs or alcohol on the premises or being under the influence while at work. They were soon thereafter discharged from employment with defendant as a consequence of having used or purchased or being under the influence of alcohol and/or marijuana in violation of defendant's conditions of employment.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiffs processed grievances pursuant to their collective bargaining agreement, seeking reinstatement. Each alleged that during his interviews, in addition to the conduct mentioned above, he was coerced into providing the admissions and that the substance of the admissions implicating the use of controlled substances was false. Each grievance was submitted to arbitration pursuant to the collective bargaining agreement. The arbitrators upheld each plaintiff's discharge as being for cause and dismissed each grievance as without merit. The arbitrators noted that the matter involved a credibility contest and found defendant more credible.

Plaintiffs filed this complaint alleging, among other things, intentional infliction of emotional distress and fraudulent inducement to sign a false and coerced confession. Defendant removed the case to federal court, where all but the two claims now before us were dismissed. On remand, defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10) was denied. The trial court rejected defendant's argument that because plaintiffs pursued their claims and were denied relief through binding arbitration, the fraud and intentional infliction of emotional distress issues had actually been litigated and resolved and were barred by res judicata or collateral estoppel. The trial court found neither doctrine applicable. Defendant had also argued, to no avail, that the emotional distress claim was unavailable to plaintiffs in this wrongful discharge action and, alternatively, defendant's conduct had not been sufficiently extreme or outrageous to support such a claim.

We review trial courts' rulings on summary disposition rulings de novo. *Ladd v Ford Consumer Finance Co*, 217 Mich App 119, 124; 550 NW2d 826 (1996). A motion that is brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim and should be granted if, solely upon the pleadings, the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 125. A motion under MCR 2.116(C)(10) tests the factual basis of a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 124.

Defendant first argues that the trial court erred in concluding that plaintiffs' fraud claim was not barred and therefore the court erred in denying its motion for summary disposition. We agree that the trial court erred in denying defendant's motion for summary disposition.

To establish a claim of fraud or misrepresentation, a plaintiff must prove (1) that the defendant made a material misrepresentation; (2) defendant knew it was making a misrepresentation or made it recklessly; (3) the misrepresentation was made with the intent that it be acted upon; (4) the plaintiff acted in reliance upon it; and (5) suffered an injury as a result. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976); *Christensen v Michigan State Youth Soccer Ass'n, Inc*, 218 Mich App 37, 44; 553 NW2d 638 (1996). Plaintiffs complain that they relied on defendant's alleged knowing and intentional misrepresentation (i.e., that if they admitted to the conduct at issue they would not be terminated), admitted to the conduct, and were terminated as a result. However, plaintiffs were not terminated because they relied on defendant's alleged misrepresentation, but rather because, as found by the arbitrator, they either were under the influence of alcohol or controlled substances while at work or used or purchased them on the premises. The arbitrators determined that the confessions of illegal drug and alcohol use, and violation of the collective bargaining

agreement, were true, and that the discharges were unassailable under the collective bargaining agreement. Any damages suffered by plaintiffs must necessarily arise out of the discharges, which were proper. Therefore, plaintiffs failed to establish their fraud claim and defendant was entitled to judgment as a matter of law. The trial court erred in denying defendant's motion for summary disposition.

We also find that the trial court should have dismissed plaintiffs' claim for intentional infliction of emotional distress. The elements of intentional infliction of emotion distress are: "(1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress." *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). For conduct to achieve the requisite level of "extreme and outrageous" to satisfy that element of the tort, it must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Linebaugh v Sheraton Mich Corp*, 198 Mich App 335, 342; 497 NW2d 585 (1993). Additionally, whether the defendant's conduct is initially of the degree to permit recovery is a question for the court, although where reasonable persons may differ, the question is one for the jury. *Doe*, *supra* at 92.

Unlike the trial court, we find that reasonable minds could not differ and that the conduct alleged by plaintiffs falls short of causing us to exclaim, "Outrageous!" See *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985), quoting Restatement Torts, 2d § 46, comment d, pp 72-73. The interviewing investigators told each plaintiff of the methods of investigation available to them (i.e., still photography, video surveillance, background checks), but, although plaintiffs claim they were convinced that evidence had been obtained through these methods, there is no evidence that the investigator expressly told plaintiffs that indeed these methods had been used and incriminating evidence obtained. Similarly, the record reveals that plaintiffs were asked to cooperate in the investigation and that if they did they "probably" would not lose their jobs. Plaintiffs were apparently informed that it was not up to the investigators to take action, but that was the responsibility of defendant. We note that this, even coupled with the length of the interviews and the alleged denial of union representation at the interview is simply insufficient to satisfy the degree of extreme and outrageous conduct required to recover under the tort of intentional infliction of emotional distress. Thus, because there is no genuine issue of material fact and defendant was entitled to judgment as a matter of law, summary disposition was appropriate under MCR 2.116(C)(10). The trial court erred in failing to grant defendant's motion.

Reversed.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Mary A. Chrzanowski