STATE OF MICHIGAN

IN THE 22nd JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

GUY BOYD,

Plaintiff,

v.

NOT AN LLC d/b/a JSD SUPPLY and KYLE THUEME,

Defendants.

Case No: 24-000304-NP
Hon. Julia B. Owdziej

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PLAINTIFF GUY BOYD'S OPPOSITION TO DEFENDANT NOT AN LLC d/b/a JSD SUPPLY'S MCR 2.116(C)(8) MOTION FOR SUMMARY DISPOSITION

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INTRODUCTION

This is a case about Defendant Not an LLC d/b/a JSD Supply's ("JSD") callous disregard for the obvious and foreseeable risks of giving a minor access to a gun and Plaintiff Guy Boyd, a kid whose life was forever shattered because of it.

JSD's motion for summary disposition, much like its business model, is built on cynical misdirection. Each begins with the pretense that JSD does not sell guns; it simply sells "kits" that can be turned into guns. Based on this supposition, JSD attempts to shield itself from the foreseeable consequences of its conduct. Nevermind that it only takes its customers minutes to easily convert its "kits" into guns and that customers do so using the encouragement and information JSD provides to them. Nevermind that JSD takes *no* steps to avoid selling its kits to children, or that JSD proudly promotes its entire "kit"-based scheme as a way to *intentionally* circumvent state and federal gun safety laws and regulations. And nevermind that its actions allowed a 17-year-old kid to access a gun that he used to accidentally shoot Mr. Boyd in the face, causing Mr. Boyd permanent and catastrophic injuries that will impact the rest of his life. None of that matters, JSD argues, because it sells "kits" and not guns.

But this argument ("we sell kits, not guns") is largely irrelevant to Mr. Boyd's legal claims. JSD has no immunity from general principles of law simply because they sell "kits" rather than completed and operable guns. Regardless of the precise moment when one of JSD's products officially becomes a gun, JSD's ghost gun kits are dangerous instrumentalities, and JSD is liable for selling them to a kid under traditional principles of negligence, negligent entrustment, and consumer protection.

This is not a case that can be resolved by Summary Disposition. Doing so would overlook the deference afforded to a plaintiff's allegations at this stage of the case as well as applicable law.

JSD's motion should be quickly dispatched, and this case should proceed expeditiously to discovery and trial, where culpability can be evaluated by a jury.

BACKGROUND

JSD sells "ghost guns," which are guns that are packaged by their component parts, sold by retailers, and purchased by consumers who then finish assembly of the guns at home. JSD's website touts that these handy "kits" provide the consumer all they need to assemble a fully operable, non-traceable, and unregistered pistol in a matter of minutes. Complaint ("Compl.") ¶¶ 41-42. JSD openly acknowledges that it sells kits precisely to try to avoid federal and state gun regulations, including paperwork required for gun sales. *See id.* ¶ 48-49. As it proudly promotes: the company "was founded based on a love of guns and a hatred of paperwork." *Id.* ¶ 49(f).

This case concerns JSD's sale of ghost gun kits to Defendant Kyle Thueme, a 17-year-old kid at the time of purchase. Specifically, on two separate occasions, JSD sold Mr. Thueme two companion kits, a Polymer 80 PF940c Completion Kit and a PF940c Full Build Kit (hereinafter "Ghost Gun Kits" or "Kits"), which were intended to be purchased together. *Id.* ¶¶ 29-43, 63-67. Neither time did JSD utilize any age-gating mechanism, ask *any* questions whatsoever about Mr. Thueme's age, or even ask Mr. Thueme to certify that he was legally entitled to possess a gun (he was not). *Id.* ¶ 68-71. The Ghost Gun Kits included every part needed to easily complete a functioning, able-to-fire pistol. *Id.* ¶ 77. And JSD encouraged customers to check out its YouTube page to "finish" their guns. *Id.* ¶ 47 & n.13. Although Mr. Thueme had no prior specialized knowledge or training, he easily assembled the guns as directed by JSD. *Id.* ¶¶ 78-80.

To state the obvious: JSD's sales of Ghost Gun Kits to a 17-year-old kid was dangerous, reckless, and unreasonable, in part because young people generally exhibit diminished capacity for self-control and decision-making and have a greater likelihood of taking unreasonable risks.

See id. ¶ 54. Accordingly, both Michigan and federal law contain significant safeguards to prevent children from accessing handguns.[1]

Circumventing these gun safety laws and selling Ghost Gun Kits like the ones it sold to Mr. Thueme was JSD's "entire business model." *Id.* ¶ 28. JSD claimed that it and its customers could avoid all applicable regulations by taking the position that it was not selling "guns," but instead only selling *components* of guns. This is, of course, nonsense.[2] But JSD, an unlicensed firearms dealer, wholeheartedly embraced that approach. JSD shamelessly (and falsely) advertised on its website and elsewhere that the guns assembled from its products, including the Ghost Gun Kits, could be possessed "off-the-books," without any government registration or license and with "absolutely no paperwork." *Id.* ¶¶ 48-49.

The results of JSD's reckless business model were as tragic as they were foreseeable. As set out in the Complaint, on May 31, 2021, Mr. Boyd, who was 17 years old at the time, was accidentally shot in the face by a gun assembled by Mr. Thueme from one of the Ghost Gun Kits that JSD had recently sold to him. *Id.* ¶¶ 87-93. Mr. Boyd thankfully survived, but he continues to suffer devastating injuries, many of which will persist for the rest of his life. *Id.* ¶ 101.

In light of the foregoing, Mr. Boyd brought suit to seek relief for his devastating injuries. As to JSD, he asserts three claims: (i) **negligence**, in connection with JSD's sale and marketing of its Ghost Gun Kits to Mr. Thueme, a minor, *id.* ¶¶ 105-20; (ii) **negligent entrustment**, in connection with JSD's entrustment of Ghost Gun Kits to Mr. Thueme, *id.* ¶¶ 132-43; and (3) **violation of the Michigan Consumer Protection Act ("MCPA")**, due to JSD's various unfair,

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[1] *See, e.g.*, MCL § 28.422(3)(b) (state licensing scheme imposing minimum age requirements for pistol purchase); 18 U.S.C. § 922(x)(1), (2) (federal law imposing minimum age requirements for handgun sale, purchase, and ownership).

[2] To offer an analogy, it would be as if IKEA claimed it did not sell furniture simply because its customers need to finish assembly of its products at home.

unconscionable, and deceptive business methods, acts, and practices, *id.* ¶¶ 144-61. JSD now moves to dismiss this case as a matter of law, but each of the arguments it offers in support of its motion is deficient. There is no basis to dismiss any of Mr. Boyd's claims at this preliminary stage of the case.

STANDARD OF REVIEW

"A motion seeking summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim, with all well-pleaded factual allegations in the complaint being accepted as true." *Andary v. USAA Cas. Ins. Co.*, 512 Mich. 207, 230 (2023). On such a motion, "[o]nly the pleadings may be considered," MCR 2.116(G)(5), and relief "may be granted only 'when a claim is so clearly unenforceable that no factual development could possibly justify recovery.'" *Andary*, 512 Mich at 230 (quoting *El-Khalil v Oakwood Healthcare, Inc.*, 504 Mich. 152, 160 (2019)).

ARGUMENT

Despite the scale of the tragedy at issue, this is ultimately a straightforward negligence and consumer protection case. And the central question presented to this Court at this stage is a simple one: Should a Michigan jury be precluded from considering whether JSD's sale of Ghost Gun Kits to a 17-year-old was reasonable? In its motion papers, JSD deflects attention away from this central question, primarily by focusing on tangents about whether its Ghost Gun Kits legally constitute "firearms." However, that issue is neither dispositive of any of Mr. Boyd's claims nor necessary to resolve at this stage of the proceedings. The question at hand is whether Mr. Boyd's well-pled factual allegations, taken as true, state legally sufficient claims for negligence, negligent entrustment, and violations of the MCPA. They plainly do.

Mr. Boyd has alleged, in detail, (i) how JSD sold dangerous Ghost Gun Kits to a 17-year-old kid (Mr. Thueme) without conducting any age verification, Compl. ¶¶ 23-28, 58; (ii) how JSD

marketed its products by falsely stating that they could be turned into guns that can be owned without a license or paperwork, *id.* ¶¶ 48-49; (iii) that Mr. Thueme used the Ghost Gun Kits exactly as JSD intended him to—by converting them into operable pistols, *id.* ¶¶ 79-80; and (iv) that Mr. Thueme then, foreseeably, accidentally discharged one of the pistols, critically injuring Mr. Boyd, a bystander. *Id*. ¶¶ 93-101. All of this, according to the well-pled allegations in the Complaint, was a foreseeable feature of the business model JSD purposefully designed.

These factual allegations are clearly sufficient to state claims under Michigan common law and the MCPA. Each of JSD's attacks on Mr. Boyd's claims fails.

I. Mr. Boyd States a Negligence Claim Against JSD

"All negligence actions . . . require a plaintiff to prove four essential elements: duty, breach, causation, and harm." *Kandil-Elsayed v. F & E Oil, Inc*., 512 Mich. 95, 110 (2023). JSD appears to contend that Mr. Boyd failed to sufficiently allege two of these elements: (i) duty and (ii) causation. Both arguments fail because Mr. Boyd has alleged facts sufficient to establish that JSD owed him a duty and that the harm he suffered was foreseeable.

a. Mr. Boyd Sufficiently Alleges that JSD Owed Him a Duty

JSD argues that Mr. Boyd failed to allege facts sufficient to give rise to a duty. JSD is wrong. Accepting the Complaint's well-pleaded allegations as true (as is required at this stage), JSD's duty to Mr. Boyd is clear. It arises from two separate sources: (i) the common law duty to exercise reasonable care, especially in connection with marketing and selling dangerous instrumentalities to children; and (ii) the doctrine of *negligence per se*, which *presumes* a breach of duty where a defendant acts in violation of law.

i. JSD Owed a Common Law Duty to Mr. Boyd to Exercise Reasonable Care in Its Marketing and Sale of Ghost Gun Kits

JSD asserts that it "did not owe Plaintiff Boyd any duty of care." Def. Br. at 5. But it neglects to mention that the Michigan Supreme Court has conclusively decided that those who sell dangerous instruments to minors "owe a legal obligation of due care to a bystander affected by use of the product." *Moning v. Alfono*, 400 Mich. 425, 432 (1977). In fact, Michigan courts have specifically "recognized a general duty to keep children from possessing firearms" in light of their "'inability to appreciate danger and . . . inclination to explore without regard to risk.'" *Lelito v. Monroe*, 273 Mich. App. 416, 422-23 (2006) (quoting *Moning*, 400 Mich. at 445).

Moning concerned a set of facts analogous to those here: A minor plaintiff lost sight in one eye when his friend, another minor, fired a slingshot pellet that accidentally ricocheted off a tree and struck the plaintiff in the face. 400 Mich. at 432. The injured minor brought negligence claims against the retailer, distributor, and manufacturer of the slingshot. *Id.* The trial court issued a directed verdict, reasoning that none of them owed the plaintiff a legal duty of care, and the Court of Appeals affirmed. *Id.* The Michigan Supreme Court, however, reversed, finding that "it is well established that placing a product on the market creates the requisite relationship between [merchants] and persons affected by use of the product giving rise to a legal obligation or duty to the persons so affected." *Id.* at 439. In so holding, *Moning* dispatched with all three arguments that JSD alludes to in its briefing on common law duty.

First, *Moning* makes clear that JSD's misrepresentations about the legality of its Kits do not relieve JSD of its common law duty to behave reasonably. For slingshots and Ghost Gun Kits alike, determining whether a defendant's sale of dangerous products to a minor gives rise to a duty of care is "unavoidably the Court's responsibility[.]" *Moning*, 400 Mich. at 436.

Second, *Moning* squarely forecloses JSD's argument that it owes no duty to Mr. Boyd because Mr. Thueme's use of the Ghost Gun Kits was unforeseeable. Def. Br. at 8. As the Michigan Supreme Court explained, it is perfectly foreseeable that a minor might mishandle a dangerous offensive instrument which the defendant has sold them. *See Moning*, 400 Mich. at 444-49. As such, sellers owe a duty to plaintiffs who were foreseeably injured in such accidents:

> A manufacturer, wholesaler and retailer of slingshots can be expected to foresee that they will be used to propel pellets and that a person within range may be struck. Moning, as a playmate of a child who purchased a slingshot marketed by the defendants, was within the foreseeable scope of the risk created by their conduct in marketing slingshots directly to children. Moning was a foreseeable plaintiff. The defendant[s] . . . were under an obligation for the safety of Moning.

Id. at 440; *see also Kirk v. Hanes Corp. of N.C.*, 16 F.3d 705, 710 (6th Cir. 1994) ("*Moning* provides a clear statement of the public policy of the state of Michigan. A manufacturer who bypasses adults, upon whom the law ordinarily places responsibility, and markets a simple, but dangerous, tool directly to children may not avoid liability on the ground that the child 'should have known better.'").

JSD's motion (like its business practices) completely fails to grapple with the unique risks associated with selling dangerous instrumentalities directly to minors and the fact that a "special duty not to tempt children with firearms stems from children's . . . lack of adult judgment and capacity for restraint." *Lelito*, 273 Mich. App. at 422-23; *see also Moning*, 400 Mich. at 444 ("The obligation 'to guard or secure objects which are dangerous to children' arises 'because of the likelihood of their own intermeddling.'" (quoting Fleming James, Jr., *Scope of Duty in Negligence Cases*, 47 Nw. U. L. R. 778, 782 (1953))).

Third, *Moning* elucidates the nature of the duty JSD breached. It is not, as JSD mistakenly asserts, a "duty to protect another from the criminal acts of a third party [Mr. Thueme]." Def. Br. at 8. Rather, like the defendants in *Moning*, JSD breached a duty to conform its *own* conduct in

business "to the legal standard of reasonable conduct in the light of the apparent risk.'" 400 Mich. at 443 (quoting William L. Prosser, Law of Torts § 53 (4th ed. 1971)).

Every case JSD cites underscores that it misunderstands the duty at issue: They all concern a defendant's *inaction* in the face of danger created by third parties' intentionally criminal conduct. Def. Br. at 8. Mr. Boyd, on the other hand, alleges that JSD actively *created* the danger associated with marketing and selling Ghost Gun Kits, not that JSD failed to *protect* him from a danger caused by a third party. Specifically, Mr. Boyd alleges that JSD had a duty "to so govern [its] actions as not to unreasonably endanger the person or property of others." *Schultz v. Consumers Power Co.*, 443 Mich. 445, 449 (1993) (quoting *Clark v. Dalman*, 379 Mich. 251, 261 (1967)); *see also Ross v. Glaser*, 220 Mich. App. 183, 186 (1996) ("Michigan courts have distinguished active misconduct causing personal injury (misfeasance) and passive inaction or the failure to protect others from harm (nonfeasance).").

In this case, JSD had a duty to exercise reasonable care in selling and marketing its Kits to the general public online, and to refrain from doing so in a way that would endanger others—for instance, by marketing and selling its Kits to minors. Mr. Boyd alleges that JSD breached this duty. JSD proudly and repeatedly touted that anyone could obtain a gun by way of its Ghost Gun Kits, and it marketed and sold them in a manner that foreseeably targeted users who were prohibited from obtaining guns, including minors. *See, e.g.*, Compl. ¶¶ 48-50, 73-75. JSD knew and had reason to know that guns were particularly dangerous in the hands of kids, and that kids could access its products. *Id.* ¶¶ 51-61. In fact, JSD was on notice that prohibited purchasers (like minors) were buying its products. *Id.* ¶¶ 56-57, 62-81, 107. It then actually sold and shipped its Ghost Gun Kits to at least one minor, who shot and critically injured Mr. Boyd. *Id.* ¶¶ 62-67, 89-93.

These allegations form more than a sufficient basis for stating a claim that JSD behaved negligently. Under binding Supreme Court precedent, JSD owed a duty to Mr. Boyd because it negligently marketed and sold dangerous instruments to a minor (Mr. Thueme). This minor foreseeably mishandled the product in his "inability to appreciate [its] danger" and ended up shooting his friend (Mr. Boyd) in the face. *Moning*, 400 Mich. at 445. Mr. Boyd's injuries fit neatly "within the foreseeable scope of the risk" which gives rise to common law duty. *Id.* at 439.

ii. In Any Event, JSD's Duty to Mr. Boyd is *Presumed* as a Matter of Law Pursuant to the Doctrine of *Negligence Per Se*

JSD also owed Mr. Boyd a duty under the doctrine of *negligence per se*. That doctrine provides that certain statutes create a legal duty to another, meaning that a defendant's violation of a statute gives rise to a rebuttable presumption that the defendant breached a legal duty. *Randall v. Mich. High Sch. Athletic Ass'n*, 334 Mich. App. 697, 720 (2020). In determining whether a statute creates such a duty, courts consider whether "the Legislature intend[ed] that the statute would prevent the type of injury and harm actually suffered by the party;" and whether "the Legislature intend[ed] that the party was within the class of persons protected by the statute[.]" *Id.* A court has discretion to decide that a violation of a penal statute creates the same presumption of negligence. *Zeni v. Anderson*, 397 Mich. 117, 137 (1976).

JSD acknowledges the doctrine of *negligence per se*, *see* Def. Br. at 6-7, but argues that Mr. Boyd failed to allege that JSD violated any law. But as laid out below, Mr. Boyd alleged several statutory violations, each of which independently serves as a basis for *negligence per se* and gives rise to a duty owed by JSD.[3]

[3] Contrary to JSD's assertion, Def. Br. at 7, the statutes establishing a duty of care need not contain a private right of action. *Randall*, 334 Mich. App. at 718-20.

First and *second*, Mr. Boyd alleges that JSD violated MCL §§ 28.422 and 750.234f(1), which prohibit (a) selling a firearm without filling out a license form, as well as (b) underage and unlicensed individuals from possessing a pistol or firearm. JSD does not deny that Mr. Thueme violated these statutes. And, as Mr. Boyd alleged, JSD not only violated MCL § 28.422 itself but also aided and abetted Mr. Thueme's violations by encouraging his purchases of Ghost Gun Kits through false representations that he could lawfully own the gun built from the kits "off-the-books." *See* Compl. ¶¶ 48-49, 62-81, 111-15. Because Michigan law treats aiders-and-abettors as having violated the underlying statute, MCL § 767.39, JSD itself is deemed to have violated this statutory provision. Further, these two provisions are safety statutes intended to prevent injuries caused by firearms that are misused by unlicensed and unsuitable users, like minors. Mr. Boyd—a party in fact injured by that conduct—is well within the class of plaintiffs the statutes were intended to protect.

Third, Mr. Boyd alleges that JSD violated the MCPA, MCL § 445.903, by falsely stating that the pistol Mr. Thueme would assemble need not be registered or licensed. *See* Compl. ¶¶ 48-49; 146-61. Mr. Boyd—an individual grievously injured due to the dangerously unlawful marketing practices of JSD—is within the class of individuals protected by the MCPA.

Fourth and *fifth*, Mr. Boyd alleges that JSD violated The Youth Handgun Safety Act of 1993, 18 U.S.C. § 922(x), which prohibits selling handguns to juveniles, and The Federal Gun Control Act of 1968, 18 U.S.C. §§ 922(a)(1)(A), 923, which prohibits engaging in the business of dealing in firearms without a license.

In response, JSD argues at *length* that these rules do not apply to its conduct because, in its view, what it sold to Mr. Thueme did not qualify as a "handgun" or a "firearm" under those statutes. Def. Br. at 7. This argument is both procedurally premature and substantively incorrect.

At this stage, Mr. Boyd has sufficiently alleged that JSD's Ghost Gun Kits are "designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3) (defining "firearm"); MCL § 750.222(e) (providing the same definition under Michigan law). Mr. Boyd intends to prove at trial that these Kits were, in fact, "designed to" and "may readily be converted to" function as firearms, as well as just how quickly and easily even a minor like Mr. Thueme could convert them into fully operable pistols. Compl. ¶¶ 32, 40, 42, 45, 47; *see also United States v. Wick*, 697 F. App'x 507, 508 (9th Cir. 2017) (concluding that ghost gun kits are firearms because of their ready convertibility). JSD's efforts to selectively introduce misleading documents to dispute these facts are not permitted during Summary Disposition,[4] when all of Mr. Boyd's well-pleaded allegations must be "accepted as true and construed in a light most favorable to [him]." *Johnson v. Pastoriza*, 491 Mich. 417, 435 (2012).

For the purposes of Summary Disposition, the Court need only find that Mr. Boyd has sufficiently *alleged* that JSD's Ghost Gun Kits are firearms. *See United States v. Yannott,* 42 F.3d 999, 1005 (6th Cir. 1994) ("[W]hether a particular weapon fits within the legal definition of a firearm . . . is a question of fact").

[4] Improperly attempting to offer evidence on a motion under MCR 2.116(C)(8), JSD attaches two classification letters sent by ATF to Polymer80 as supposed evidence that its kits are not firearms. Those exhibits should not be considered on this motion for summary disposition. *See El-Khalil*, 504 Mich. at 154 ("In this case, the Court of Appeals erroneously conducted an MCR 2.116(C)(10) analysis instead of a (C)(8) analysis because it considered evidence beyond the pleadings and required evidentiary support for plaintiff's allegations rather than accepting them as true."); *Daley v. Dykema Gossett*, 287 Mich. App. 296, 305 (2010) ("A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions."). Moreover, JSD has misrepresented the findings and procedural history with respect to these determination letters. Should the court choose to consider this evidence, Mr. Boyd respectfully requests the opportunity to address JSD's improper arguments in supplemental briefing.

c. Mr. Boyd's Proximate Cause Allegations Are Sufficient

With regard to proximate cause, JSD argues that Mr. Boyd's allegations are deficient because he failed to allege that JSD's sale of Ghost Gun Kits to Mr. Thueme was a proximate cause of Mr. Boyd's injuries. *See* Def. Br. at 8-9. That argument is a non-starter. Even if this issue were resolvable on this motion (it is not), as a matter of clear case law (and common sense), JSD's sale of deadly gun kits to a kid was an obvious, foreseeable, and proximate cause of that kid's negligent use of the gun he built from those kits.

An assessment of proximate cause "requires a determination of whether it was foreseeable that the defendant's conduct could result in harm to the victim." *Ray v. Swager*, 501 Mich. 52, 65 (2017). Rather than engaging in an analysis of foreseeability under the facts alleged in the Complaint, JSD declares that "[c]riminal activity, by its deviant nature, is normally unforeseeable." Def. Br. at 8 (quoting *Papadimas v. Mykonos Lounge*, 176 Mich. App. 40, 46-47 (1989)). That generalization ignores the specific factual allegations made by Mr. Boyd as well as caselaw holding that criminal activity *is* often foreseeable for purposes of tort liability, *see Moning*, 400 Mich. at 442 n.16 ("Even criminal conduct by others is often reasonably to be anticipated." (quoting Fowler V. Harper & Fleming James, Jr., *The Law of Torts* § 20.5, at 1144-46 (1956))). Indeed, Michigan courts have refused to hold that a kid's negligent use of a dangerous instrument that was made available to him by defendant's conduct was unforeseeable as a matter of law. *See id.* at 441-42 (a child's "conduct in using the slingshot to propel pellets was to be anticipated" by defendant and his "shooting pellets toward a tree and a ricochet into [plaintiff's] eye was within the 'recognizable risk of harm' created by marketing slingshots directly to children"); *Gilbert v. Sabin*, 76 Mich. App. 137, 145-47 (1977) (injuries caused by a child shooting a gun he found on defendant's property were foreseeable to the property owner); *cf. Ross*, 220 Mich. App. at 188-89 (injuries caused by criminal shooting were foreseeable to defendant who handed a gun to someone

who was "chronically mentally unstable"). Here, it was eminently foreseeable that a minor customer like Mr. Thueme would engage in criminal or negligent conduct with the Ghost Gun Kits sold to him by JSD.

In any event, even were there some question as to whether Mr. Thueme's irresponsible use of the gun he built from JSD's Ghost Gun Kits was foreseeable to JSD, it would be premature to resolve the issue in JSD's favor at this stage.[5]

II. Mr. Boyd States a Negligent Entrustment Claim Against JSD

In addition to asserting a negligence claim, Mr. Boyd sues JSD for negligent entrustment. Negligent entrustment "imposes liability on one who supplies a chattel for the use of another whom the supplier knows or has reason to know is, because of youth, inexperience, or otherwise, likely to use it in a manner involving unreasonable risk of physical harm." *Bennett v. Russell*, 322 Mich. App. 638, 643 (2018) (quoting *Eason v. Coggins Mem. Christian Methodist Episcopal Church*, 210 Mich. App. 261, 265 (1995)). The claim has two elements: "First, the entrustor is negligent in entrusting the instrumentality to the entrustee. Second, the entrustee must negligently or recklessly misuse the instrumentality." *Allstate Ins. Co. v. Freeman*, 160 Mich. App. 349, 357 (Mich. Ct. App. 1987).

This cause of action was tailor-made for the present circumstances. Mr. Boyd alleges that JSD (the entrustor) was negligent in entrusting Ghost Gun Kits (the instrumentality) to Mr. Thueme (the entrustee) because JSD either "kn[e]w or ha[d] reason to know" that Mr. Thueme, because of

[5] It is axiomatic that "[p]roximate cause is usually a factual issue to be decided by the trier of fact." *Dawe v. Bar-Levav & Assoc.* (On Remand), 289 Mich. App. 380, 393 (2010); *see also Johnston v. Harris*, 387 Mich. 569, 574-75 (1972) (reserving for the jury the factual question of whether even the criminal intervening act of a third party was foreseeable in a manner that implicated proximate cause). Only when the "facts bearing on proximate cause are not disputed and if reasonable minds could not differ" is the issue "one of law for the court." *Dawe*, 289 Mich. App. at 393.

his youth, would use those Ghost Gun Kits "in a manner involving unreasonable risk of physical harm," and he did so.

In moving for summary disposition of Mr. Boyd's negligent entrustment claim, JSD attacks only the first element, arguing that Mr. Boyd did not sufficiently allege that JSD *negligently* entrusted Mr. Thueme with an instrumentality. Def. Br. at 9-11. As JSD puts it, "Boyd's negligent entrustment theory fails because JSD did not know Thueme would misuse the Kits while he was drunk and high, nor should JSD have known Thueme would illegally misuse the Kits while under the influence of drugs." *Id.* at 9. JSD's argument misses the mark for several reasons.

To start, JSD frames the relevant risk far too narrowly. The question is not whether JSD knew the *precise* way in which Mr. Theume would negligently use the product it entrusted to him. Rather, Mr. Boyd need only allege that JSD knew or should have known that Mr. Thueme generally possessed "unreasonable risk propensities." *Fredericks v. Gen. Motors Corp.*, 411 Mich. 712, 719 (1981). Stated differently, it was sufficient for Mr. Boyd to allege "peculiarities of the entrustee sufficient to put [JSD] on notice of th[e] likelihood" that he would use the product dangerously. *Id.* And here, the relevant "peculiarity" suggesting that Mr. Thueme would use the instrumentality entrusted to him in an unsafe manner was his youth.

This precise issue was addressed in *Haddad v. Tosukalas*, No. 256659, 2006 WL 73639 (Mich. Ct. App. Jan. 12, 2006) (**Exhibit 1**). There, the court reversed a summary disposition of a negligent entrustment claim where the plaintiff alleged that the defendant negligently entrusted a gun to a teenager, and it did so by expressly relying on the fact that youth is "a 'peculiarity' sufficient to place defendant on notice that [a] handgun could be misused or handled in an unsafe manner." *Id.* at *3; s*ee also Moning*, 400 Mich at 444 n.18 (explaining that the doctrine of

negligent entrustment "is not limited to plaintiffs whose 'individual' propensities are known to the supplier" but "also applies to classes of persons").

Here, Mr. Boyd alleged that JSD knew or had reason to know that Mr. Thueme was underage and therefore in a class of people with unreasonable risk propensities. The Complaint alleged facts showing that JSD *had reason to know—i.e.*, had "constructive knowledge—of Mr. Theume's age. *See People v. Granderson*, No. 297838, 2011 WL 3760893, at *6 (Mich. App. Ct. Aug. 25, 2011) (**Exhibit 2**) (concluding that the term "had reason to know" incorporates the concept of "constructive knowledge"). "Constructive knowledge" is "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Echelon Homes, LLC v. Carter Lumber Co.*, 472 Mich. 192, 197 (2005) (quoting *Knowledge*, Black's Law Dictionary (8th ed. 2004)). Applying these terms, JSD had, at the least, constructive knowledge that Mr. Thueme was a minor because JSD would have known that he was a minor had it used even a modicum of care in selling Ghost Gun Kits to him (especially where, as alleged, JSD marketed the Kits in a manner calculated to appeal to minors and other prohibited persons). *See* Compl. ¶¶ 68-75.

In addition, Mr. Boyd alleged that JSD was willfully blind to (or deliberately ignorant of) Mr. Thueme's age and therefore had the requisite knowledge as a matter of law.[6] As Mr. Boyd alleges, JSD purposefully failed to take steps to learn the age of its customers. *See id.* JSD cannot escape liability simply because it deliberately prevented itself from learning Mr. Thueme's age.

[6] *See Deputy Comm'r of Agric. v. O&A Elec. Co-op., Inc.*, 332 Mich. 713, 716 (1952) ("If he has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries and does not make, but studiously avoids making, the obvious inquiries, he must be taken to have notice of those facts which, had he used ordinary diligence, would have been readily ascertained."); *People v. Xun Wang*, 505 Mich. 239, 255 (2020) ("Knowing or knowingly includes acting in deliberate ignorance of the truth or falsity of facts.").

In any event, Mr. Boyd has alleged enough to state a claim for negligent entrustment and intends to explore in discovery the state of JSD's actual knowledge at the time of Mr. Thueme's purchases. Mr. Boyd should be permitted to do so, and summary disposition should be denied.

III. Mr. Boyd States an MCPA Claim Against JSD

In addition to his negligence-based claims, Mr. Boyd also alleges that JSD's false marketing violates the MCPA. "[T]he MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce, [and] it must be liberally construed to achieve its intended goals." *Brownlow v. McCall Enters., Inc.*, 315 Mich. App. 103, 125 (2016). Mr. Boyd alleges that JSD violated the MCPA by falsely advertising its products, particularly its Ghost Gun Kits, to suggest to potential customers, including minors, that they can possess them off-the-books and without any licensing. *See* Compl. ¶¶ 48-49. JSD makes two main arguments against Mr. Boyd's MCPA claim: (i) Mr. Boyd lacks standing because JSD sold the Ghost Gun Kits to Mr. Thueme, not Mr. Boyd; and (ii) JSD has a statutory defense because its conduct was "specifically authorized" by the ATF. Both arguments fail.

a. Mr. Boyd Has Standing Under the MCPA

JSD argues that Mr. Boyd lacks standing to bring an MCPA claim because he was not the consumer, Mr. Thueme was. This argument has been repeatedly and consistently rejected. *See, e.g.*, *Barth v. First Consumer Credit, Inc.*, No. 278517, 2008 WL 5003026, at *3 (Mich. App. Nov. 25, 2008) (**Exhibit 3**); *Action Auto Glass v. Auto Glass Specialists*, 134 F. Supp. 2d. 897, 903 (W.D. Mich. 2001).

Central to the reasoning of these courts is the recognition that the MCPA confers standing on any "*person* who suffers loss as a result of a violation of this act." MCL § 445.911(2) (emphasis added). The MCPA defines the term "person" without reference to one's status as a consumer, MCL § 445.902(d), "and nothing in the text of the statute suggests an intention on the part of the

legislature to limit to consumers the right of action created under the MCPA." *Action Auto Glass*, 134 F. Supp. 2d. at 903 (quoting *John Labatt Ltd. v. Molson Breweries*, 853 F. Supp. 965, 970 (E.D. Mich. 1994)). Indeed, the term "person" stands in contrast to the use of the terms "consumer" and "customer" elsewhere in the MCPA. *Compare* MCL § 445.911(2), *with e.g.,* MCL § 445.903(x), *and with* MCL § 445.903l(4)(c). In addition, as courts have explained, "the intent of protecting consumers is well served by allowing suit to be brought by non-consumers who have a significant stake in the events." *John Labatt Ltd.*, 853 F. Supp. at 970.

To be sure, the MCPA also separately requires that the unfair conduct occur in the course of "trade or commerce." MCL § 445.903.[7] But there is no reason to conflate the "trade or commerce" requirement with the standing requirement, as JSD does in its motion. Def. Br. at 18.[8] Courts in Michigan have repeatedly recognized that non-consumers can bring suit under the MCPA without having engaged in transactions, as long as *defendants* engaged in "trade or commerce." *See, e.g.*, *Golden Star Wholesale, Inc. v. ZB Importing, Inc.*, 531 F. Supp. 3d 1231, 1255-56 (E.D.

[7] "Trade or commerce" is defined by statute as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes," and it also includes advertising. MCL § 445.902(g); *see also Noggles v. Battle Creek Wrecking, Inc.*, 153 Mich. App. 363, 367 (1968). Contrary to JSD's suggestion, *Noggles* addresses the trade or commerce requirement, not standing.

[8] *See Action Auto Glass*, 134 F. Supp. 2d. at 901 ("Defendant's assertion that Plaintiffs must allege that there has been a transaction between the parties involving the purchase of consumer goods in order to assert a claim under the MCPA impermissibly narrows the scope of the statutory definition of trade or commerce."); *see also FOMCO, LLC v. Hearthside Grove Assoc.*, No. 20-cv-1069, 2021 WL 2659632, at *3 (W.D. Mich. June 29, 2021) (**Exhibit 4)** ("Defendants also argue that a claim under the MCPA requires a commercial transaction between the plaintiff and defendant . . . . Defendants' argument finds little support in the text of the MCPA or the case law."). Defendant cites to *Diehl v. RL Coolsaet Constr. Co.*, No. 253596, 2005 WL 3179624 (Mich. App. Nov. 29, 2005) (**Exhibit 5**), but that case is inapposite. After holding that the transaction at issue was improperly "commercial," the court explained that the plaintiff "was not a 'party to the transaction' under 445.903(1)(n) and (1)(y), so these sections do not apply to him." *Id.* at *2. Here, Mr. Boyd brings a claim under Section 445.903(1)(n) for the confusion and misunderstanding of Mr. Thueme, who was a party to the underlying transaction with JSD, and which caused Mr. Boyd's injuries.

Mich. 2021) (competitor brought MCPA claim); *Buhland v. Fed. Cartridge Co., Inc.*, No. 12-cv-244, 2013 WL 12085097, at *4, *5, *7 (W.D. Mich. May 8, 2013) (friend who borrowed a firearm brought MCPA claims) (**Exhibit 6**); *Barth*, 2008 WL 5003026, at *3 (wife of debtor brought MCPA claims); *Janda v. Riley-Meggs Indus., Inc.*, 764 F. Supp. 1223, 1229-30 (E.D. Mich. 1991) (a surgeon and researcher brought MCPA claims for misappropriation).

b. JSD Cannot Invoke the "Specifically Authorized" Exception Under the MCPA

JSD further argues that it is entitled to an exemption from the MCPA because its conduct was "specifically authorized by . . . laws administered by a regulatory board [*i.e.*, the ATF]." Def. Br. at 16 (citing MCL § 445.904(1)(a)). This argument fails for four, independently sufficient reasons.

First, the specific authorization exemption is an affirmative defense, *Hartman & Eichhorn Bldg. Co. v. Dailey*, 478 Mich. 891 (2007), which is "generally not proper grounds for summary disposition under MCR 2.116(C)(8)." *Iafrate v. Angelo Iafrate, Inc.*, No. 355597, 2022 WL 259248, at *6 (Mich. Ct. App. Jan. 27, 2022) (**Exhibit 7**); *see also Golden Star Wholesale, Inc.,* 531 F. Supp. 3d at 1253 (finding it "inappropriate" to address this "specifically authorized" exemption at the motion to dismiss stage). JSD therefore cannot meet its "burden of proving an exemption," MCL § 445.904(4), as part of a summary disposition motion.

Second, no specific authorization exists. JSD asserts that the ATF "determined" that JSD's Ghost Gun Kits are not "firearms," and that the ATF "specifically authorized" the sale of Ghost Gun Kits by JSD. As discussed *supra,* at 11 n.4, the ATF never made any such determination, and JSD's assertions to the contrary rely on unauthorized evidentiary submissions that are inappropriate for consideration at this stage. However, accepting JSD's misrepresentations actually renders its reliance on the MCPA's specific-authorization exemption even more absurd. If the ATF has determined that JSD's Ghost Gun Kits are not firearms subject to the Gun Control

Act (it has not), then the ATF would not have "specifically authorized" their sale within the meaning of the MCPA, because it would not have "administered" applicable rules as a "regulatory board . . . acting under [relevant] statutory authority." MCL § 445.904(1)(a); *see also Wong v. T-Mobile USA, Inc.*, No. 05-73922, 2006 WL 2042512, at *7 (E.D. Mich. July 20, 2006) (**Exhibit 8**) ("'[S]pecifically authorized' does not simply mean 'not prohibited.' To conclude otherwise would be to create a gap in enforcement in those areas not covered by government regulation.").

In fact, each of the cases on which JSD relies undercuts its position by explicitly holding that defendants were entitled to an exemption under § 445.904 only because they *were* subject to detailed and onerous regulations (not because there *were not*). *See* Def. Br. at 17; *Peter v. Stryker Orthopaedics, Inc.*, 581 F. Supp. 2d 813, 816 (E.D. Mich. 2008) ("Prosthetic knees are medical devices, which are heavily regulated by the FDA."); *Mills v. Equicredit Corp.*, 294 F. Supp. 2d 903, 910 (E.D. Mich. 2003) ("[Defendant] was a licensed mortgage lender under a Michigan law that was regulated by the Commissioner of the Office of Financial and Insurance Services."); *McEntee v. Incredible Techs., Inc.*, No. 263818, 2006 WL 659347, at *1 (Mich. Ct. App. Mar. 16, 2006) (**Exhibit 9**) ("[Relevant agency] has expansive and exclusive authority to regulate all aspects of casino gambling in Michigan"). JSD, by contrast, insists that it can sell its Kits unburdened by any government regulation. Def. Br. at 3. It cannot simultaneously invoke the exemption.

Third, "a person who does not hold the license to engage in the relevant conduct cannot claim the exemption under MCL 445.904(1)(a)." *Hinderer v. Snyder,* No. 339759, 2019 WL 360732, at *8 (Mich. Ct. App. Jan. 29, 2019) (**Exhibit 10**) (citing *Atty Gen. v. Diamond Mortg. Co.*, 414 Mich. 603, 617 (1982)); *see also Liss v. Lewiston-Richards, Inc.*, 478 Mich. 203, 215 (2007). JSD concedes that it lacks any relevant license, Def. Br. at 5, and, thus, cannot claim the exemption.

Fourth, even if the ATF somehow authorized JSD's sale and marketing of its Ghost Gun Kits through silence (*i.e.*, by supposedly determining the Ghost Gun Kits are not "firearms"), the ATF could not have authorized JSD's deceptive *advertisements*. *See Baker v. Arbor Drugs, Inc.*, 215 Mich. App. 198, 207-08 (1996) (finding that a licensed pharmacist was not exempted from an unfair or deceptive advertising claim under the MCPA because the relevant pharmacy board regulations did not cover advertising). ATF regulates the manufacture and sale of "firearms," not advertisements. It is the latter which comprise the gravamen of Mr. Boyd's MCPA claims. Compl. ¶¶ 148-56.[9]

CONCLUSION

For the above reasons, Mr. Boyd respectfully requests that this Court deny JSD's motion for summary disposition in full.

[9] *See Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 123 (2019) ("false, deceptive, and other forms of wrongful advertising are regulated principally through unfair trade practice laws," including as to firearms).

Dated: July 16, 2024

Respectfully submitted,

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EXHIBIT 1

2006 WL 73639
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Mark HADDAD, Plaintiff-Appellant,
v.
George TSOUKALAS, Defendant-Appellee,
and
ALEXANDER HARLAMBOS SAKELLARIS and Alexandra Sakellaris, Defendants.

No. 256659.
|
Jan. 12, 2006.

Before: DONOFRIO, P.J., and BORRELLO and DAVIS, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiff appeals as of right the February 10, 2004, order dismissing his cause of action against defendant, George Tsoukalas. Specifically, plaintiff challenges the grant of summary disposition on his claim of negligent entrustment. Because plaintiff has plead and created a justiciable question of fact on his theory of defendant's negligent entrustment of his registered Smith and Wesson .357 Magnum revolver to Alexander Sakellaris, we reverse and remand to the trial court. [1]

During the evening of January 11, 2002, plaintiff and friends visited with Sakellaris in the basement of his home. After a short while, Sakellaris produced the revolver to, "handle it and show it off." He opened the chamber, removed one of the bullets and announced that it was a hollow point, replaced the bullet, and then spun the cylinder "like a toy." The gun did not have a trigger lock in place. As Sakellaris ascended the basement stairs with the gun in his left hand he tripped, fell, and dislodged the banister, all of which resulted in an accidental discharge of the firearm. Plaintiff was shot in the knee.

The revolver was registered to defendant. Sakellaris reported to the police that he was keeping the handgun for his defendant cousin whose parents would not permit him to maintain the gun in their home. When the police investigated, they found the handgun in the trunk of Sakellaris' vehicle in a case, unloaded, and secured with a trigger lock. When defendant was interviewed by the police he reported he had purchased the handgun along with a holster. Police questioned defendant further when they noted the holster purchased for use with the handgun was for a left-handed individual and defendant is right-handed and Sakellaris is left-handed. When questioned regarding this observation, defendant acknowledged that he and Sakellaris had gone to purchase the handgun and that it was Sakellaris who provided the monies for the purchase. Defendant stated that it was their intent, at some point in the future, to turn ownership of the handgun over to Sakellaris.

When Sakellaris was reinterviewed he acknowledged that he had accompanied defendant to purchase the gun and that he had requested defendant purchase the handgun, with the intent that when Sakellaris turned eighteen, the gun would be transferred and registered in his name. Sakellaris reported that defendant purchased the gun for him, but that defendant registered the handgun in his own name and took it home. Defendant's father discovered a bullet for the handgun in their home and instructed defendant to remove the gun from the home. Defendant took it with a trigger lock in place to Sakellaris to retain. Defendant reported to police that he did not give Sakellaris any ammunition with the handgun. Sakellaris and defendant took the gun to a shooting range on two or three occasions. After shooting, Sakellaris would clean the gun and replace the trigger lock. Defendant asserted that he permitted Sakellaris to store the handgun based on his "superior knowledge" of weapons and his experience with guns.

***2** Prior to this incident, Sakellaris was reported to have had several contacts with police as a juvenile, including incurring speeding tickets, breaking and entering and probation violations. Defendant contended that he was unaware of any criminal history or police involvement with Sakellaris before this event.

Below, plaintiff contended defendant's assertion that Sakellaris had been trained and was knowledgeable in the use of firearms was uncorroborated. Plaintiff also asserted Sakellaris' history of juvenile problems, at school and with police, verified his immaturity and his incompetence to

possess a handgun. Further, that Sakellaris' possession of the handgun was illegal due to his age, and that the handgun could not have been legally transferred from defendant to Sakellaris until he turned eighteen. The handgun purchase was described as an illegal "strawman" purchase, involving the legitimate purchase of the handgun by defendant with the illegal transfer of the weapon to Sakellaris, without proper registration or transfer paperwork.

On appeal, plaintiff argues the trial court erred in granting summary disposition in favor of defendant on his claim of negligent entrustment. The tort of negligent entrustment is comprised of two elements:

> First, the entrustor is negligent in entrusting the instrumentality to the entrustee. Second, the entrustee must negligently or recklessly misuse the instrumentality. [*Allstate Ins Co v. Freeman,* 160 Mich.App 349, 357; 408 NW2d 153 (1987).]

The doctrine of negligent entrustment essentially comprises a determination of whether an individual's conduct was reasonable in view of the apparent risk involved. *Bragan v. Symanzik,* 263 Mich.App 324, 341; 687 NW2d 881 (2004) (*Murphy, J., concurring.*)

Originally, this Court, in *Muscat v. Khalil,* 150 Mich.App 114, 121; 388 NW2d 267 (1986), discussed the law of negligent entrustment, indicating:
Michigan courts have adopted the following definition of the theory from 2 Restatement Torts, 2d, § 392:

'One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.' *Moning v. Alfono,* 400 Mich. 425, 443-444; 254 NW2d 759 (1977).

Subsequently, the Michigan Supreme Court, in *Fredericks v. General Motors,* 411 Mich. 712, 719; 311 NW2d 725 (1981), clarified the applicable standard of care determining that:

To sustain a cause of action for negligent entrustment a plaintiff must prove that defendant knew or should have known of the unreasonable risk propensities of the entrustee.

To prove an entrustor should have known an entrustee was likely to use the entrusted chattel in an unsafe manner, peculiarities of the entrustee sufficient to put the entrustor on notice of that likelihood must be demonstrated.

***3** This was further refined in *Buschlen v. Ford Motor Co (On Remand),* 121 Mich.App 113, 117; 328 NW2d 592 (1982), where this Court indicated that to prove negligent entrustment:
[P]laintiffs must show either that defendant knew the entrustee was not to be entrusted or that defendant 'had special knowledge of (the entrustee) which would put defendant on notice.'

The *Fredericks* Court did not recognize a duty to inquire, on the part of the entrustor, to ensure that the chattel being entrusted was being used in a safe manner. Instead:

> [T]he entrustor must first have special notice of the peculiarities of the entrustee sufficient to put the entrustor on notice before the entrustor is under any further duty to ensure an entrusted chattel's safe use. [*Buschlen, supra,* p 118.]

Additionally, an essential element of negligent entrustment involving "inherently dangerous materials" involves "the failure of the principal to see that all appropriate precautions are taken to insure that the inherently dangerous activity will be properly performed." *Beck v. Westphal,* 141 Mich.App 136, 145; 366 NW2d 217 (1984).

Contrary to plaintiff's assertion in the lower court, Sakellaris' youth was not sufficient, in and of itself, to impose liability for negligent entrustment. However, age did function as a "peculiarity" sufficient to place defendant on notice that the handgun could be misused or handled in an unsafe manner. As noted previously by this Court, the entrustment of a potentially dangerous article to an underage or young individual:

> [M]ay pose an unreasonable risk of harm not only because the child may not appreciate the risk or may not have the skill to use the article safely but-even if he does appreciate the risk and does have the requisite skill-because he may recklessly ignore the risk and use the article frivolously due to immaturity of judgment, exuberance of spirit, or sheer bravado. [*Bragan, supra,* p 341 (*Murphy, J., concurring*) (citations omitted).]

Thus, based on Sakellaris' youth, defendant was placed on notice requiring either the taking of sufficient precautions before entrusting the handgun or the necessity of further investigation regarding Sakellaris' competency to possess the weapon. This is especially true given defendant's knowledge that the handgun was required to be registered and that Sakellaris, based on age, was ineligible to possess the weapon. While defendant claimed that he provided a trigger lock for the handgun, the question of access to the key is conspicuously absent. When police recovered the handgun from Sakellaris the trigger lock was in place.

The trial court erred in granting summary disposition because questions of fact existed regarding defendant's knowledge of factors pertaining to Sakellaris' history with police, in addition to his age, which put defendant on notice of the potential for Sakellaris to mishandle the firearm. Questions of fact also existed regarding whether defendant had exercised sufficient and reasonable precautions prior to entrusting the weapon to Sakellaris. As such, it was in the province of the jury to determine whether defendant's entrustment of the weapon to Sakellaris was negligent.

***4** We reverse the grant of summary disposition and remand to the trial court for submission of the issue of negligent entrustment to a jury. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2006 WL 73639

Footnotes

1 Plaintiff's claims against the other named defendants were dismissed without prejudice.

EXHIBIT 2

2011 WL 3760893
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
John Henry GRANDERSON, Defendant–Appellant.

Docket No. 297838.
|
Aug. 25, 2011.

Saginaw Circuit Court; LC No. 09–032961–FH.

Before MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

Opinion

PER CURIAM.

***1** Following a jury trial, defendant was convicted of receiving or concealing a stolen firearm, MCL 750.535b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to a term of nine months to two years' imprisonment for the stolen firearm conviction, and two years for the felony-firearm conviction, to be served consecutively. Defendant appeals as of right. We reverse and remand.

I. BACKGROUND

Defendant's receiving or concealing a stolen firearm conviction stems from the theft in February 2009 of six weapons owned by Robert and Shelia Burk—two rifles, an AR–15 and an "AK–47 style," as well as four handguns, a Springfield XD–9 (a 9–millimeter), a Springfield XD–45 (a .45), a Walther P–22, and a Ruger SP101 (a .357). The theft was detected on February 13, 2009, when the owner of the home where the weapons were stored in a gun safe discovered his home had been burglarized.

Several of the weapons were ultimately used in shootings on February 24, 2009 at Bridgeport High School, and on March 5, 2009 in Saginaw, Michigan. The Springfield XD–45, Springfield XD–9, and Ruger .357 were recovered by police from a vehicle after a fight at BASE alternative school in Bridgeport on February 26, 2009. The car from which they were recovered was registered to codefendant Aaron Smith's parents. The "AK–47 style" rifle was recovered from a backyard after the March 5, 2009 shooting.

Officers investigating these incidents became aware of photographs posted on MySpace of Alontae Smith, Aaron's Smith's brother, holding the rifle. The user's profile name was "King Lontae." [1] According to statements made by "King Lontae" on MySpace, the photographs of the weapons were removed because "[t]hey were aware that the police were looking into it."

The police then obtained a search warrant for Alontae Smith's home because:

> Alontae Smith's name came up in the shots fired, in the fight at the high school, and the fact that both Alontae Smith and Aaron Smith were arrested in Bridgeport where the three recovered handguns were found by Bridgeport where the three recovered handguns were found by Bridgeport Township officers.

In light of the pictures that had been posted on the internet that showed a room and some individuals, including Aaron Smith, holding weapons, the police were looking for both photographs and weapons.

Aaron and Alontae Smith were both at the home when the warrant was executed, as were their parents and another brother. The room in the pictures turned out to be Aaron Smith's bedroom. It was located in the basement and was easily identifiable because it was bright red with black blinds. No weapons were found in the room, but a camera, cell phone, laptop, and other items were seized from the home. The camera was taken from Aaron Smith's pants' pocket. The computer was retrieved from Aaron Smith's bedroom. The computer was believed to be Aaron Smith's because his father called "wanting to know when I [Alontae] was going to be finished with the computer because Aaron needed it back for school."

***2** The prosecution admitted pictures into evidence that had been on the camera. The people in the photographs, one of whom was defendant, appeared to be posing and an officer indicated that the fingers they were holding up were gang signs. One of the photographs was of Alontae Smith holding the "AK–47 style" rifle with codefendant Clarence Thomas on the bed apparently reaching out for it. The photographs had what appeared to be a date-stamp of 3/1/09, but no one was certain whether that was when the pictures were taken.

Although defendant appeared in the photographs, the officers were unfamiliar with him, so a photograph was broadcast on several television stations to ask for help determining his identification. That information led the police to defendant. Defendant's mother, Lorise Granderson, identified defendant in two photographs in which he was holding a firearm. She testified that defendant was 19 at the time of the photograph, that she had not seen the firearm before, and that she had not known him to own or purchase such a weapon.

Defendant, Clarence Thomas, and Aaron Smith were all tried together before a single jury. Each defendant stated on the record that he did not want to testify. Each was charged with receiving or concealing stolen property and felony-firearm. The jury found Clarence Thomas not guilty, but found defendant and Aaron Smith both guilty on both counts.

Defendant filed a motion for a new trial making the same arguments he now makes on appeal, namely that there was insufficient evidence that defendant knew the weapon was stolen, that the standard provided to the jury that defendant "knew or should have known" was improper, and that, because there was no evidence that defendant did not steal the weapon, there was insufficient evidence that he received the firearm. The trial court denied defendant's motion. Defendant now appeals.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to sustain his conviction. We disagree. We review de novo a claim of insufficient evidence, taking the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt. *People v. Sherman–Huffman,* 241 Mich.App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich. 39 (2002). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime. Minimal circumstantial evidence is sufficient to prove an actor's state of mind." *People v. Fennell,* 260 Mich.App 261, 270; 677 NW2d 66 (2004).

Defendant was charged under MCL 750.535b(2), which provides:

> A person who receives, conceals, stores, barters, sells, disposes of, pledges, or accepts as security for a loan a stolen firearm or stolen ammunition, knowing that the firearm or ammunition was stolen, is guilty of a felony, punishable by imprisonment for not more than 10 years or by a fine of not more than $5,000.00, or both.

***3** Thus, the elements the prosecution was required to prove in this case were "that defendant (1) received, [or] concealed ... (2) a stolen firearm ... (3) knowing that the firearm ... was stolen." *People v. Nutt,* 469 Mich. 565, 593; 677 NW2d 1 (2004).

Defendant argues that the prosecution failed to present sufficient evidence of the first and third elements. That is, instead of showing receipt or concealment, the prosecution simply showed mere possession, and instead of actual knowledge, it showed simply that defendant had reason to know or reason to believe that the weapon was stolen, which was insufficient.

Looking first at defendant's argument regarding receiving or concealing versus mere possession, the evidence in this case consisted of two photographs showing defendant holding the rifle while in the bedroom of his codefendant Aaron Smith. Defendant argues that this is simply evidence of possession, not receiving. We disagree. Under CJI 26.2(2), "[t]o receive means to accept possession of property." Here, defendant has conceded possessing the weapon. In addition, there were photographs of other individuals holding the rife, leading to the reasonable inference that defendant accepted possession of the rifle from someone else. Therefore, there was sufficient evidence of defendant's receiving the stolen rifle.

Defendant contends that, absent evidence showing he was not the thief, he cannot be found guilty of receiving the property. Although that was previously the rule, see *People v. Kyllonen,* 402 Mich. 135; 262 NW2d 2 (1978), in *People v. Hastings,* 422 Mich. 267; 373 NW2d 533 (1985), our Supreme Court held that the Legislature's amendment to the general receiving or concealing statute, immediately following the decision in *Kyllonen,* to include possession and concealment to the statute, evidenced an intent to permit a thief to also be charged under the receiving or concealing statute. *Hastings,* 422 Mich. at 268–272. All of the cases cited by defendant in his brief in support of his proposition all predate *Hastings* and, therefore, are inapplicable.

Defendant does not cite *Hastings,* but does recognize the Legislature's 1979 amendment to the general receiving or concealing statute. Defendant argues that the amendment is inapplicable because the amendment added the word "possesses," which was not added to MCL 750.535b. There are two problems with this argument. First, MCL 750.535b was added in 1991, after *Hastings* was decided. Second, defendant ignores that the amendment to MCL 750.535 [2] added both "possesses" *and* "conceals," and that "conceals" *is* part of MCL 750.535b, as are the verbs "sells" and "disposes of," among others. Thus, the reasoning behind the former prohibition against also charging a thief with MCL 750.535 [3] has never applied to MCL 750.535b, and the reasoning behind *Hastings* [4] permits the conclusion that the thief is intended to be included.

***4** Finally, even assuming that the prohibition applied, absent any evidence that defendant was, in fact, the thief, there is no prohibition on charging with defendant with receiving or concealing. Given that defendant goes to great lengths to indicate that there is no evidence that he knew the weapons were stolen, there is clearly no evidence that he was the thief and, therefore, nothing that precluded him from being charged or convicted of receiving or concealing a stolen weapon.

Defendant next argues that there was insufficient evidence that he knew the rifle was stolen. Before we can determine whether the evidence was sufficient, we must first determine what type of knowledge is necessary for conviction. Thus, we must determine what the statute requires when it states that the receiving or concealing must be done "knowing that the firearm ... was stolen."

We located no cases, and defendant has cited none, where the specific knowledge requirement of MCL 750.535b is discussed. However, given that, until the 2006 amendment, the knowledge requirement under MCL 750.535 and MCL 750.535b was identical, i.e. "knowing [the property] was stolen," we conclude that cases interpreting the knowledge requirement of MCL 750.535 prior to its amendment are the most applicable to this situation.

In *People v. Tantenella,* 212 Mich. 614, 612; 180 NW 474 (1920), our Michigan Supreme Court held, "Guilty knowledge means not only actual knowledge, but constructive knowledge, through notice of facts and circumstances from which guilty knowledge may be fairly inferred." However, in *Echelon Homes, LLC v. Carter Lumber Co,* 472 Mich. 192; 694 NW2d 544 (2005), the Court clarified its *Tantenella* holding:

> Although the *Tantenella* Court characterized its analysis of these facts as examining the defendant's constructive knowledge, the Court was, in fact, determining that the defendant had knowledge, proven by circumstantial evidence, that the car was stolen.... The *Tantenella* Court used the term "constructive knowledge" synonymously with knowledge proven through circumstantial evidence. This, the Court's use of the term "constructive knowledge" is a misnomer; what the Court really meant was knowledge proven by circumstantial evidence. *[Id.* at 199–200.]

Although the Court in *Echelon Homes* was interpreting the knowledge requirement under MCL 600.2919a, see *id.* at 200, the statute involved liability that only occurred "when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property *knew that the property was* stolen, embezzled, or converted...." MCL 600.2919a (emphasis added). Because that statutory language parallels the language of MCL 750.535 prior to its amendment, and the *Tantenella* case which the Court was clarifying involved a conviction under MCL 750.535, we conclude that the holding in *Echelon Homes* is dispositive of the knowledge requirement necessary for MCL 750.535b.

Accordingly, we agree with defendant that constructive knowledge is insufficient and that actual knowledge is required.

***5** Nevertheless, case law is also clear that actual knowledge may be proven by circumstantial evidence. *Echelon Homes,* 472 Mich. at 199–200; see also *People v. Westerfield,* 71 Mich.App 618, 621; 248 NW2d 641 (1976) ("Guilty knowledge, as with most states of mind, cannot generally be proved by direct evidence absent admission by the defendant. By the very nature of the element, it must usually be inferred from all of the various circumstances of the case."). After reviewing the record and taking the evidence in the light most favorable to the prosecution, we hold that there was sufficient circumstantial evidence from which a reasonable jury could conclude that defendant had actual knowledge that the weapon was stolen.

One factor in assessing whether guilty knowledge existed in a receiving or concealing case is whether the defendant possessed the article shortly after it was stolen. *People v. Salata,* 79 Mich.App 415, 421; 262 NW2d 844 (1977). Although this factor cannot support a conviction by itself, see *People v. White,* 22 Mich.App 65, 68; 176 NW2d 723 (1970), it can be considered with other evidence in order to sustain a conviction. *People v. Staples,* 68 Mich.App 220, 223; 242 NW2d 74 (1976).

Here, the photographs of defendant with the rifle appeared to be dated March 1, 2009, which was shortly after the weapons had been stolen from the Burks and before the rifle was used in, and disposed of after, the shooting on March 5, 2009. In addition, defendant's mother testified that she had not seen the weapon and had not purchased it for defendant. There was no evidence to suggest that defendant or either of the codefendants possessed the ability or capacity to acquire the weapon legally. Codefendants Smith and Thomas were both photographed at the same location as defendant—Smith's house—and both were found in vehicles containing the other stolen firearms. Given that the three men were together and posing with the rifle, it is reasonable to infer that defendant spoke with his codefendants regarding the rifle, and also reasonable to infer that they told him it was stolen—hence, wanting to be photographed it. Although this circumstantial evidence is far from overwhelming, it was sufficient to permit a reasonable jury to infer that defendant had actual knowledge that the rifle was stolen.

Thus, we conclude that there was sufficient evidence in the record from which a reasonable jury could find defendant guilty of receiving and concealing stolen property.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his counsel was ineffective for failing to realize that under MCL 750.535b, simple possession was insufficient and that actual knowledge was required. We agree.

"To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different." *People v. Jordan,* 275 Mich.App 659, 667; 739 NW2d 706 (2007). Defendant bears the burden to overcome the presumption that counsel's performance constituted sound trial strategy. *Id.*

***6** As previously noted, MCL 750.535, the general receiving or concealing statute, and MCL 750.535b, the statute under which defendant was charged, have significant differences based on amendments to MCL 750.535, which occurred in 2006. Namely, MCL 750.535 provides for conviction for "possession" of the stolen property where a defendant "knew or had reason to know or reason to believe that the property was stolen." MCL 750.535b provides for conviction for "receiving" or "concealing," among others, but does not include "possession" and also requires actual, not constructive, knowledge.

The trial court gave CJI2d 26.1, 26.2, and 26.3, all of which are patterned on the language in MCL 750.535 and, therefore, include the elements of "possession" and "had reason to know or reason to believe," neither of which are contained in MCL 750.535b. Accordingly, the jury was instructed as to elements which are not, in fact, part of MCL 750.535b. Although errors in jury instructions do not necessarily require a new trial, here, the jury was misinstructed as to the elements of the charge and what the prosecution was required to prove.

Because juries are presumed to follow their instructions, *People v. Unger,* 278 Mich.App 210, 235; 749 NW2d 272 (2008), and the erroneous instruction actually lessened the prosecution's burden on the knowledge requirement, the instructional error undermined the reliability of the verdict.

Although there was sufficient evidence to find defendant received the weapon with actual knowledge that it was stolen, it was even easier for the jury to conclude that when defendant possessed the weapon he had reason to know or reason to believe that it was stolen. Thus, it is possible that a jury would find enough evidence to convict of possession with constructive knowledge, but not receiving with actual knowledge. Consequently, the error was outcome determinative. See *People v. Hawthorne,* 474 Mich. 174, 181–182; 713 NW2d 724 (2006) ("An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict" [quotation marks and citations omitted].).

Having concluded that the erroneous instructions were outcome determinative error, and being unable to think of a strategic reason for permitting jury instructions that lessen the prosecution's burden to prove defendant's guilt, [5] counsel's failure to recognize that the jury instructions were wrong and to object to them constituted ineffective assistance of counsel. *Jordan,* 275 Mich. at 667. Accordingly, defendant is entitled to a new trial.

III. CONCLUSION

There was sufficient evidence from which a reasonable jury could convict defendant of receiving or concealing a stolen firearm with actual knowledge that it was stolen. However, the jurors were improperly instructed as to the elements of MCL 750.535b and defense counsel's failure to recognize and object to the erroneous instructions constituted ineffective assistance of counsel, entitling defendant to a new trial. Accordingly, we reverse defendant's conviction and remand for a new trial. We do not retain jurisdiction.

SHAPIRO, J. (concurring in part and dissenting in part).

***7** I concur with the majority that defendant's convictions must be reversed in light of the inaccurate instruction on the knowledge element provided for in MCL 750.535b. However, rather than remanding the case for retrial with proper instructions, I would vacate the conviction because sufficient evidence on yet another element was not proffered.

Defendant was convicted under MCL 750.535b(2), which requires that at the time a defendant "receives, conceals, stores, barters, sells, disposes of, pledges or accepts [a firearm] as security for a loan" he know that the firearm was stolen. No evidence was submitted that, when defendant had a gun, he "conceal[ed], store[d], barter[d], [sold], dispose[d] of, [or] pledge[d] or accept[ed][it] ... as security for a loan." The sole evidence that defendant "receive[d]" the firearm was the fact that two photographs were discovered of him holding the weapon.

MCL 760.535, the general receiving and concealing statute, unlike MCL 750.535(b), also makes it a crime to "possess" stolen property. While one may argue that a jury could reasonably find that holding the weapon long enough simply to take a photo does not constitute possession, it is also clear that a reasonable jury could so find and that such evidence would be sufficient to convict assuming the other elements were present. Accordingly, had defendant been charged under MCL 760.535, a conviction would have been proper. However, I do not believe that two photographs of defendant holding a firearm is sufficient to conclude that he "received" the weapon, as required by MCL 760.535b.

The majority concludes that "receipt" means "to accept possession of property" and therefore equates receipt with simple possession. I disagree. When the Legislature adopted MCL 760.535b in 1991, it chose not to include mere possession, even though it had specifically amended MCL 760.535 to include mere possession in 1979 and could certainly have included the same language in MCL 760.535b. In addition, the 1979 amendment was adopted following the decision in *People v. Kyllonen,* 402 Mich. 135; 262 NW2d 2 (1978), which held that the term "receiving" in the pre-amended version of MCL 750.535 did *not* include mere possession. Rather, the Supreme Court held that the term "received" related to "those persons who assist the thief or others in the disposition or concealment of the stolen property." *Id.* at 145. See also, *People v. Botzen,* 151 Mich.App 561, 564; 391 NW2d 410 (1986) (prior to the 1979 amendment, "the statute was directed towards those who assisted the thief or others in the disposition or concealment of stolen property").

The sole evidence in this case, i.e., two photographs of defendant holding the gun while in a friend's bedroom, is not sufficient to demonstrate participation in the disposition or concealment of the weapon, which, under *Kyllonen,* is required to show "receiving," and the statute does not proscribe mere "possession." Accordingly, I would vacate defendant's convictions.

All Citations

Not Reported in N.W.2d, 2011 WL 3760893

Footnotes

1 It appears that the photograph was actually the user-profile's icon and, therefore, was extremely small, but had the same background (i.e. Aaron Smith's bedroom) as the other photographs.

2 The current version of MCL 750.535(1) provides, “A person shall not buy, receive, possess, conceal, or aid in the concealment of stolen, embezzled, or converted money, goods, or property knowing, or having reason to know or reason to believe, that the money, goods, or property is stolen, embezzled, or converted.” The previous version provided, in relevant part, “A person who buys, receives, or aids in the concealment of any stolen, embezzled, or converted money, goods, or property knowing the same to have been stolen, embezzled, or converted ... is guilty of a felony....” *Hastings,* 422 Mich. at 269.

3 To wit, “To interpret the words ‘buys,’ ‘receives,’ or ‘aids in the concealment’ of stolen property to mean the buying or receiving from one's self or aiding one's self in concealment is needlessly to corrupt a forthright and harmonious statute.” *Kyllonen,* 402 Mich. at 145.

4 “The everyday understanding of the language presently employed in the statute now includes the person who committed the larceny.” *Hastings,* 422 Mich. at 271. “Prosecution of the thief for possessing or concealing stolen property does not torture the language of the statute, as it would have to have to read the former prohibition on buying, receiving, or aiding in the concealment of stolen property.” *Id.*

5 In all fairness to both defense counsel and the trial court, there are neither separate instructions for, nor notes indicating a need to alter the general instructions to match the elements of, MCL 750.535b. It appears that the parties and the trial court were simply not aware that MCL 750.535b had different elements than MCL 750.535. On remand, we remind the trial court and the parties to alter the jury instructions to appropriately match the elements of MCL 750.535b.

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EXHIBIT 3

2008 WL 5003026
Only the Westlaw citation is currently available.

UNPUBLISHED
Court of Appeals of Michigan.

Jennifer BARTH and Michael Barth, Plaintiffs-Appellants,
v.
FIRST CONSUMER CREDIT, INC., Defendant-Appellee.

Docket No. 278517.
|
Nov. 25, 2008.

West KeySummary

1 **Alternative Dispute Resolution** Sales Contracts Disputes

The plaintiff's claims were arguably within the arbitration agreement and the dispute was not expressly exempt from the arbitration terms of the contract. The plaintiff entered into a retail installment contract with a third-party for the purchase and installment of windows. The third-party assigned the contract to the defendant and the plaintiff became delinquent in his payments. The plaintiff then filed a complaint alleging that the defendant, in attempting to collect the contractual debt, had been making repeated, threatening, and harassing phone calls to the plaintiff, to his friends, family, and neighbors, and to his place of employment, resulting in the loss of his job. The court found that the claims were subject to arbitration under the arbitration agreement in the retail installment contract.

1 Case that cites this headnote

Oakland Circuit Court; LC No.2006-079111-NZ.

Before: SCHUETTE, P.J., and MURPHY and FITZGERALD, JJ.

Opinion

PER CURIAM.

***1** Plaintiffs appeal as of right from the order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8) in this action in which plaintiffs alleged that defendant's debt-collection activities constituted, *inter alia,* violations of the Michigan Collection Practices Act, MCL 445.251 *et seq.*, and the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* We affirm in part, reverse in part, and remand.

I

Plaintiff Michael Barth entered into a retail installment contract with Erie Construction Midwest, Inc., for the purchase and installation of replacement windows. Plaintiff Jennifer Barth, Michael Barth's wife, is not a party to the contract. Erie subsequently assigned the contract to defendant. There is no dispute that Michael Barth became delinquent in his payments.

Plaintiffs filed a complaint alleging that defendant, in attempting to collect the contractual debt, had been making repeated, threatening, and harassing phone calls to plaintiffs, to their friends, family, and neighbors, and to Michael Barth's place of employment, resulting in the loss of his job. In addition to their claims under the collection practices act and the MCPA, plaintiffs raised tort claims of intentional infliction of emotional distress, intrusion upon seclusion, and disclosure of embarrassing facts.

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8), holding that Michael's claims were subject to arbitration under an arbitration agreement in the retail installment contract. The court further dismissed Jennifer's claims on the ground that she "lack[ed] standing to pursue any claims with respect to the agreement between Michael Barth and [defendant]."

II

Plaintiffs first argue that the trial court erred in mandating arbitration of Michael Barth's claims because the claims do not arise out of, or relate to, the contract. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Dressel v. Ameribank,* 468 Mich. 557, 561, 664 N.W.2d 151 (2003). Likewise, the existence and enforceability of an arbitration agreement are questions of law for a court to determine de novo. *Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC,* 276 Mich.App. 146, 152, 742 N.W.2d 409 (2007); *Michelson v. Voison,* 254 Mich.App. 691, 693-694, 658 N.W.2d 188 (2003). When reviewing a decision on a motion for summary disposition predicated on the existence of an agreement to arbitrate, this Court accepts the plaintiff's well-pleaded allegations as true and construes them in favor of the nonmoving party. *Michelson, supra* at 694, 658 N.W.2d 188, citing MCR 2.116(C)(7).

Michigan common law and statutory law "strongly favor arbitration." *Rembert v. Ryan's Family Steak Houses, Inc.,* 235 Mich.App. 118, 127-128, 596 N.W.2d 208 (1999). The Michigan arbitration act (MAA), MCL 600.5001 *et seq.,* "evidences Michigan's strong public policy favoring arbitration," *Watts v. Polaczyk,* 242 Mich.App. 600, 607, 619 N.W.2d 714 (2000), quoting *Grazia v. Sanchez,* 199 Mich.App. 582, 584, 502 N.W.2d 751 (1993), and stands as "a strong and unequivocal endorsement of binding arbitration agreements." *Watts, supra* at 607-608, 619 N.W.2d 714, quoting *Rembert, supra* at 132, 596 N.W.2d 208.

***2** Generally, the parties' agreement determines the scope of arbitration. *Rooyakker & Sitz, supra* at 163, 742 N.W.2d 409; *Fromm v. MEEMIC Ins. Co.,* 264 Mich.App. 302, 305-306, 690 N.W.2d 528 (2004). "To determine whether an issue is arbitrable, 'the court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration agreement, and whether the dispute is expressly exempt from arbitration by the terms of the contract.' " *Rooyakker & Sitz, supra* at 163, 742 N.W.2d 409, quoting *Fromm, supra* at 305-306, 690 N.W.2d 528 (internal citations omitted). Any doubts about whether the dispute is subject to arbitration should be resolved in favor of arbitration. *Rooyakker & Sitz, supra* at 163, 742 N.W.2d 409; *Fromm, supra* at 306, 690 N.W.2d 528; *Burns v. Olde Discount Corp.,* 212 Mich.App. 576, 580, 538 N.W.2d 686 (1995).

The subject arbitration agreement provides:

> Buyer and Creditor agree that any and all disputes, claims or controversies arising under or relating to this contract, including by way of example and not as a limitation: (i) the relationships resulting from this contract; (ii) the breach or alleged breach of this contract; or (iii) the validity of this contract or the validity or enforceability of this arbitration provision, shall be subject to binding arbitration to be determined by a board of three arbitrators, in accordance with and pursuant to the then prevailing rules and procedures of the Commercial Rules of the American Arbitration Association....

The language employed by the arbitration provision is very broad in scope, contemplating that "any *and all* disputes, claims or controversies arising under *or relating to* this contract" shall be subject to binding arbitration (emphasis supplied). Each of plaintiffs' claims is premised on defendant's activities in attempting to collect Michael Barth's contractual debt, and are therefore claims "arising under or relating to" the retail installment contract. Moreover, the non-exhaustive list of examples in the arbitration agreement explicitly provides that "the relationships resulting from this contract" are subsumed within the category of disputes or controversies that arise under or relate to the contract. Defendant's alleged debt-collecting activities are inseparable from the credit relationship established by the terms of the installment contract. [1] Because plaintiffs' claims are arguably within the arbitration agreement, and because the dispute is not expressly exempt from arbitration by the terms of the contract, the trial court properly determined that the claims fall within the scope of the arbitration agreement. *Rooyakker & Sitz, supra* at 163, 742 N.W.2d 409; *Fromm, supra* at 305-306, 690 N.W.2d 528.

III

Plaintiffs assert that even if plaintiffs' claims are within the scope of the arbitration agreement, the agreement is

nevertheless unenforceable because it is procedurally and substantively unconscionable. Plaintiffs' arguments regarding the enforceability of the arbitration agreement were raised in response to defendant's motion for summary disposition.[2] The trial court failed, however, to address plaintiffs' arguments regarding the enforceability of the arbitration agreement.[3] Because the enforceability of an agreement to arbitrate will turn on whether the contract preserves substantive rights and remedies and is procedurally fair, see, e.g., *Rembert, supra* at 156, 596 N.W.2d 208; and because the trial court completely failed to determine whether the arbitration agreement in this case is procedurally and substantively unconscionable, we remand this matter to the trial court for such a determination.

IV

***3** Plaintiffs argue that the trial court erred in dismissing Jennifer's claims on the ground that she lacked standing to pursue claims arising out of the agreement between Michael Barth and defendant. A review of the record reveals that the trial court dismissed Jennifer's claims under the collections practices act and the MCPA on the ground that she lacked standing to pursue these claims. The trial court did not address Jennifer's tort claims, nor did the trial court determine whether any of Jennifer's claims failed to state a cause of action.

With regard to Jennifer's claim under the collections practice act, the act does not require that a claimant qualify as a "consumer" or "debtor," defined in MCL 445.251(d) as "a natural person obligated or allegedly obligated to pay a debt." Rather, MCL 445.257(1) provides that "[a] *person* who suffers injury, loss, or damage, or from whom money was collected by the use of a method, act, or practice in violation of this act may bring an action for damages or other equitable relief" (emphasis supplied). The trial court erred by finding that Jennifer lacked standing to pursue her claims under the collections practices act solely on the ground that she was not a party to the retail installment contract. With regard to Jennifer's claim under the MCPA, MCL 445.911 permits an action by any "person" to enforce the provisions of the MCPA. Accordingly, notwithstanding that Jennifer Barth was not a party to the retail installment contract, she nevertheless had standing to bring a claim alleging that defendant's conduct violated the MCPA.[4]

We therefore reverse the trial court's finding that Jennifer lacked standing to pursue her claims under the collection practices act and the MCPA. Although the trial court also dismissed Jennifer's tort claims, the trial court did not specifically find that Jennifer lacked standing to pursue the claims and, in fact, failed to provide any reasoning whatsoever with regard to these claims. We are therefore unable to determine whether the trial court properly concluded that Jennifer lacked standing to pursue her tort claims. We therefore reverse the trial court's finding that Jennifer lacked standing to pursue her tort claims without prejudice to defendant once again raising this issue before the trial court.

Affirmed in part, reversed in part, and remanded. Jurisdiction is not retained.

All Citations

Not Reported in N.W.2d, 2008 WL 5003026

Footnotes

1 Plaintiffs' reliance on two federal cases, *Seifert v. U.S. Home Corp.*, 750 So.2d 633 (Fla App, 1999), and *Denali Flavors, Inc. v. Marigold Foods, LLC*, 214 F Supp 2d 784 (W.D.Mich.2002), is misguided. While *Seifert* involved allegations of an unforeseeable death resulting from the defendant's negligence in the design and manufacture of a new home-a claim which, arguably, had little connection to the parties' commercial agreement-plaintiffs' allegations concerning defendant's debt-collection activities in this case are intricately related to the retail contract at issue, and collection activities were anticipatable under the very terms of the contract. *Denali Flavors* is likewise distinguishable. Contrary to the expansive language of the arbitration

clause at issue in this case, the subject clause in *Denali* provided, narrowly, that “a dispute concerning this agreement, or either parties' [sic] responsibilities under the agreement ... shall be submitted to arbitration.”

2 Plaintiffs presented a number of arguments in support of the assertion that the arbitration agreement is procedurally and substantively unconscionable. Plaintiffs argued that the arbitration agreement was cost-prohibitive and therefore did not provide for effective vindication of plaintiff's statutory rights. They maintained that filing a lawsuit and jury request in the State of Michigan would cost $235, while instituting arbitration under the Commercial Arbitration Rules of the American Arbitration Association would cost of a minimum of $4,000. They also maintained that the arbitration clause did not allow joinder of Jennifer Barth and therefore plaintiffs would incur the additional cost of filing a separate legal action for her claims. They further maintained that the arbitration clause permitted the arbitrator to include an award of costs and legal fees, thus vitiating the fee-shifting provisions of the collection practices act and MCPA. Additionally, they argued that the arbitration clause was buried in fine print on the back of the contract and did not provide clear notice, and that the clause did not afford a fair arbitral hearing because it allocated some arbitration costs to the consumer, thus deterring claims and circumventing the fee-shifting provisions of the collection practices act and MCPA.

3 The trial court simply found that the claims fell within the arbitration agreement and that Michael Barth signed the agreement and was therefore bound by its terms.

4 The trial court did not rule that Jennifer's claims were insufficiently pled.

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EXHIBIT 4

2021 WL 2659632
Only the Westlaw citation is currently available.
United States District Court, W.D. Michigan, Southern Division.

FOMCO, LLC, Plaintiff,
v.
HEARTHSIDE GROVE ASSOCIATION, et al., Defendants.

Case No. 1:20-cv-1069
|
Signed 06/29/2021

Attorneys and Law Firms

Melissa Ann Rogers McCurdy, Jeffrey Scott Standley, Standley Law Group LLP, Dublin, OH, for Plaintiff.

Kayleigh Long, Kevin Michael Hirzel, Hirzel Law, PLC, Farmington, MI, for Defendants.

OPINION

HALA Y. JARBOU, UNITED STATES DISTRICT JUDGE

***1** FOMCO, LLC, which does business as Hearthside Grove, brought this action against Defendants Hearthside Grove Association (the "Association") and Holiday Vacation Rentals, LLC ("HVR"), asserting various claims under federal and state law. FOMCO provides real estate services, including real estate development and the leasing and management of residential condominiums located within campground developments. (*See* Compl. ¶ 14, ECF No. 1.) One of its developments is named Hearthside Grove, located in Petoskey, Michigan. FOMCO apparently formed a homeowners' association, called Hearthside Grove Association, to manage the common areas of that development. FOMCO is no longer associated with the Hearthside Grove development. Its complaint takes issue with the continued use of the Hearthside Grove name and logo by the Association and by HVR, which advertises, sells, and rents lots at Hearthside Grove. Before the Court is Defendants' motion to dismiss Count VI of the complaint, which asserts a claim under Michigan's Consumer Protection Act (MCPA), Mich. Comp. Laws § 445.901 *et seq.* For the reasons herein, the Court will grant the motion in part, dismissing the claim against HVR.

I. STANDARDS

Defendants rely on Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for dismissal of the complaint. Rule 12(b)(1) permits dismissal for lack of subject matter jurisdiction. Rule 12(b)(6) permits dismissal of failure to state a claim.

A complaint may be dismissed for failure to state a claim if it fails " 'to give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint need not contain detailed factual allegations, a plaintiff's allegations must include more than labels and conclusions. *Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). The court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

Assessment of the complaint under Rule 12(b)(6) must ordinarily be undertaken without resort to matters outside the pleadings; otherwise, the motion must be treated as one for summary judgment under Rule 56. *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1104 (6th Cir. 2010). "However, a court may consider exhibits attached to the complaint, public records, items appearing in the record of the case, and exhibits attached to defendant's motion to dismiss, so long as they are referred to in the complaint and are central to the claims contained therein, without converting the motion to one for summary judgment." *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016).

II. ANALYSIS

A. Subject Matter Jurisdiction

***2** Defendants' argument regarding subject matter jurisdiction is not entirely clear. Defendants apparently contend that, because Count VI fails to state a claim, the Court cannot exercise jurisdiction over it. That argument puts the cart before the horse. The Court must first determine whether it has jurisdiction. If the Court lacks subject matter jurisdiction, then it would be improper for the Court to dismiss Count VI for failure to state a claim.

Here, it is clear that the Court possesses subject matter jurisdiction over Count VI. The Court has original subject matter jurisdiction over the federal claims in the complaint because they arise under federal law. *See* 28 U.S.C. § 1331. The Court has supplemental jurisdiction over the other claims, including Count VI, because they are part of the "same case or controversy" as the federal claims. *See* 28 U.S.C. § 1367(a). It is true that the Court can decline to exercise supplemental jurisdiction, but the Court sees no reason to do so at this stage. Thus, the Court will not dismiss Count VI for lack of subject matter jurisdiction.

B. Failure to State a Claim

Defendants raise three arguments in favor of dismissal for failure to state a claim:

(1) Defendants are exempt from the MCPA under Mich. Comp. Laws § 445.904; (2) the MCPA does not apply to a claim where there is no transaction between the plaintiff and defendant and the plaintiff is a business entity; and (3) the MCPA does not apply to the Association because it does not operate a business.

1. Exemption

The MCPA prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." Mich. Comp. Laws § 445.901. By its terms, the MCPA does not apply to a "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Mich. Comp. Laws § 445.904(1)(a). When determining whether this exemption applies, "the relevant inquiry 'is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.' " *Liss v. Lewiston-Richards, Inc.*, 732 N.W.2d 514, 518 (Mich. 2007). A general transaction that is not specifically authorized is one that is " 'explicitly sanctioned.' " *Id.* at 520.

The parties disagree about what constitutes the relevant "transaction specifically authorized by law." In its complaint, FOMCO's MCPA claim focuses on Defendants' "for-profit real estate services," which FOMCO contends constitute "trade or commerce" under the MCPA. (Compl. ¶ 128.) Here, FOMCO is ostensibly referring to Defendants' "for profit services of the rental and sale of real estate." (*Id.* ¶ 40.) FOMCO alleges that Defendants' use of the Hearthside Grove name has caused consumers to mistakenly do business with Defendants, believing that they were transacting with FOMCO. (*Id.* ¶ 130.) This conduct has "resulted in increased sales of Defendants' real estate services while hindering the sale of Plaintiff's real estate and real estate development services." (*Id.* ¶ 77.) Thus, according to the complaint, the transactions at issue for purposes of the MCPA claim are the rental and sale of real estate.

Real estate brokers and salespersons are regulated by Michigan's Occupational Code, Mich. Comp. Laws § 339.2501 *et seq.*; thus, their real estate transactions are exempt from the MCPA. *See Love v. Ciccarelli*, No. 243970, 2004 WL 981164, at *4 (Mich. Ct. App. May 6, 2004); *Timmons v. DeVoll*, Nos. 241507, 249015, 2004 WL 345495, at *6 (Mich. Ct. App. Feb. 24, 2004). The complaint alleges that the Association "partnered" with HVR, and that the lots for sale or rent are listed on websites owned and operated by HVR. (Compl. ¶¶ 41, 59, 60, 63.) The Court takes judicial notice of public records indicating that HVR is a licensed real estate broker. (*See* ECF No. 15-3.) Thus, HVR's real estate transactions are exempt from the MCPA, whether or not HVR improperly used the Hearthside Grove name in connection with those transactions.

***3** Nevertheless, FOMCO argues that it states a claim against *the Association* because the Association is not a licensed real estate broker. The Association allegedly used the words "HEARTHSIDE GROVE ASSOCIATION ... in conjunction with for profit services of the rental and sale of real estate," starting in December 2019. (Compl. ¶ 40.) And in August 2020, it allegedly launched a website at www.hearthsidegroveassociation.com "for the rental and sale of real estate." (*Id.* ¶ 57.) FOMCO contends that the relevant "transaction or conduct" is the Association's "commercial use of business names, trademarks, and domain names which are

confusingly similar to [FOMCO's] [m]arks." (Pl.'s Resp. Br. 12, ECF No. 27.) In other words, the Association advertised the rental or sale of lots at Hearthside Grove. This conduct, FOMCO argues, is not exempt from the MCPA because the Association is not a licensed real estate broker. As such, its conduct would not be specifically authorized by Michigan's Occupational Code. The Association does not point to any other regulation that "specifically authorizes" its conduct. Consequently, the Association has not shown that, based on the facts the Court can consider at this stage, it is entitled to the exemption in the MCPA.

2. Conducting Business

The Association also argues that the MCPA does not apply to it because it does not engage in any business at all. The MCPA applies only to "the conduct of a business providing goods, property, or service[s].... and includes the advertising, solicitation, offering for sale or rent, sale, lease or distribution of a service or property[.]" Mich. Comp. Laws § 445.902(g) (defining "trade or commerce"). Although the Association used the Hearthside Grove name on its website, FOMCO alleges that HVR owned and operated the websites with the real estate listings. Apart from maintaining a website with links to HVR's websites, FOMCO does not allege that the Association itself managed or was involved in the listing, rental, or sale of real estate at Hearthside Grove. Moreover, the Association does not own the lots at Hearthside Grove (Compl. ¶ 48), so there is no reason to believe that it engaged in any transactions for their rental or sale. Simply using a name on a website that directs the user to a real estate broker's website is not conducting a business providing real estate or real estate services.

On the other hand, as FOMCO indicates, the Association's website contains a page titled "Hearthside Grove Association Lot Sales," which states, "Our experienced staff is ready to make your dreams a reality." (ECF No. 1-6, PageID.57.) This page suggests that the Association did more than create a website passively directing users to HVR. The page suggests that the Association's staff was directly involved in marketing the lots for sale in Hearthside Grove. Thus, it is plausible to infer that the Association was involved in the business of "advertising, solicitation, offering for sale" of real estate, on behalf of the lot owners, which is conduct covered by the MCPA.

Defendants point to the Association's by-laws and articles of incorporation to argue that it is a non-profit association, incapable of operating a business engaged in "trade or commerce." However, FOMCO correctly notes that the Association's status at its creation does not rule out the possibility that it has operated as a business since that time, subjecting it to the MCPA. Thus, as to the Association, Defendants' first and third arguments in favor of dismissal of the MCPA claim are not persuasive.

3. Business Requirement

Defendants also argue that a claim under the MCPA requires a commercial transaction between the plaintiff and defendant; it does not apply to an action between business competitors who have not entered such a transaction. Defendants' argument finds little support in the text of the MCPA or the case law.

The MCPA permits a "person who suffers a loss as a result of a violation of this act" to bring an action to recover damages. Mich. Comp. Laws § 445.911(2). The MCPA defines "person" as "an individual, corporation, limited liability company, trust, partnership, incorporated or unincorporated association, or other legal entity." Mich. Comp. Laws § 445.902(1)(d). Thus, the text of the MCPA does not preclude a business from bringing claims. Nor does it require a transaction between the plaintiff and the defendant. It simply requires "a loss as a result of a violation." It is not difficult to see how a defendant's use of "deceptive methods" in dealing with consumers, particularly where that deception involves the improper use of the plaintiff's name, could result in a loss to a plaintiff.

***4** Many courts have allowed MCPA claims by a business alleging that conduct by a business competitor has caused confusion in the marketplace through the use of confusingly similar trademarks and domain names. Indeed, courts in the Sixth Circuit have repeatedly stated that, when the MCPA claim is based on a competitor's use of a confusingly similar name, the test for liability under the MCPA *is the same* as the test for liability under claims of unfair competition and trademark infringement. *See, e.g.*, *Coach Servs., Inc. v. Source II, Inc.*, 728 F. App'x 416, 417 (6th Cir. 2018); *Kibler v. Hall*, 843 F.3d 1068, 1082-83 (6th Cir. 2016); *Homeowners Grp., Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1105 (6th Cir. 1991); *Choice Hotels Int'l, Inc. v. Apex Hosp., LLC*, No. 1:11-cv-00896, 2012 WL 2715716, at *2 (W.D. Mich. June 13, 2012). And the Michigan Court of Appeals has said the

same thing. *See, e.g.*, *APCO Oil Co. v. Knight Enters., Inc.*, No. 262536, 2005 WL 2679776, at *3 (Mich. Ct. App. Oct. 20, 2005) ("Similar to the Michigan Consumer Protection Act, the Lanham Act prohibits the use of words or symbols in such a way as to likely cause confusion or mistake as to some attribute of a good."). Those statements would make no sense if a business competitor could not bring a claim under the MCPA.

Granted, some courts have concluded that a business entity cannot bring a claim because the "trade or commerce" regulated by the MCPA involves "the conduct of a business providing goods, property, or service *primarily for personal, family, or household purposes*[.]" Mich. Comp. Laws § 445.902(1)(g) (emphasis added). When a business purchases a product, the MCPA generally does not apply to that transaction because the corporation's purchase is "primarily for business or commercial rather than personal purposes[.]" *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 393 (Mich. Ct. App. 1999); *accord Slobin v. Henry Ford Health Care*, 666 N.W.2d 632, 634-35 (Mich. 2003). However, the commercial transactions at issue in this case are for the purchase and rental of real estate by "consumers," ostensibly for personal purposes. (*See* Compl. ¶ 50.) Thus, the personal-purpose requirement is satisfied.

Defendants rely on cases concluding that a business could not bring a MCPA claim because the business transaction at issue was not for "personal, family, or household purposes." *See, e.g.*, *Cosmetic Dermatology & Vein Ctrs. of Downriver P.C. v. New Faces Skin Care Ctrs., Ltd.*, 91 F. Supp. 2d 1045, 1060 (E.D. Mich. 2000) ("No purchase or transaction was involved ... within the meaning of the act," i.e., for personal, family, or household purposes.); *Beaver v. Figgie Int'l Corp.*, No. 87-1362, 1988 WL 64710, at *4 (6th Cir. June 24, 1988) (Plaintiff "did not lease the scaffolding planks to the Board for 'personal, family, or household purposes.' "); *Robertson v. State Farm Fire & Cas. Co.*, 890 F. Supp. 671, 673 (E.D. Mich. 1995) ("Since the coverage sought was not 'primarily for personal, family or household purposes,' the MCPA does not apply."); *Burba v. Mills*, No. 201787, 1998 WL 1990366, at *1 (Mich. Ct. App. Sept. 4, 1998) ("[T]he MCPA does not apply in this case because defendants did not enter into this transaction for personal or household purposes[.]"). For the reasons discussed in the previous paragraph, those cases are distinguishable.

The Court is not persuaded by the reasoning in *Watkins & Son Pet Supplies v. Iams Co.*, 107 F. Supp. 2d 883 (S.D. Ohio 1999), which concluded that the MCPA "does not create a private right of action for a business entity." *Id.* at 893. That court provided little support for its assertion that the "majority of cases" have decided that a business competitor could not bring a MCPA claim. *Id.* at 892. Strangely, that court relied on several federal court decisions in support of its decision, including *Beaver* and *Robertson*, instead of a Michigan Court of Appeals case which held that a business entity could bring a justiciable claim against another company. *See id.* at 892 (citing *Michaels v. Amway Corp.*, 522 N.W.2d 703, 707 (Mich. Ct. App. 1994)). This Court puts more weight on a decision by a state court interpreting its own law than on non-binding decisions by a federal court. Moreover, reliance on the decisions in *Beaver* and *Robertson* was misplaced. As discussed above, those decisions turned on the nature of the transaction at issue rather than the identity of the plaintiff.

III. CONCLUSION

***5** In short, the Court has jurisdiction over FOMCO's claim. The Court will dismiss the claim against HVR in Count VI because its actions are exempt from the MCPA. However, the Court is not persuaded that FOMCO fails to state a MCPA claim against the Association. Thus, the Court will grant the motion to dismiss Count VI as to HVR only.

An order will enter in accordance with this Opinion.

All Citations

Not Reported in Fed. Supp., 2021 WL 2659632

EXHIBIT 5

2005 WL 3179624
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

L.E. DIEHL, Plaintiff-Appellant,
v.
R.L. COOLSAET CONSTRUCTION COMPANY and Liberty Mutual Group, Defendants-Appellees.

No. 253596.
|
Nov. 29, 2005.

Before: WHITBECK, C.J., and SAAD and O'CONNELL, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiff appeals by right an order granting summary disposition in favor of defendants. We affirm.

In July 1998, Ameritech hired Coolsaet Construction Company ("Coolsaet") to install plastic conduit in certain utility easements in the city of Westland. During the course of the installation, Coolsaet dug a ditch across the width of plaintiff's property and, as a result, damaged or removed some tree roots, causing trees on plaintiff's property to die. Both Coolsaet and Liberty Mutual, Coolsaet's insurer, refused to replace the trees or reimburse plaintiff for the cost of the trees. Plaintiff brought an action in contract and under the Michigan Consumer Protection Act (MCPA) against defendants seeking damages for the loss of the trees and for medical expenses incurred as a result of anxiety, frustration, and stress. In response, defendants filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10). Defendants argued that plaintiff's claims were barred by the statute of limitations, plaintiff was not a third-party beneficiary of the contract between Coolsaet and Ameritech or of the contract between Coolsaet and Liberty Mutual, and that the MCPA did not apply. After a hearing on defendants' motion, the trial court granted summary disposition in favor of defendants.

On appeal, plaintiff argues that summary disposition was inappropriate because he was an intended third-party beneficiary of both the contract between Ameritech and Coolsaet and the insurance agreement between Liberty Mutual and Coolsaet. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v. Rozwood,* 461 Mich. 109, 118; 597 NW2d 817 (1999). By statute, a third party may only enforce a contract if "the promisor ... has undertaken to give or to do or refrain from doing something directly to or for [the third party]." MCL 600.1405(1). Therefore, only intended, not incidental, third-party beneficiaries may enforce a contract. *Koenig v. City of South Haven,* 460 Mich. 667, 680; 597 NW2d 99 (1999).

Plaintiff failed to offer any proof that he was an intended third-party beneficiary of the contract between Ameritech and Coolsaet. Plaintiff alleged in his complaint that Coolsaet had a contractual obligation to install the conduit without damaging plaintiff's property. However, plaintiff failed to produce a copy of the contract or any other documentary evidence regarding the relevant terms or provisions of the contract between the parties. In the absence of such evidence, plaintiff has failed to substantiate his claim that he was an intended beneficiary. Because plaintiff failed to present documentary evidence establishing a genuine issue of material fact, defendants' motion for summary disposition was properly granted on this issue.

Similarly, plaintiff failed to produce any evidence that he was an intended third-party beneficiary of the insurance agreement between Liberty Mutual and Coolsaet. When an insurance agreement fails to specifically denominate an individual, or a particularly defined class to which the individual belongs, as an intended third-party beneficiary, the individual does not have a right to sue for contract benefits. *Schmalfeldt v. North Pointe Insurance Co,* 469 Mich. 422, 429; 670 NW2d 651 (2003). The insurance coverage at issue was clearly provided for the sole purpose of protecting Coolsaet, and the contract's terms simply do not suggest that the parties intended to enter into the contract to benefit plaintiff directly. Therefore, the trial court correctly granted defendants summary disposition on plaintiff's claim that he is a third-party beneficiary to these contracts.

***2** Plaintiff argues that he has a cause of action under the MCPA. We disagree. Under the MCPA, it is unlawful to use unfair or unconscionable practices in the conduct of trade or commerce. MCL 445.903(1). The MCPA defines "trade or commerce" as "the conduct of a business providing

goods, property, or service primarily for personal, family, or household purposes....” MCL 445.902(d). The intent of the act is “to protect consumers in their purchases of goods which are primarily used for personal, family or household purposes.” *Noggles v. Battle Creek Wrecking, Inc,* 153 Mich.App 363, 367; 395 NW2d 322 (1986). If an item is purchased primarily for commercial purposes, then the MCPA does not apply. *Zine v. Chrysler Corp,* 236 Mich.App 261, 273; 600 NW2d 384 (1999).

Here, Ameritech hired Coolsaet to install plastic conduit along certain utility easements in the city of Westland. The installation of the plastic conduit was for commercial purposes, so the MCPA does not apply. Moreover, contrary to plaintiff's assertions, he was not a “party to the transaction” under MCL 445.903(1)(n) and (1)(y), so these sections do not apply to him. Because plaintiff failed to establish that he was a third-party beneficiary of either contract and because the MCPA does not apply, the trial court did not err when it granted defendants' motion for summary disposition.

Affirmed.

All Citations

Not Reported in N.W.2d, 2005 WL 3179624

EXHIBIT 6

2013 WL 12085097
Only the Westlaw citation is currently available.
United States District Court, W.D. Michigan, Southern Division.

Jonathan BUHLAND, Plaintiff,
v.
FEDERAL CARTRIDGE COMPANY, INC., Palmetto State Armory, LLC, Blackthorne Products, LLC, and Remington Arms Company, LLC, formerly known as DPMS Firearms, LLC, Defendants.

No. 1:12-cv-244
|
Signed 05/09/2013

Attorneys and Law Firms

Brace Edward Kern, Mark R. Dancer, Dingeman Dancer & Christopherson PLC, Traverse City, MI, for Plaintiff.

Anthony Joseph Sukkar, Dennis M. Goebel, Harvey Kruse PC, Troy, MI, for Defendants.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS

Paul L. Maloney, Chief United States District Judge

***1** In this personal-injury and product-liability suit, three of four defendants have moved to dismiss the charges against them, claiming that the plaintiff has failed to state a claim upon which relief can be granted. For the reasons discussed below, this court will grant the motions in part and dismiss them in part.

I. BACKGROUND

On June 6, 2011, Plaintiff Jonathan Buhland went shooting with Thomas Becker in a field in Kalkaska County, Michigan. Mr. Becker let Mr. Buhland shoot his gun—a firearm containing components manufactured by Defendants Remington Arms and Blackthorne and loaded with ammunition manufactured by Defendant Federal Cartridge and sold by Defendant Palmetto. As a bullet was being chambered, the gun exploded in Mr. Buhland's face, causing him serious injuries.

Mr. Buhland has now filed suit, asserting claims of negligence, strict liability, breach of implied warranty, breach of express warranty, violation of the Michigan Consumer Protection Act, and a generic claim for exemplary or punitive damages against each of these defendants. (*Id.*) Federal Cartridge and Palmetto have moved to dismiss each of Mr. Buhland's claims against them (ECF Nos. 22, 28), and Remington Arms has moved to dismiss all but the negligence claim (ECF No. 23).

II. LEGAL FRAMEWORK

To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must provide sufficient factual allegations that, if accepted as true, are sufficient "to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true ...." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation omitted). The court considering a motion to dismiss must accept as true all factual allegations, but need not accept any legal conclusions. *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011). Only enough facts are required "to state a claim to relief that is plausible on its face." *Id.* at 570; *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim is plausible on its face if the 'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' " *Ctr. for Bio-Ethical Reform*, 648 F.3d at 369 (quoting *Twombly*, 550 U.S. at 556). The plausibility standard is not the same thing as "a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (internal quotations and citations omitted).

III. DISCUSSION

A. Federal Cartridge Company, Inc.

1. Negligence

Under Michigan law, a claim of negligence requires that the plaintiff prove four elements: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v. Consumers Power Co.*, 615 N.W.2d 17, 20 (Mich. 2000). Federal Cartridge argues that Mr. Buhland has not adequately pleaded the second

element, breach. This is not to say that Mr. Buhland ignores this element, however. In relevant part, the complaint states:

> ***2** Defendant CARTRIDGE negligently designed, tested, developed, manufactured, assembled, inspected, investigated, repaired, packaged, labeled, marketed, promoted, advertised, sold and distributed the Ammunition.
>
> Defendant CARTRIDGE negligently failed to warn, or instruct, or adequately warn, or adequately instruct of the dangerous and defective properties of the Ammunition.
>
> Defendant CARTRIDGE negligently failed to conduct an adequate investigation, recall or retrofit program with respect to the Ammunition.
>
> Defendant CARTRIDGE negligently investigated, advised, instructed, guided and entrusted repair of the Ammunition's defects.

(ECF No. 6, ¶¶ 32–35.) These allegations are insufficient, Federal Cartridge argues. Supreme Court precedent holds that only factual allegations should be assumed true; legal conclusions such as these are not entitled to such treatment.

Mr. Buhland responds that overbreadth alone does not doom his claims. He claims that the mere fact that Federal Cartridge's ammunition exploded in his face while being chambered is enough to state a plausible claim for negligence, and he suggests that this claim will be narrowed through discovery.

Federal Cartridge has the better of this argument. The allegations quoted above simply assert that Federal Cartridge acted negligently in myriad ways. But "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Mr. Buhland alleges no facts that would support these claims. Nowhere in his complaint does he suggest how Federal Cartridge's actions in designing the ammunition, testing it, developing, manufacturing, and assembling it, and so on, could have been negligent. Nor does the explosion itself raise a suggestion that Federal Cartridge was negligent. Mr. Buhland takes great care to distinguish this argument from a claim of *res ipsa loquitur*—which is for the best, as that doctrine is clearly not available here, where (among other things) the exploding gun was not within Federal Cartridge's exclusive control and where Mr. Buhland's actions contributed in some way to the explosion. *See Jones v. Porretta*, 405 N.W.2d 863, 872 (Mich. 1987). But the same reasons this doctrine does not apply here cripple Mr. Buhland's analogous argument as well. As the four defendants in this case clearly demonstrate, one cannot reasonably infer that *Federal Cartridge's* negligence caused the explosion here. Even though ammunition does not normally explode in the shooter's face, any number of parties—including Mr. Becker and Mr. Buhland himself—could have acted negligently here. Without any allegations supporting the claim that Federal Cartridge was negligent in some way, Mr. Buhland's complaint fails the requirements of *Twombly* and *Iqbal*. The court will therefore dismiss this claim.

2. Strict Liability

Next, Defendants argue that Michigan does not recognize a separate "strict liability" cause of action in product-liability cases, but rather only negligence and implied-warranty claims. *See Johnson v. Chrysler Corp.*, 254 N.W.2d 569, 571 (Mich. Ct. App. 1977) (" Strict liability has not been recognized as a third theory of recovery."). As the Michigan courts have held, "If anything, the proofs that would be presented under a strict liability theory in a product case would overlap with the proofs that would be presented under an implied warranty theory. The addition of the [strict-liability] count adds only confusion, not substance." *Id.*

***3** Mr. Buhland admits that Michigan courts have rejected strict-liability claims in product-liability cases as redundant of implied-warranty claims. Yet he argues that this claim should be seen as an argument for extension of Michigan law. The products involved here are particularly hazardous and designed to explode even when used properly, he argues. This makes it difficult to prove which of these defendants was in fact responsible for his injury, and so strict liability should attach "[i]f Buhland presents *prima facie* evidence that any of the Defendants (including Federal) was manufacturing or selling products in an unreasonably dangerous condition."

This argument is unconvincing. First, the court notes that this reasonableness requirement is a hallmark of a negligence claim, not strict liability. Second, this proposed claim would work an enormous change in the law, holding manufacturers and vendors strictly liable for a wide range of incidents that result in damage to or the destruction of their product. Guns and ammunition are little different from cars, trains, and many other products that by their very nature are often damaged or destroyed when they fail. Yet the Michigan courts have declined to hold auto manufacturers strictly liable for

all car accidents, instead requiring a plaintiff to establish "a defect attributable to the manufacturer and a causal relationship between that defect and the injury complained of." *Heckel v. Am. Coupling Corp.*, 179 N.W.2d 381, 383 (Mich. 1970) (enumerating elements of claim for breach of implied warranty). Michigan's law is well settled on this point. *See, e.g.*, *Holloway v. Gen. Motors Corp. Chevrolet Div.*, 271 N.W.2d 777, 781 (Mich. 1978) (holding, in car-accident liability suit, that plaintiff must establish "that the accident was probably caused by a defect attributable to the manufacturer"). A federal court sitting in diversity is neither empowered nor well placed to change state law. *See Wieczorek v. Volkswagenwerk, A.G.*, 731 F.2d 309, 310 (6th Cir. 1984) ("[T]he decisions of the Michigan intermediate courts ... are binding authority in federal courts in the absence of any Michigan Supreme Court precedent."). That task should be reserved for the Michigan legislature, and this court will not usurp their role here.

For these reasons, the court will dismiss Mr. Buhland's purported strict-liability claim against Federal Cartridge.

3. Breach of Implied Warranty

As noted above, a claim for breach of implied warranty requires that the plaintiff prove "a defect attributable to the manufacturer and a causal relationship between that defect and the injury complained of." *Heckel v. Am. Coupling Corp.*, 179 N.W.2d at 383. In his complaint, Mr. Buhland alleges that Federal Cartridge impliedly warranted its ammunition "despite the fact that it was not fit for its intended purpose and was not safe for foreseeable users." (ECF No. 6, ¶¶ 94–95.) Buhland argues that this claim is sufficient for the same reasons his negligence claim is sufficient, and the court rejects them accordingly. Buhland's complaint contains no allegations that would tend to make his conclusion plausible. He suggests that he has theories about the defect at issue here, stating that "the nature of the facts suggest *several* reasonably likely defects," but he provides no suggestion whatsoever of what those might be. The court will therefore dismiss this claim.

4. Breach of Express Warranty

Next, Federal Cartridge argues that Mr. Buhland's claim for breach of express warranty should be dismissed. Federal Cartridge admits that Buhland's complaint identifies a number of express warranties. Yet this is insufficient, it argues, because he never identifies which were breached and because none are relevant to his claim.

***4** This argument goes to the truth of Mr. Buhland's allegations, however. The complaint specifically identifies a number of express warranties allegedly made by Federal Cartridge, including that its ammunition was "reliable feeding," had "great ballistics," was "produced by Lake City Arsenal to Nato specifications," and was "new production." (ECF No. 6, ¶ 115.) The complaint goes on to allege that Federal Cartridge breached these warranties and that as a result, Mr. Buhland was harmed. (*Id.* ¶ 117.) These specific factual allegations distinguish this claim from the ones discussed earlier. Mr. Buhland does not simply allege that an unidentified warranty existed and that Federal Cartridge breached it; he claims that Federal Cartridge made specific representations, which turned out to be false and caused him harm. Further, while the link between the alleged warranties and Mr. Buhland's claimed harm is not particularly clear, Mr. Buhland sufficiently alleges its existence. Whether or not that allegation is supported by the evidence is another matter entirely, but that is an issue for summary judgment or trial, not a Rule-12 motion to dismiss.

For these reasons, the court will allow Mr. Buhland's claim for breach of express warranty to go forward.

5. Violation of the Michigan Consumer Protection Act

Mr. Buhland's claim under the Michigan Consumer Protection Act simply alleges that Federal Cartridge violated various portions of the Act "[b]y engaging in the actions set forth herein including, but not limited to, the breach of one or more implied and/or express warranties." (ECF No. 6, ¶ 134.) Federal Cartridge, incorporating its arguments regarding prior claims, asserts that this is insufficient. But at the very least, the specific warranties alleged in the previous claim set out a sufficient basis here. As Buhland points out, Mich. Comp. Laws § 445.903(c) provides that "[r]epresenting that goods or services have ... characteristics, ingredients, uses, benefits, or quantities that they do not have" violates the law, and subsection (d) provides the same for falsely representing that a product is new. Mr. Buhland has alleged that Federal Cartridge made such statements, that they were false, and that he was harmed thereby. He did not need to do more at this stage.

6. Exemplary or Punitive Damages

Finally, Federal Cartridge asks the court to dismiss Buhland's claim for "exemplary/punitive damages." Federal Cartridge argues that in Michigan, exemplary damages are allowed only for acts that are "malicious or so wilful and wanton as to demonstrate a reckless disregard of the plaintiff's rights." *Jackson Printing Co., Inc. v. Mitan*, 425 N.W.2d 791, 794 (Mich. Ct. App. 1988). The complaint contains no facts supporting any such allegation, it claims.

As Buhland points out in response, however, the complaint contains several factual allegations on this issue. In particular, Buhland alleges that Federal Cartridge "willfully and wantonly": "failed to fully investigate the causes of prior similar occurrences involving other ammunition that had exploded or burst during normal use"; failed to warn of known defects; and failed to investigate and recall the ammunition after learning of prior explosions. (ECF No. 6, ¶¶ 146–49.) These go far beyond simply claiming that Federal Cartridge acted willfully and wantonly; they allege specific facts as a basis for this conclusion. This is enough to satisfy Rule 8.

B. Remington Arms Company, LLC

1. Negligence

Defendant Remington does not challenge Mr. Buhland's negligence count.

2. Strict Liability

Like Federal Cartridge, Defendant Remington argues that Michigan law does not recognize a strict-liability cause of action in product-liability cases. As discussed above, the court agrees and declines to allow Mr. Buhland's claim as a good-faith argument for modification of the law. This claim will therefore be dismissed.

3. Breach of Implied Warranty

The parties' arguments regarding this count likewise repeat those made above, and for the same reasons, the court will dismiss this claim. Mr. Buhland alleges that Remington impliedly warranted its "AR 15 Lower" "despite the fact that it was not fit for its intended purpose and was not safe for foreseeable users" (ECF No. 6, ¶¶ 109–10), and he alleges that the piece exploded. But he makes no allegations that would tend to show that a defect in the AR 15 Lower caused the explosion. Without this, his conclusion does not follow. This claim therefore fails.

4. Breach of Express Warranty

***5** Here, Defendant Remington's arguments diverge from those made earlier by Defendant Federal Cartridge. Remington acknowledges that Buhland's complaint lists several alleged warranties made about the AR 15 Lower. Remington argues, however, that these statements are insufficient to create express warranties, because (1) they are not express statements, affirmations, or promises; (2) Mr. Buhland does not allege that the statements were provided to him with the AR 15 Lower; and (3) they are general expressions of opinion.

Each of these arguments fail. First, Mr. Buhland has alleged that Remington made these specific statements; this is enough for Rule 8. (*See* ECF No. 6, ¶¶ 129–30 ("Defendant [Remington] expressly warranted the AR 15 Lower"; "express warranties were made ... as to the following material facts."). Second, whether Remington actually provided these statements to Mr. Buhland or the purchaser is a question of fact. Mr. Buhland adequately pleaded that Remington made these statements and that he relied on them. Remington cites no case law requiring more; indeed, its one citation involved a motion for summary judgment, not a Rule-12 motion to dismiss. *See Lyall v. Leslie's Poolmart*, 984 F. Supp. 587, 597 (E.D. Mich. 1997). Similarly, Remington's third argument also relies on questions of fact. *See Dow Corning Corp. v. Weather Shield Mfg., Inc.*, 790 F. Supp. 2d 604, 611 (E.D. Mich. 2006) ("The trier of fact must determine whether the circumstances necessary to create an express warranty are present in a given case.") (quoting *Overstreet v. Norden Labs., Inc.*, 669 F.2d 1286, 1290 (6th Cir. 1982)). Mr. Buhland's express-warranty claim therefore survives.

5. Violation of the Michigan Consumer Protection Act

Here, Remington argues that Mr. Buhland has made no allegations that would support a violation of the Michigan Consumer Protection Act. As before, Buhland incorporates

his earlier allegations, including those from the express-warranty claim, as support for Remington's alleged breach. (ECF No. 6, ¶ 143.) And as before, he alleges that Remington violated various subsections of Mich. Comp. Laws § 445.903. For its part, Remington repeats its argument that these alleged warranties are insufficient. But the court has already rejected this argument, and Remington gives it no reason to find differently here. For the reasons discussed above, then, the court finds that Mr. Buhland's allegations set out a cause of action at least as to subsection 445.903(c). This claim will therefore survive.

6. Exemplary or Punitive Damages

Next, Remington argues for dismissal of Mr. Buhland's claim for exemplary or punitive damages. Michigan law does not permit punitive damages, Remington argues, and in any case, exemplary damages are not available in product-liability actions. Mr. Buhland admits that punitive damages are not available here. He argues, however, that exemplary damages are allowed whenever a plaintiff's tortious acts are "malicious or so wilful and wanton as to demonstrate a reckless disregard of the plaintiff's rights." *Jackson Printing Co., Inc. v. Mitan*, 425 N.W.2d 791, 794 (Mich. Ct. App. 1988).

Remington does not cite, and this court has not found, any case law holding that exemplary damages are entirely unavailable in product-liability actions. Instead, the Michigan courts' description of exemplary damages suggests that they should be broadly available:

> Exemplary (formerly punitive) damages are compensation for injury to feelings. They are awardable where the defendant commits a voluntary act which inspires feelings of humiliation, outrage, and indignity. The conduct must be malicious or so wilful and wanton as to demonstrate a reckless disregard of the plaintiff's rights. The purpose of exemplary damages is not to punish the defendant, but to render the plaintiff whole. When compensatory damages can make the injured party whole, exemplary damages must not be awarded.

***6** *Id.* (internal quotations omitted). Where a plaintiff can show that a defendant's malicious or willful and wanton acts caused harm to his feelings, and where that harm is not otherwise compensable, exemplary damages should be available. While it is true that product-liability actions do not usually involve such circumstances, Mr. Buhland has alleged that this one does. This court sees no reason to depart from the statement of law quoted above by carving out an exception for product-liability cases. It will therefore deny Remington's motion to dismiss on this point. *See Parr v. Cent. Soya Co., Inc.*, 732 F. Supp. 738, 741–42 (E.D. Mich. 1990) (allowing exemplary damages in product-liability suit); *Bondie v. BIC Corp.*, 739 F. Supp. 346, 354 (E.D. Mich. 1990) (allowing exemplary damages in product-liability suit where plaintiff adequately alleged willful and wanton misconduct).

7. Motion to Strike

Relatedly, Remington asks the court to strike subparts (f) and (I) of Mr. Buhland's demand for relief. Both subparts request exemplary damages. For the reasons discussed above, the court finds that these requests are not improper at this stage in the proceedings. It will therefore deny Remington's motion to strike.

C. Palmetto State Armory, LLC

1. Negligence

Like Federal Cartridge, Defendant Palmetto argues that Mr. Buhland alleges no facts in support of his negligence claim. Like Federal Cartridge, Palmetto is correct. The complaint's allegations on this point are largely similar to its allegations against Federal Cartridge, and they are insufficient for the same reasons. The court will dismiss this claim.

2. Strict Liability

The parties' arguments here duplicate those discussed above. For the reasons already discussed, Mr. Buhland's strict-liability claim also fails.

3. Breach of Implied Warranty

Palmetto argues that this claim is effectively no different than Buhland's negligence claim, because under Mich. Comp. Laws § 600.2947(6), a non-manufacturing seller such as Palmetto is only liable for breach of express warranty or failure to exercise reasonable care—that is, negligence. In response, Mr. Buhland admits that under Michigan law, Palmetto is only liable under this claim if it failed to exercise reasonable care. But, he argues, he has adequately pleaded this element.

Mr. Buhland is wrong. He claims that Palmetto acted negligently, it is true. But he has not alleged facts that would make this conclusion plausible. Instead, he has pleaded a laundry list of potential ways that Palmetto could have been negligent: it "negligently inspected, investigated, repaired, promoted, advertised, sold and distributed the Ammunition"; it "negligently failed to warn, or instruct, or adequately warn, or adequately instruct of the dangerous and defective properties of the Ammunition"; and it "negligently failed to conduct an adequate investigation, recall or retrofit program with respect to the Ammunition." (ECF No. 6, ¶¶ 40–42.) As the court has already discussed, such an abstract list does not establish with any plausibility that Palmetto might have acted negligently. Instead, it sets out a list of ways in which Mr. Buhland thinks a vendor *could* be negligent—essentially, a list of areas that Mr. Buhland would want to investigate in discovery. This does not satisfy Rule 8. The court will therefore dismiss this claim.

4. Breach of Express Warranty

Palmetto next argues that Mr. Buhland's express-warranty claim fails because it made no express warranties. Mr. Buhland's complaint recites a number of warranties that Palmetto allegedly made, however. (*See* ECF No. 6, ¶ 120.) As discussed above, these allegations are sufficient to defeat this Rule-12 motion. It is true that these alleged warranties are the exact same ones supposedly made by Federal Cartridge, but whether or not Palmetto actually made the warranties that Mr. Buhland claims it made is a factual dispute to be addressed at trial or on summary judgment.

***7** As further evidence that it did not make any warranties, Palmetto presents the Terms of Use of its web site, where Mr. Becker allegedly purchased the ammunition. But the court may not consider this document on a Rule-12 motion. Such motions must be based on the pleadings, with an exception only for matters of public record and documents attached to the pleadings or "referred to in the pleadings and ... integral to the claims." *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335–36 (6th Cir. 2007) (citing *Lynch v. Leis*, 382 F.3d 642, 648 n.5 (6th Cir. 2004); Fed. R. Civ. P. 10(c)). Palmetto's Terms of Use is neither, and so the court must exclude it under Rule 12(d).

Palmetto also argues that Mr. Buhland's complaint fails to allege that Palmetto's breach of any warranty was the proximate cause of his injury. He does allege this, however: "As a direct and proximate result of the breach of such express warranties ... Mr. BUHLAND sustained damages ...." (ECF No. 6, ¶ 122.) As the court has noted, while the link between these alleged warranties and Mr. Buhland's harm is not particularly clear, this is an issue of fact. Mr. Buhland's claims are definite enough to meet *Twombly*'s plausibility standard. That is sufficient here.

5. Violation of the Michigan Consumer Protection Act

For the same reasons that this claim survives as to Federal Cartridge and Remington, it survives as to Palmetto. Mr. Buhland alleges that Palmetto's breach of express warranty also violated various parts of Mich. Comp. Laws § 445.903, including subsection (c), which prohibits vendors and others from "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have." That allegation, along with the allegedly false statements identified in Mr. Buhland's express-warranty claim, is enough to satisfy Rule 8 here.

6. Exemplary or Punitive Damages

Palmetto's arguments against punitive and exemplary damages parallel those discussed—and rejected—previously. Mr. Buhland admits that punitive damages are not available, but again argues that he has adequately pleaded a basis for punitive damages. For the reasons discussed above, the court agrees. Palmetto's motion to dismiss on this issue is denied.

7. Mich. Comp. Laws § 600.2947(5)

Finally, Palmetto argues that all product-liability claims should be dismissed pursuant to Mich. Comp. Laws § 600.2947(5), which provides that a manufacturer or seller is not liable for harms "caused by an inherent characteristic of the product" that is generally recognized and that "cannot be eliminated without substantially compromising the product's usefulness." Palmetto asserts that this provision applies to it because it sells ammunition in factory-closed boxes and could not disassemble the bullets without substantially compromising their usefulness. These are factual assertions, inappropriate for a motion to dismiss. The court denies Palmetto's motion on this ground.

D. Leave to Amend

In his responses, Mr. Buhland informally requests an opportunity to amend his pleadings if the court finds his current ones deficient. Specifically, he asks for "leave to amend his complaint ... once discovery has been conducted, and Buhland has access to evidence currently unavailable to him." This appears to misunderstand the point of Rule 8's pleading requirement. Pleadings are not simply an empty formality intended to enable the broad discovery needed to identify one's real claims, and Mr. Buhland's assertion that he will be able to plead properly after discovery does not suggest to the court that he could have pleaded properly in the first place. Rule 11 requires that factual contentions in a party's pleadings "have evidentiary support or ... will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). Assuming that Mr. Buhland satisfied this requirement before filing his complaint, he already has a basis for believing his myriad allegations. This information should not be difficult to provide in an amended pleading, if it does indeed exist. But so far, Mr. Buhland has not filed a motion for leave to amend, and he has not provided the court with a proposal of any such amended complaint. Without this, the court cannot determine whether amendment would be futile. Under these circumstances, the court declines to grant Mr. Buhland leave to amend without a proper motion, accompanied by a proposed amended complaint. [1]

IV. CONCLUSION

***8** The court understands that in product-liability cases, a potential plaintiff may often have trouble figuring out just what happened without discovery. But this does not mean that the pleading rules do not apply in those cases. A plaintiff need not plead every detail of the defective product to survive a motion to dismiss, but he must allege facts that make the defendant's liability at least plausible. Mr. Buhland's complaint in this case meets this standard in some respects, but fails it in others. For the reasons discussed above, the court will dismiss Mr. Buhland's negligence claims against Federal Cartridge and Palmetto (counts I and II), and his strict-liability and implied-warranty claims against Federal Cartridge, Palmetto, and Remington (counts V, VI, VIII, IX, X, and XII). Buhland's other claims survive Defendants' motions to dismiss.

ORDER

For the reasons discussed above, **IT IS HEREBY ORDERED** that counts I, II, V, VI, VIII, IX, X, and XII of Plaintiff Buhland's amended complaint (ECF No. 6) are **DISMISSED**. The motions to dismiss filed by Defendants Federal Cartridge Company, Inc. (ECF No. 22), Remington Arms Company, LLC (ECF No. 23), and Palmetto State Armory, LLC (ECF No. 28) are **GRANTED** to that extent and otherwise **DENIED**.

IT IS SO ORDERED.

Date: May 9, 2013.

All Citations

Not Reported in Fed. Supp., 2013 WL 12085097

Footnotes

1 The court will not entertain a motion to the extent it attempts to revive a strict-liability claim, as any such amendment would be futile. *See* *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 569 (6th Cir. 2003) ("[L]eave to amend may be denied where the amendment would be futile.")

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EXHIBIT 7

2022 WL 259248
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Angelo E. IAFRATE, Individually, as Personal Representative of the Estate of Angelo Iafrate, Sr., and as Successor Co-Trustee of the John Iafrate Irrevocable Trust, Rebecca Iafrate, as Successor Co-Trustee of the John Iafrate Irrevocable Trust, and Dominic Iafrate, Plaintiffs-Appellants,
v.
ANGELO IAFRATE, INC., and Robert Adcock, Defendants-Appellees.

No. 355597
|
January 27, 2022

Wayne Circuit Court, LC No. 19-009098-CB

Before: Gleicher, C.J., and Borrello and Ronayne Krause, JJ.

Opinion

Per Curiam.

***1** Plaintiffs [1] appeal as of right the trial court's order granting summary disposition in favor of defendants. We affirm.

I. FACTUAL BACKGROUND

In 1969, Angelo E. Iafrate Sr. (Angelo Sr.) [2] incorporated Angelo Iafrate, Inc. (the Company), which was "an earth-moving, road building, construction company ..." The Company issued shares to Angelo Sr. and his children: Angelo Jr., Dominic, John, and Anna. Insofar as we can determine, Anna passed away, and was no longer a shareholder in the Company, before any of the events that gave rise to this case. Although not expressly stated in so many words, John's interests are apparently represented by the John Iafrate Irrevocable Trust, U/A/D January 1, 1988 (the Trust), of which Angelo Sr. was the trustee at relevant times. In 2000, Angelo Sr., Dominic, and John moved to Florida, and Angelo Jr. remained in Michigan and served as the Company's president and sole director. While Angelo Jr. was president, defendant Robert Adcock was the Company's Executive Vice President.

Slightly more than ten years later, Angelo Sr. and the living children assembled a plan to sell the Company to its employees through an Employee Stock Ownership Plan (ESOP). The plan entailed plaintiffs financing 100% of the purchase price through loans to the company, in exchange for which they each received two Promissory Notes (a senior and a junior note) and Common Stock Warrants. [3] Plaintiffs' plan and expectation was that their respective Promissory Notes would be receive equal relative priority, such that their respective junior notes would be paid off at the same time as each other, and their senior notes would be paid off at the same time as each other. The Warrants would then allow plaintiffs to benefit from the growth of the Company after their notes were paid in full.

The plan was effectuated in 2013, when a "new Company was formed" by filing articles of incorporation. Plaintiffs contributed all of their stock to the new entity, and received all 30,000 of its shares. Then the new company formed an ESOP that purchased the 30,000 shares from plaintiffs. The Company provided the Promissory Notes and Warrants for 7,500 shares divided between the plaintiffs. The Promissory Notes required quarterly installment payments. They further provided, in relevant part:

> ***2** 1.4 Discretionary Prepayments. Obligor [the Company] may prepay all or part of the principal of this Note at any time ... Any prepayment made under this Section shall be applied pro rata to the Sellers' [plaintiffs'] [junior or senior] Notes based on the remaining principal balance of each note.
>
> * * *
>
> 4 Waiver. No waiver by Payee [plaintiff] of any right or remedy under this Note shall be effective except in writing and signed by Payee. Neither the failure nor any delay in exercising any right, power or privilege under this Note will operate as a waiver of such right, power or privilege and no single or partial exercise of such right, power or privilege by Payee will preclude any other or further exercise of any other right, power or privilege or the exercise of any other right, power or privilege. To the maximum extent permitted by applicable law, (a) no claim or right of Payee arising out

> of this Note can be discharged by Payee, in whole or in part, by a waiver or renunciation of the claim or right unless in a writing, signed by Payee; (b) no waiver that may be given by Payee will be applicable except in the specific instance for which it is given; and (c) no notice to or demand on Obligor will be deemed to be a waiver of any obligation of Obligor or of the right of Payee to take further action.

The Warrants provided, in relevant part:

> 1. Exercise. This Warrant may be exercised at any time and from time to time by the Holder hereof, subject to the conditions set forth herein ... In the event that the Warrant is exercised in respect of less than all of the Shares specified herein, a new Warrant evidencing the remaining Shares will be issued by the Company.
>
> * * *
>
> 3. Warrant Term. This Warrant shall terminate on, and may no longer be exercised on or after, the date that is 60 days after the date that the Company has paid in full both the Senior Promissory Note and Junior Promissory [sic] issued by the Company in favor of the Holder.
>
> * * *
>
> 4[a]. Reservation of Shares. ... The Shares to be issued upon exercise of this Warrant represent 4.5%[4] of the fully diluted equity interests of the Company at the time this Warrant is executed, and the number of Shares shall be adjusted as determined appropriate by the Company's Board of Directors from time to time to reflect any change in the issued and outstanding equity interests of the Company ... such that the Shares will represent 4.5% of the fully diluted equity interests of the Company at all times until this Warrant is exercised (in part or in whole) or terminates.

Finally, plaintiffs executed an Intercreditor Agreement amongst themselves "to ensure that no Plaintiff received more favorable treatment than any other when it came to the timing or amount of payments." In relevant part, the Intercreditor Agreement provided:

> 4. Application of Payments and Collateral. In the event a Creditor receives any payment on the Creditor Indebtedness, or any payment or distribution from any of the Collateral,[5] in each case prior to the time all of the Creditor Indebtedness shall have been fully paid, that Creditor shall receive and hold the same in trust for the benefit of all Creditors and shall forthwith apply the same Pro Rata against the Creditor Indebtedness.

Although defendants were technically not parties to the Intercreditor Agreement, defendant executed the following Acknowledgement:

> ***3** The undersigned, being the Borrower referred to in the foregoing Intercreditor Agreement, hereby acknowledges receipt of a copy of the foregoing Intercreditor Agreement, waives notice of acceptance thereof by the Creditors, consents thereto, and agrees to the foregoing terms and provisions. By execution hereof, the Borrower agrees to be bound by the provisions of the foregoing intercreditor Agreement as they relate to the relative rights of the Creditors in the Collateral. The Borrower further agrees that the terms of the foregoing Intercreditor Agreement are solely for the benefit of the Creditors, and their respective successors and assigns, and that no other party, including the Borrower, shall claim any third-party beneficiary rights or any other rights thereunder.

After the close of the transaction, Adcock became president of the Company, and the board of directors was composed of Dominic, Angelo Jr., and Michael Stefani. Stefani is an attorney who also represented at least two of the Iafrates.[6] In January 2016, Angelo Jr. resigned from the board of directors.

In March 2016, Adcock informed the board of directors that he asked the Company's bonding company for permission to issue a prepayment of $4 million on the Promissory

Notes, but that the bonding company had denied the request. After that discussion, Angelo Jr. told Adcock that he would like his portion of any prepayment to be paid to Angelo Sr. In November 2016, Adcock obtained approval from the bonding company to make a prepayment on the amount owed under Angelo Sr.'s Promissory Notes, and, in December 2016, he authorized the Company to issue a payment for that amount to Angelo Sr. In February 2017, Adcock directed the Company to issue payments to Dominic and the Trust for the amounts owed under their Promissory Notes. Adcock contemporaneously asked Dominic to resign from the Company's board of directors, and apparently Stefani resigned as well.[7] In February 2018, Adcock authorized the Company to issue a payment to Angelo Jr. for the amount owed on his Promissory Notes.

Plaintiffs believed that the final February 2018 payment was the triggering event for all four of the Warrants, and all four of them attempted to exercise those warrants. Defendants contended that only Angelo Jr's Warrant was timely and would be honored. The other Warrants had all expired because the Promissory Notes held by Angelo Sr., Dominic, and the Trust had each been paid in full by the Company more than 60 days previously. In April 2018, plaintiffs commenced an action in federal district court, where, in due course, plaintiffs' securities fraud claims were eventually dismissed on the merits, and plaintiffs' remaining state law claims were dismissed without prejudice. See *Iafrate v Angelo Iafrate, Inc*, 827 F Appx 543, 547 (CA 6, 2020). In July 2019, plaintiffs filed their complaint underlying this appeal which primarily concerned defendants' refusal to honor the expired Warrants. Plaintiffs raised four claims: (1) breach of contract, (2) reformation, (3) unjust enrichment, and (4) fraud.

***4** In lieu of an answer, defendants filed a motion for summary disposition under MCR 2.116(C)(8). The trial court granted the motion, following which plaintiffs promptly moved for reconsideration and for clarification. Following the Sixth Circuit's decision in *Iafrate*, plaintiffs filed a supplemental brief in support of their motion for reconsideration and a motion for leave to file an amended complaint. The trial court apparently had not realized plaintiffs filed a motion for reconsideration, but following plaintiffs' supplemental brief, it entered orders denying reconsideration and denying leave to file an amended complaint. This appeal followed.

II. APPLICABLE STANDARDS OF REVIEW

On appeal, plaintiffs argue that the trial court erred by dismissing their breach of contract, reformation, and fraud claims. Plaintiffs do not challenge the trial court's dismissal of their unjust-enrichment claim. Plaintiffs also contend that the trial court erroneously applied the wrong standard when considering the motion for summary disposition.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id.* at 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id.* at 119-120. However, pursuant to MCR 2.113(C), "[i]f a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading," unless, in relevant part, the instrument is "in the possession of the adverse party and the pleading so states." Any documents attached to the pleadings are considered part of the pleadings and may be considered by the trial court when deciding a motion under MCR 2.116(C)(8). *El-Khalil v Oakwood Hosp*, 504 Mich 152, 163; 934 NW2d 665 (2019).

This Court reviews questions of contract interpretation de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties," and in so doing, "we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Highfield Beach v Sanderson*, 331 Mich App 636, 654; 954 NW2d 231 (2020) (quotation marks and citation omitted). Courts must "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). "[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Generally, "separate agreements are treated separately," but if "parties enter into multiple agreements

relating to the same subject-matter," then those agreements must be read "together to determine the parties' intentions." *Wyandotte Electric Supply Co v Electrical Technology Sys, Inc*, 499 Mich 127, 148; 881 NW2d 95 (2016).

"Whether a grant of equitable relief is proper under a given set of facts is a question of law that this Court also reviews de novo." *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371; 761 NW2d 353 (2008). "When considering whether a trial court properly ordered reformation, this Court must be mindful that courts are required to proceed with the utmost caution in exercising jurisdiction to reform written instruments." *Johnson v USA Underwriters*, 328 Mich App 223, 234; 936 NW2d 834 (2019) (quotation marks and citation omitted). "To reform a contract, the facts necessary for the allowance of the remedy shall be proved by clear and convincing evidence and not by a mere preponderance." *Id.* (quotation marks and citation omitted). "Whether a duty exists is a question of law that is solely for the court to decide." *Harts v Farmers Ins Exch*, 461 Mich 1, 6; 597 NW2d 47 (1999).

III. CORRECT SUMMARY DISPOSITION SUBRULE

***5** As an initial matter, plaintiffs contend that the trial court erred by looking beyond the pleadings when considering defendants' motion for summary disposition under MCR 2.116(C)(8). We find no error.

Plaintiffs attached copies of the Warrants and the Intercreditor Agreement to their complaint, but they did not attach copies of the Promissory Notes. Defendants attached copies of the Promissory Notes to their motion for summary disposition. Our Supreme Court has cautioned that although documents attached to the pleadings may be considered by a court deciding a motion for summary disposition under MCR 2.116(C)(8), the contents of those documents must not be considered as "substantive evidence sufficient to" dispose of the nonmoving party's claims. *El-Khalil*, 504 Mich at 163. In context, however, our Supreme Court was referring to certain emails in that case that had not been adopted by the nonmoving party as true. *Id.* Its holding was therefore nothing more than the unremarkable principle that "[a] motion under MCR 2.116(C)(8) may not be supported by affidavits, depositions, admissions, or other documentary evidence." *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). In contrast, the Promissory Notes were instruments upon which both plaintiffs' claims and defendants' defenses were based. Moreover, plaintiffs alleged that defendants possessed copies of the Promissory Notes. Therefore, the Promissory Notes, the Warrants, and the Intercreditor Agreement were all properly considered part of the pleadings under MCR 2.113(C)(2).

Plaintiffs do not articulate or identify what other evidence the trial court supposedly considered beyond the pleadings, and the trial court explicitly stated that it based its decision entirely on the legal principles applicable to MCR 2.116(C)(8), despite "the colloquy at oral argument." We find no indication that the trial court improperly considered evidence beyond the pleadings.

Plaintiffs further argue that the trial court necessarily applied the wrong standard because it found that plaintiffs waived pro rata repayment of the Promissory Notes, which is intrinsically a factual determination. Plaintiffs correctly observe that, traditionally, what constitutes a waiver is a question of law, and whether the facts in a case establish such a waiver is a question for the trier of fact. *Klas v Pearce Hardware & Furniture Co*, 202 Mich 334, 339; 168 NW 425 (1918). However, that does not establish that the trial court considered any evidence outside the pleadings. Furthermore, the distinction between a factual determination and a legal determination is not always so clear. There are circumstances under which a waiver may be found as a matter of law based on undisputed facts. See *Smith v Grange Mut Fire Ins Co of Mich*, 234 Mich 119, 122-123; 208 NW2d 145 (1926). As discussed, the interpretation of contracts is a question of law, and it may be appropriate for a court to determine under MCR 2.116(C)(8) that the legal significance of the facts in the pleadings establishes a waiver. See *Walters v Bloomfield Hills Furniture*, 228 Mich App 160, 165-166; 577 NW2d 206 (1998). Notably, in considering a motion for summary disposition under MCR 2.116(C)(8), the courts must accept as true all factual allegations in the complaint and any reasonable inferences from those factual allegations; however, the courts will not accept a party's conclusions. *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014). Merely phrasing an allegation as factual does not make it so. See *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958).

***6** Plaintiffs finally argue that they were not obligated to plead in avoidance of the affirmative defense of waiver. We agree, because "pleading in avoidance" is generally understood to apply in the context of governmental liability. See *Mack v Detroit*, 467 Mich 186, 203; 649 NW2d 47 (2002).

Plaintiffs further correctly point out that the party claiming waiver has the burden of proving waiver. See *Patel v Patel*, 324 Mich App 631, 634; 922 NW2d 647 (2018). Affirmative defenses are therefore generally not proper grounds for summary disposition under MCR 2.116(C)(8). See *Booth Newspapers, Inc v Regents of Univ of Mich*, 93 Mich App 100, 108-109; 286 NW2d 55 (1979). Nevertheless, so long as a court does not consider any evidence beyond the pleadings, we do not think it is categorically erroneous *per se* for the court to determine that the pleadings show a claim to be barred by an affirmative defense. See *Glazier v Lee*, 171 Mich App 216, 217-221; 429 NW2d 857 (1988) (applying the affirmative defense of wrongful conduct in a motion under MCR 2.116(C)(8).[8] We are unpersuaded that the trial court erroneously misapplied MCR 2.116(C)(8).

IV. WAIVER UNDER PROMISSORY NOTES

Plaintiffs argue that the trial court erred by ruling that plaintiffs waived the pro rata prepayment term of the Promissory Notes on the grounds that the court disregarded both plaintiffs' allegation that the Trust never consented to any non-pro-rata prepayments, and the nonwaiver term in the Promissory Notes. We are not persuaded.

"[A] waiver is a voluntary and intentional abandonment of a known right." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). "It is well settled that a course of affirmative conduct, particularly coupled with oral or written representations, can amount to waiver." *Id.* at 379. Furthermore, "it is well established in our law that contracts with written modification or anti-waiver clauses can be modified or waived notwithstanding their restrictive amendment clauses ... because the parties possess, and never cease to possess, the freedom to contract even after the original contract has been executed." *Id.* at 372. However, any such alteration to the original contract must be demonstrably mutual, and an anti-waiver provision in the original contract is highly relevant to assessing the parties' subsequent course of conduct. *Id.* at 372-375.

"Magic words are unnecessary to effectuate a valid waiver, but a waiver must be explicit, voluntary, and made in good faith." *Patel*, 324 Mich App at 634. "In order to ascertain whether a waiver exists, a court must determine if a reasonable person would have understood that he or she was waiving the interest in question." *Id.* "Thus, a valid waiver may be shown by express declarations or by declarations that manifest the parties' intent and purpose, or be an implied waiver, evidenced by a party's decisive, unequivocal conduct reasonably inferring the intent to waive." *Id.* (quotation marks and citations omitted).

As set forth above, the Promissory Notes and the Intercreditor Agreement[9] both contained provisions that clearly anticipated the possibility of irregular payments made on a single Promissory Note instead of all Promissory Notes. Under § 1.4 of the Promissory Notes, the Company appears to be obligated to apply discretionary prepayments pro rata to all Promissory Notes of the same priority level (i.e., all senior or all junior Notes). Notwithstanding the anti-waiver provision, Angelo Jr. told Adcock "that if the Company was going to make a prepayment on the Senior and Junior Notes, that his portion of any prepayment should be paid to Angelo Sr. due to Angelo Sr.'s age." Defendants proceeded to issue a payment of $5.4 million on Angelo Sr.'s Promissory Notes. Plaintiffs alleged that Angelo Sr. held that amount in trust for all plaintiffs pursuant to the Intercreditor Agreement. By necessary implication, Angelo Sr. accepted the payment. Furthermore, at that time, Dominic and Stefani were still on the Company's board of directors, and Angelo Sr. was the trustee of the Trust. It is starkly inescapable that plaintiffs and defendants all mutually agreed to waive the pro-rata provision of § 1.4 of Angelo Sr.'s Promissory Notes.

***7** In February 2017, nearly two months after the Company paid $5.4 million to Angelo Sr., Adcock directed the Company to issue payments to Dominic and the Trust for the amounts owed under their Promissory Notes, which was $9,742,485.08 and $3,395,102.86, respectively. Plaintiffs alleged that Dominic and the Trust held their payments in trust under the terms of the Intercreditor Agreement. Again, Dominic and Stefani were still on the board until after those payments were made, and by necessary implication, Dominic and Angelo Sr. (the latter as trustee of the Trust[10]) accepted the payments. Also again, there is no way to interpret these undisputed facts as anything other than a mutual waiver, through a course of conduct, of § 1.4 of Dominic's and the Trust's Promissory Notes.

Plaintiffs generally contend that defendants breached the pro-rata provisions of the Promissory Notes, which, as discussed, caused three of the four Warrants to be triggered earlier than plaintiffs anticipated. However, the trial court correctly found that the parties, through their affirmative and fully admitted conduct, mutually waived the pro-rata provisions. The trial court recognized the anti-waiver provision, but it correctly

recognized that the anti-waiver provision was not dispositive under the circumstances.

V. BREACH OF THE INTERCREDITOR AGREEMENT

Plaintiffs argue that the trial court erred by ruling that defendants were not party to the Intercreditor Agreement and by overlooking the pro rata payment term of that agreement. We disagree.

It is manifestly apparent on its face that defendants were not, in fact, parties to the Intercreditor Agreement. The Intercreditor Agreement states at the outset that it was between Angelo Sr., Dominic, Angelo Jr., and the Trust. None of the provisions in the Intercreditor Agreement appear to place any obligations or responsibilities upon the Company or upon Adcock, and it specifically stated that the Company was not a beneficiary of the Agreement. The Company's president at the time, Angelo Jr., signed a separate acknowledgment indicating that the Company "agree[d] to the foregoing terms and provisions," none of which, as noted, imposed any obligations upon the Company. As set forth above, the acknowledgement stated that the terms of the Intercreditor Agreement were "solely for the benefit of" plaintiffs, and the only specific obligation the Company undertook was to respect "the relative rights of the Creditors in the Collateral." Nowhere in the Intercreditor Agreement was a non-pro-rata payment on a Promissory Note forbidden; to the contrary, § 4 unambiguously anticipated that such non-pro-rata payments might occur. Under such an eventuality, the Company had no obligations; rather, the recipient of the payment was obligated to hold the payment in trust for the other plaintiffs.

The trial court properly found that defendants were not parties to the Intercreditor Agreement. Furthermore, the Warrants did not reference or rely upon the Intercreditor Agreement. Although the Promissory Notes prohibited non-pro-rata payments, the parties waived that prohibition. The Intercreditor Agreement only established obligations as between plaintiffs, and the Company only agreed to respect plaintiffs' obligations as between each other. Plaintiffs do not explain how their agreement to hold any payments in trust for one another prevented individual Promissory Notes from being extinguished until all of them were paid in full. Although plaintiffs agreed to hold any payments that they received from the Company in trust so that those payments could be applied pro rata among themselves until all of the Promissory Notes were satisfied, the Intercreditor Agreement did not restrict the Company's prerogative to satisfy individual Promissory Notes with non-pro-rata prepayments. The Intercreditor Agreement also did not, for example, obligate any recipient of a non-pro-rata payment to refuse that payment. Any acceptance of such payment would necessarily constitute valid payment by the Company on that particular Promissory Note.

VI. BREACH OF THE WARRANTS

***8** Plaintiffs contend that the trial court erred by failing to address how the Company was required to reissue, amend, or restate the Warrants. We conclude that the Warrants did not require the Company to take those actions.

As an initial matter, we observe that the trial court correctly applied the plain language of the Warrants, which, as set forth above, unambiguously refer to "the date that *the Company has paid* in full both the Senior Promissory Note and Junior Promissory [sic] issued by the Company in favor of *the Holder*" (emphases added). The only possible interpretation of this language is that the specific Warrant would be triggered when the particular Promissory Notes held by *the holder of that Warrant* were paid *by the Company.* Plaintiffs apparently expected that all of their Promissory Notes would be paid off at the same time. However, they did not structure their contracts to make a simultaneous payoff inescapable, and they waived the provisions that should have resulted in their payoffs being simultaneous. Notably, they could easily have drafted their Warrants in such a way that they would be triggered only after the last Promissory Note was paid in full. As discussed, we enforce the plain language of contracts as written, and as written, the outcome in this matter was fully permitted.

Plaintiffs argue that defendants committed the first material breach of the Warrants by violating § 4.a. of the Warrants, which plaintiffs characterize as an "anti-dilution provision, providing that the number of shares recited in the Warrants would collectively at all times represent 20% of the Company's full diluted equity interest" (emphasis omitted). Plaintiffs argue that the Company issued additional shares, which altered the Company's equity interests and therefore mandated reissuance of each Warrant. Generally, one party's initial substantial breach of a contract may excuse the other party's nonperformance of its obligations under that contract. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 613; 792 NW2d 344 (2010). However, the breach must

be substantial, meaning the breach in some way precluded or drastically undermined either the other party's ability to perform or the essential purpose of the contract. See *Baith v Knapp-Stiles, Inc*, 380 Mich 119, 126; 156 NW2d 575 (1968).

Accepting as true that defendants indeed breached the Warrants by failing to reissue them, the evidence does not show that defendants diluted the Company's equity to the point of rendering the Warrants shams. More importantly, the evidence does not show that any reissuance of the Warrants would have entailed changing any terms other than their number of shares. Reissuance would therefore not have altered the legal effect of plaintiffs' waiver of the Promissory Notes' prohibition against non-pro-rata payments. Accordingly, the "first substantial breach" doctrine is inapplicable.

VII. REFORMATION OF THE WARRANTS

Plaintiffs argued below that reformation of the Warrants was necessary because there was both a mutual mistake between the parties and a unilateral mistake on the part of plaintiffs. The trial court disagreed, and it ruled that plaintiffs' reformation claim failed because their complaint failed to allege a mutual mistake or actionable fraud. On appeal, plaintiffs also argue that an amended contract was created after plaintiffs waived the pro rata prepayment term of the Promissory Notes; that the amended contract was composed of the amended Promissory Notes, the Warrants, and the Intercreditor Agreement; and that their reformation claim was directed at the amended contract because that agreement failed to reflect the parties' intent that the Warrants all be exercised on a single date. We find that plaintiffs' latter argument is not readily apparent from the lower court record, because plaintiffs' complaint and argument in the trial court focused solely on reforming the Warrants rather than a novel amended gestalt contract. We therefore find the latter argument unpreserved. See *Glasker-Davis v Auvenshine*, 333 Mich App 222, 227-228; 964 NW2d 809 (2020).

***9** "Michigan courts sitting in equity have long had the power to reform an instrument that does not express the true intent of the parties as a result of fraud, mistake, accident, or surprise." *Johnson Family Ltd Partnership*, 281 Mich App at 371-372. "Courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true intent of the parties." *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 24; 592 NW2d 379 (1998) (quotation marks and citations omitted). A contract drafted as the parties intended will not be reformed merely because the parties were mistaken about the contract's legal effect. *Schmalzreidt v Titsworth*, 305 Mich 109, 119; 9 NW2d 24 (1943). In contrast, a mistake in drafting an instrument, such that the contract as written does not reflect the parties' agreement, may warrant reformation of the instrument to comport with the parties' intentions. *Id.* at 119-120. A unilateral mistake may warrant reformation where the mistake was induced by fraud, or where one party knew the contract did not accurately express the other party's intentions and concealed that other party's misapprehension. *Johnson Family Ltd Partnership*, 281 Mich App at 380.

Plaintiffs argue that their "claim for reformation of the parties' contract is founded upon the fact that the contract does not accurately carry out the parties' intent, and reformation is sought to conform the parties' contract to the actual intent of the contracting parties." We accept that the Promissory Notes, Intercreditor Agreement, and Warrants should be considered together. See *Wyandotte Electric Supply Co*, 499 Mich at 148. However, plaintiffs' argument is that some term was omitted from the contract, or defendants were aware that the contract did not reflect plaintiffs' intentions and failed to correct the misapprehension. The former theory requires that a term agreed to by the parties never made its way into a written instrument. Plaintiffs do not articulate what that term might be. [11] The latter theory appears to be that Adcock realized before plaintiffs did that a Warrant-triggering event had occurred and failed to warn plaintiffs of that event. However, plaintiffs misapprehend the kind of unilateral mistake that will give rise to reformation: the mistake must be as to the inadvertent inclusion or exclusion of terms in the contract. [12] See *Woolner v Layne*, 384 Mich 316, 318-319; 181 NW2d 907 (1970); *Baryton State Savings Bank v Durkee*, 325 Mich 138, 140-142; 37 NW2d 892 (1949).

Ultimately, the facts as set forth by plaintiff and in the pleadings simply show that plaintiffs failed to understand the legal ramifications of their waivers of the prohibitions against pro-rata payments. The trial court properly refused to reform the parties' contract.

VIII. FRAUD

Plaintiffs contend that the trial court erred by dismissing their fraud claims. We disagree.

The trial court dismissed plaintiffs' fraud claims on the basis of collateral estoppel, holding that the dismissal of plaintiffs' securities fraud claims in federal court precluded plaintiffs' common law fraud claims. "Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Collateral estoppel may bar subsequent litigation in state courts based on issues determined in a prior federal action. *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-381; 596 NW2d 153 (1999). The trial court also held that, in any event, plaintiffs failed to plead the necessary elements of fraud.

***10** Plaintiffs' fraud claim is based in part on the general contention that Adcock undervalued the Company's performance, which undermined the value of the stock to be redeemed under the Warrants. Having determined that the Company properly regarded all but Angelo Jr.'s warrants as expired, this claim applies only to Angelo Jr.'s Warrant. Plaintiffs' securities fraud claim in federal court alleged a violation of the Securities Exchange Act, 15 USC § 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 CFR § 240.10b-5, for precisely that reason: that Adcock and the Company had intentionally undervalued the Company's stock price in an effort to manipulate the value of the Warrants. *Iafrate*, 827 F Appx at 546-547. Consistent with the allegations in the complaint in this matter, the federal courts observed that Adcock admitted to the undervaluing to Angelo Jr. before Angelo Jr. exercised his Warrant. *Id.* at 551. In Michigan, as in federal courts, an essential element of fraud is that the plaintiff not only relied on a misrepresentation but did so genuinely and reasonably. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414-415; 751 NW2d 443 (2008). [13] Plaintiffs alleged that Angelo Jr. relied on defendants' "materially false and misleading statements" and upon an earlier presentation regarding the methodology to be used in calculating the fair market value of the stocks. However, as the Sixth Circuit found, Angelo Jr. actually knew that defendants had manipulated the Company's stock value and, instead of challenging the valuation or suing for breach of contract immediately, he chose to exercise the Warrant despite that knowledge. *Iafrate*, 827 F Appx at 551-552. Even if the federal decision lacked preclusive effect, we would agree with its conclusion that plaintiffs have not alleged actionable fraud on this basis.

Plaintiffs also alleged that defendants never warned plaintiffs that the Warrants would be triggered, despite knowing that plaintiffs believed the Warrants would not be triggered and despite a request from Angelo Jr. that Adcock document how the non-pro-rata payments might alter plaintiffs' understandings. In the trial court, plaintiffs contended that Adcock owed them a fiduciary duty, the exact nature of which seems never to have been made clear. On appeal, plaintiffs provide only a cursory argument with no citation to authority. We could consider this argument waived. *Wolfe v Wayne-Westland Community Sch*, 267 Mich App 130, 139; 703 NW2d 480 (2005). Nevertheless, we presume plaintiffs are probably referring to the common-law duty of candor, under which a fiduciary or quasi-fiduciary may have an affirmative duty of disclosure under some circumstances. See *Tomkins v Hollister*, 60 Mich 470, 479; 27 NW 651 (1886); *Barrett v Breault*, 275 Mich 482, 491; 267 NW2d 544 (1936). Plaintiffs' allegations essentially articulate a claim for fraudulent misrepresentation, which requires an affirmative duty to disclose. *Titan Ins Co v Hyten*, 491 Mich 547, 557; 817 NW2d 562 (2012). [14]

It is far from clear that Adcock did owe a fiduciary duty to plaintiffs. The trust a plaintiff places in a defendant alleged to be a fiduciary must be reasonable. *Prentis Family Foundation v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 44; 698 NW2d 900 (2005). Presuming Adcock owed a fiduciary duty to plaintiffs, a claim of fraudulent misrepresentation does not require diligence on the part of plaintiffs. *Titan Ins Co*, 491 Mich at 557. However, a plaintiff may not "wilfully close his eyes to that which others clearly see." *Id.* at 562. Plaintiffs could have read the plain and unambiguous language of their Warrants. Although there are rare circumstances under which failing to advise someone of the law—which all persons are otherwise presumed to know—may be actionable, generally something more than mere silence is required, even where a fiduciary relationship exists. *Tompkins*, 60 Mich at 480-484. In any event, as discussed, the prepayments on the Promissory Notes did not change the nature of the transaction as plaintiffs argue; rather, plaintiffs simply did not understand their own contracts. Especially in light of their cursory argument, we are unpersuaded that plaintiffs have articulated a duty on the part of defendants to explain what those contracts stated or that defendants intended to honor the contracts as they were actually written.

***11** Affirmed.

All Citations

Not Reported in N.W. Rptr., 2022 WL 259248

Footnotes

1 For the sake of clarity, we refer to the members of the Iafrate family by their given names, which conforms with the designations used by the trial court.

2 Angelo Sr. was initially a plaintiff in this case, but he passed away during the proceedings and thus the trial court entered a stipulated order to replace Angelo Sr. with his estate.

3 A stock warrant is, in general, a contractual right between a person and a company to purchase stock at a specific price and at a specific date. In contrast, stock option is generally a contractual right between two individuals to buy or sell stock at a specific price prior to a specific date. See < https://www.investopedia.com/ask/answers/08/stock-option-warrant.asp >.

4 The percentage amount varied among the plaintiffs' individual Warrants; 4.5% was the amount listed in Angelo Sr.'s Warrant.

5 Plaintiffs were the creditors, the Intercreditor Agreement defined "Creditor Indebtedness" as the total amount due to all four plaintiffs, and it defined the "Collateral" as essentially all of the Company's assets.

6 Defendants characterize Stefani as the "Iafrate family attorney," which does appear to be implied by the record, but we have only found documentary evidence attached to the pleadings showing that Stefani represented Angelo Sr. and the Trust.

7 It appears that, in the meantime, Adcock had become a director of the board. See *Iafrate v Warner Norcross & Judd, LLP*, —— FRD ——, —— (ED Mich) (Docket No. 18-12028), 2021 WL 1232648 at *3.

8 See also *Rauch v Day & Night Mfg Corp*, 576 F 2d 697, 702 (CA 6, 1978), discussing application of an affirmative defense where a "claim is adequately stated, but in addition to the claim the complaint includes matters of avoidance that effectively vitiate the pleader's ability to recover on the claim ... the complaint is said to have a built-in defense and is essentially self-defeating" (quotation omitted). "Although lower federal court decisions may be persuasive, they are not binding on state courts." *Abela v General Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

9 We will discuss the Intercreditor Agreement below.

10 Plaintiffs argue that the Trust never consented, but this conclusory assertion is belied by the actual facts alleged by plaintiffs. Indeed, plaintiffs alleged that the Trust's then-trustee, Angelo Sr., accepted non-pro-rata prepayments in both his personal capacity and in his capacity as a trustee.

11 Insofar as we can determine, plaintiffs contend that a new contract was created that, for reasons we find difficult to follow, somehow called for terms other than simply the original contract with the pro-rata payment prohibition waived. Even if we were to accept this theory, it does not amount to a claim that the parties negotiated an agreement that, when reduced to writing, omitted a term without their knowledge.

12 In the context of an oral contract, the equivalent would be one party misspeaking without realization, the other party knowing the first party misspoke, and the other party nevertheless holding the first party to their word. Again, the evidence as set forth by plaintiffs shows that they knew what they had agreed upon, they simply did not realize the secondary consequences.

13 Although *Cooper* addressed fraud in an insurance context, it has long been established that "fraud is not perpetrated upon one who has full knowledge to the contrary of a representation." *Beverly v Richards*, 255 Mich 508, 514; 238 NW2d 270 (1931).

14 As the federal courts found, "[p]laintiffs fail to identify any affirmative statement by Defendants establishing that the Company would only apply prepayments *pro rata*, that even if non-*pro-rata* prepayments were made they would not trigger the warrant-exercise period, or that the Warrants would be redeemed automatically," and "Plaintiffs do not allege, with sufficient particularity, statements establishing the Company's commitment to [only apply prepayments *pro rata* or to automatically redeem the Warrants] in the first place." *Iafrate*, 827 F Appx at 549. We would agree with this assessment, irrespective of whether *Iafrate* has preclusive effect. Consequently, this theory turns on whether defendants had an affirmative duty to disclose.

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EXHIBIT 8

2006 WL 2042512
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Chun Wing WONG, Plaintiff,
v.
T-MOBILE USA, INC., Defendant.

No. 05-73922.
|
July 20, 2006.

Attorneys and Law Firms

Daniel B. Scott, Steven A. Schwartz, Chimicles & Tikellis, Haverford, PA, E. Powell Miller, Marc L. Newman, The Miller Law Firm, Rochester, MI, for Plaintiff.

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ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION [4]

NANCY G. EDMUNDS, District Judge.

***1** Plaintiff Chun Wing Wong brought this proposed class action lawsuit based on Defendant T-Mobile USA's apparent practice of overcharging its cellular telephone customers. As to Plaintiff individually, Defendant wrongfully overcharged only a small sum of money, but overall, Plaintiff alleges, Defendant may have wrongfully reaped millions of dollars from its customers.

Now before the Court is Defendant's Motion to Compel Arbitration pursuant to the cellular service contract between Plaintiff and Defendant. Importantly, Defendant's contract protects it from any sort of class action, and thus allows Defendant to overcharge its customers without substantial risk of liability.

For the reasons discussed below, this Court finds that the class action waiver in Defendant's contract is unenforceable. Because the contract prohibits class-wide arbitration, the Court DENIES Defendant's Motion.

I. Background

The facts of this case do not appear to be in serious dispute. In 2003, Plaintiff purchased a cellular telephone from Defendant and the parties entered into a contract. Part of the contract provided that in exchange for a monthly fee of $4.99, Defendant would provide Plaintiff with "unlimited T-Zones," a feature including "unlimited Internet, email and Mobile Web content." Nevertheless, Defendant charged Plaintiff additional fees for use of the internet, email, and mobile phone content. On several occasions, Plaintiff requested a refund of the money. While Defendant concedes that Plaintiff was overcharged in error, Defendant has refused to refund some of the money on account of Plaintiff's failure to object to the charges within the limitations period. Plaintiff notes that while his actual damages are only $19.74, in the aggregate, Defendant "has probably collected millions of dollars improperly." (Br. of Pl. 8.)

The service contract between Plaintiff and Defendant made arbitration of disputes mandatory and contained a class action waiver. In April of 2003, however, a federal district court in California struck Defendant's class action waiver provision and sent the case for class-wide arbitration. *Gatton v. T-Mobile USA, Inc.,* 2003 U.S. Dist. LEXIS 25922 (C.D.Cal. Apr. 18, 2003). Perhaps troubled by the prospect of class-wide arbitration, Defendant revised the arbitration agreement as follows:

> *CLASS ACTION WAIVER.* WHETHER IN COURT, SMALL CLAIMS COURT, OR ARBITRATION, YOU AND WE MAY ONLY BRING CLAIMS AGAINST EACH OTHER IN AN INDIVIDUAL CAPACITY AND NOT AS A CLASS REPRESENTATIVE OR A CLASS MEMBER IN A CLASS OR REPRESENTATIVE ACTION. NOTWITHSTANDING SEC. 22, IF A COURT OR ARBITRATOR DETERMINES IN A CLAIM BETWEEN YOU AND U.S. THAT YOUR WAIVER OF ANY ABILITY TO PARTICIPATE IN CLASS OR REPRESENTATIVE ACTIONS IS UNENFORCEABLE UNDER APPLICABLE LAW, THE ARBITRATION AGREEMENT WILL NOT APPLY, AND YOU AND WE AGREE THAT SUCH CLAIMS WILL BE RESOLVED BY A COURT OF APPROPRIATE JURISDICTION, OTHER THAN A SMALL CLAIMS COURT.

***2** (Br. of Pl.Ex. 5.) Thus, while arbitration remains the agreed-upon means to resolve the present dispute, the parties have also agreed that if this Court finds the class action waiver unenforceable, the case shall be resolved here, rather than in an arbitral forum.

Plaintiff's Class Action Complaint alleges five causes of action: (I) Violation of the Michigan Consumer Protection Act ("MCPA"), (II) Breach of Contract/Express Warranty, (III) Fraud, (IV) Unjust Enrichment/Restitution/ Disgorgement, and (V) Injunctive and Declarative Relief Including Reformation of Contract and for an Accounting.

II. Discussion

As Plaintiff points out, the first issue before the Court is whether the class action waiver is enforceable. If not, the parties have agreed to settle this dispute in this forum, and the Court need not go further.

Plaintiff argues that the class action waiver is unenforceable as contrary to the explicit policies set forth in the MCPA, which expressly grants the right to bring and participate in class action litigation. Mich. Comp. Laws § 445.911(3). Defendant argues that because the right to class actions is not a *substantive* right, but a procedural one, an arbitration agreement may dispose of this right. Indeed, Defendant notes, "[t]he whole point of arbitration is to provide for a quick, inexpensive resolution by foregoing a whole panoply of procedures available to litigants in court." (Br. of Def. 15.) In any event, Defendant contends, the MCPA does not apply here, since that statute exempts conduct authorized under law, and the federal government regulates the cellular industry.

A. Class Action Waiver

The Federal Arbitration Act ("FAA"), under which Defendant brings this Motion, provides that the arbitration clause should be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985), the Supreme Court read this statute to encourage the enforcement of arbitration agreements, even where, as here, a plaintiff raises a statutory claim:

> The "liberal federal policy favoring arbitration agreements" ... is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." "[The] preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," a concern which "requires that we rigorously enforce agreements to arbitrate." ... There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights....
>
> ...
>
> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration

***3** *Id.* at 625-28 (internal citations and footnotes omitted). Although the plaintiffs in *Mitsubishi* argued that arbitration would undermine the deterrent purposes of the statutes upon which their lawsuit was based, the Court held that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 637.

In *Rembert v. Ryan's Family Steakhouses, Inc.,* 596 N.W.2d 208 (Mich.Ct.App.1999), which the parties agree to be a key precedent, the Michigan Court of Appeals relied on the above language from *Mitsubishi* in addressing whether public policy considerations could preclude the arbitration of statutory claims. The court read *Mitsubishi* as follows:

> [T]he Court held that if the parties had agreed to arbitrate statutory claims, the agreement should be enforced unless ... the agreement foreclosed effective vindication of statutory rights....
>
> [T]he basic rationale ... is twofold. First the Court endorsed the principle that an agreement to arbitrate a statutory claim does not constitute waiver of substantive rights. Second, the Court recognized that a statute will serve both its remedial and deterrent functions as long as the prospective litigant can vindicate his statutory cause of action in the arbitral forum.

596 N.W.2d at 218-19 (citing *Mitsubishi,* 473 U.S. at 628). Thus, the *Rembert* court held that an arbitration agreement is unenforceable if it "is drafted in a away that effectively waives the plaintiff's substantive rights or remedies or so structures the procedures as to make it impossible for the plaintiff to

'effectively vindicate his statutory cause of action'...." *Id* . at 225 (internal citations omitted).

This reading finds support in a recent First Circuit Court of Appeals case. In *Kristian v. Comcast Corp.,* 446 F.3d 25 (1st Cir.2006), the court issued an exhaustive opinion addressing an arbitration agreement between a cable provider and its customers which prohibited class actions. Although the plaintiffs had brought suit under state and federal antitrust laws, rather than consumer protection laws, the analysis is helpful here.

The *Kristian* court recognized the federal policy favoring arbitration agreements, but also acknowledged an important need for class actions. As the Supreme Court has instructed, "the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617 (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir.1997)). Another court has wisely cautioned that "[t]he realistic alternative to a class action is not 17,000,000 individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.00." *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir.2004).

***4** In light of the importance of class actions, the *Kristian* court stated, "While ... the class action ... [i]s a procedure for redressing claims-and not a substantive or statutory right in and of itself-we cannot ignore the substantive implications of this procedural mechanism." 446 F.3d at 54.

> If the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law. Plaintiffs' will be unable to vindicate their statutory rights. Finally, the social goals of federal and state antitrust laws will be frustrated because of the "enforcement gap" created by the de facto liability shield.

Id. at 61. The court concluded that "the provision[ ] of the arbitration agreements ... barring class arbitration are invalid because they prevent the vindication of statutory rights under state and federal law." *Id.* at 29.

This Court recognizes that the First Circuit's approach is not universally accepted. As the *Kristian* court noted, the Third, Fourth, Seventh, and Eleventh Circuit Courts of Appeal have enforced class action prohibitions in consumer arbitration clauses. *Id.* at 78-79 (citing *Johnson v. W. Suburban Bank,* 225 F.3d 366, 374 (3d Cir.2000); *Snowden v. Checkpoint Check Cashing,* 290 F.3d 631, 638 (4th Cir.2002); *Livingston v. Assocs. Fin., Inc.,* 339 F.3d 553, 559 (7th Cir.2003); *Randolph v. Green Tree Fin. Corp.,* 244 F.3d 814, 819 (11th Cir.2001)). The Court is not aware of any Sixth Circuit case addressing this precise issue.

Two federal district court cases in Michigan are helpful, however. One recent case holds that the preclusion of class actions does not render an arbitration agreement substantively unconscionable. *Copeland v. Katz,* 2005 U.S. Dist. LEXIS 31042, at *11-12 (E.D.Mich. Nov. 28, 2005). While the question of substantive unconscionability is related, it is distinct from the issue presented here. Moreover, *Copeland* did not involve the MCPA, which expressly provides for class actions.

Lozada v. Dale Baker Oldsmobile, 91 F.Supp.2d 1087 (W.D.Mich.2000), is more directly on point. In *Lozada,* the court applied *Rembert* to the MCPA and an arbitration agreement including a class action waiver. The court found the class action waiver unenforceable:

> [U]nder the Michigan Consumer Protection Act, the availability of class recovery is explicitly provided for and encouraged by statute. *See* Mich. Comp. Laws § 445.911(3) (expressly permitting aggrieved person to bring class action for claims brought pursuant to the MCPA). Because the arbitration agreement prohibits the pursuit of class relief, it impermissibly waives a state statutory remedy.

Id. at 1105 (citing *Rembert,* 596 N.W.2d at 230).

Defendant asks this Court to reject *Lozada,* arguing that it has misinterpreted the holding in *Rembert:*

> What the *Rembert* court in fact held was that, in the context of statutory employment discrimination claims, "the arbitration agreement [must] not waive the *substantive* rights and remedies of the statute...." The right to a class action, however, is not a substantive right or remedy provided by the MCPA (which is not an employment-related statute in any event). Rather, it is a *procedural* right.

***5** (Br. of Def. 14-15.) Defendant reads *Rembert* too narrowly, however, replacing the following critical language with an ellipse: "and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights." 596 N.W.2d at 226. Despite Defendant's attempt to ignore it, this critical language controls the present case.

Whether the right to a class action is a substantive or a procedural one, it is certainly necessary for the effective vindication of statutory rights, at least under the facts of this case. Defendant makes much of the fact that it contributes toward plaintiffs' arbitration costs, but in order for arbitration to be feasible, the amount at issue must also exceed the value in time and energy required to arbitrate a claim. Defendant is alleged to have bilked its customers out of millions of dollars, though only a few dollars at a time. Plaintiff's damages are a paltry $19.74, hardly enough to make arbitration worthwhile. Class actions were designed for situations just like this. The MCPA's class action mechanism is essential to the effective vindication its statutory cause of action.

B. MCPA Preemption

The discussion above assumes that Plaintiff has a statutory cause of action, like the plaintiffs in *Rembert, Lozada* and *Kristian* . Plaintiff's only statutory claim falls under the MCPA, but Defendant argues that its conduct is exempt from the MCPA. If Defendant is correct, the MCPA would not apply, and the class-action waiver could not run afoul of that statute. In other words, the MCPA would not render the arbitration agreement unenforceable.

The MCPA contains an exemption for a "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Mich. Comp. Laws § 445.904(1)(a). The key Michigan precedent interpreting this provision is *Smith v. Globe Life Insurance Co.,* 597 N.W.2d 28 (Mich.1999), in which the Michigan Supreme Court concluded that

> when the Legislature said that transactions or conduct "specifically authorized" by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute. Contrary to the "common-sense reading" of this provision by the Court of Appeals, we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.

Id. at 38.

Recently, this Court had occasion to review the MCPA and the implications of the *Smith* case. In *Flanagan v. Altria Group,* 2005 U.S. Dist. LEXIS 24644 (E.D.Mich. Oct. 25, 2005), the plaintiff relied on the MCPA to claim that a cigarette manufacturer had unlawfully misled consumers in its labeling and advertising practices. The defendant, relying on *Smith,* argued that the MCPA did not apply, since the federal government permitted and regulated cigarette labeling and advertising.

***6** As the *Flanagan* opinion suggests, the issue was a difficult one.[1] After analyzing a comprehensive federal regulatory scheme at issue, the Court concluded that because the defendant's " 'general transaction' was the labeling and advertising of its cigarettes," and because federal law " 'establishes a comprehensive Federal program to deal with cigarette labeling and advertising,' " the defendant's conduct was exempt from the MCPA. *Id.* at *22 (quoting 15 U.S.C. § 1331). This finding relied on a factual comparison with *Smith* and a number of other cases interpreting the MCPA exemption.

In *Smith,* the conduct at issue was the sale of credit life insurance. The court held that the conduct was protected because the defendant had, pursuant to a state statute, submitted the necessary application and certificate of insurance forms to the State Commissioner of Insurance, and

had implicitly been approved for the policy. *Id.* at 36-37. In *Kraft v. Detroit Entertainment, L.L.C.,* 683 N.W.2d 200 (Mich.Ct.App.2004), the plaintiff alleged fraud based on the deceptive use of slot machines. The court found this claim exempt because the operation of slot machines was regulated and specifically authorized by the Michigan Gaming Control Board, whose administrative rules "specifically authorized defendants to operate the slot machines at issue...." *Id.* at 204-05. And in *Newton v. Bank West,* 686 N.W.2d 491 (Mich.Ct.App.2004), the plaintiffs alleged that a bank had improperly charged mortgage fees. The court found it "abundantly clear" that banks making residential mortgage loans "are engaged in transactions 'specifically authorized' under laws administered by officers acting under both state and federal statutes." *Id.* at 493-94.

In addition to these state cases, this Court cited three federal cases decided on similar grounds. *Burton v. William Beaumont Hosp .,* 373 F.Supp.2d 707, 720-22 (E.D.Mich.2005) (claims based on hospital billing practice exempt because state statute governed health facility billing practices); *Mills v. Equicredit Corp.,* 294 F.Supp.2d 903, 910 (E.D.Mich.2003) (improper lending practices claim exempt because defendant bank "was a licensed mortgage lender under a Michigan law that was regulated by the Commissioner of the Office of Financial and Insurance Services of the Department of Consumer and Industry Services"); *Wheeling, Inc. v. Stelle,* 2000 U.S. Dist. LEXIS 8628, at *18-19 (E.D.Mich.2000) (securities fraud claim exempt because the "sale of securities is regulated by the Michigan Uniform Securities Act, which is administered by the Corporation and Securities Bureau of the Michigan Department of Commerce").

The Court noted, however, that not every decision has favored defendants. Two pre-*Smith* cases are particularly instructive. In *Attorney General v. Diamond Mortgage Co.,* 327 N.W.2d 805 (Mich.1982), which *Smith* distinguished but declined to overrule, 597 N.W.2d at 37-38, the defendant was a licensed real estate broker sued for conduct related to mortgage lending. The Michigan Supreme Court held the relevant conduct was "mortgage writing," which was not "specifically authorized" under the defendant's real estate broker's license, and thus was not exempt from the MCPA:

> ***7** While the license generally authorizes Diamond to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act, nor transactions that result from that conduct.... For this case, we need only decide that a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business.

327 N.W.2d at 811.

Another case apparently left undisturbed by *Smith* is *Baker v. Arbor Drugs, Inc.,* 544 N.W.2d 727 (Mich.Ct.App.1996), in which the Michigan Court of Appeals made clear that in order to be protected, the conduct at issue-what *Smith* termed the "general transaction"-must fall within the purview of the regulatory agency:

> We do not agree with defendant that it is exempt from the MCPA because it is governed by a regulatory board, the Michigan Board of Pharmacy. It is true that the MCPA does not apply to a transaction or conduct specifically authorized under laws administered by a regulatory board or officer. This exemption does not apply in this case because the alleged violative conduct falls outside the realm of the regulatory commission. Here, plaintiff is claiming that defendant's advertising ... violates the MCPA. Advertising is not within the purview of the Pharmacy Board's regulatory powers. Therefore, plaintiff's claim that defendant's advertising ... violates the MCPA falls outside the realm of the regulatory commission and ... the MCPA does not apply.

Id. at 732 (internal citations omitted).

These cases demonstrate that while *Smith* unquestionably broadened the MCPA's exemption for conduct authorized by a government agency, it did not abrogate the statute

entirely. Even if a defendant is licensed or regulated, it may remain liable under the MCPA for conduct outside the scope of its license or the pertinent regulations. In other words, "specifically authorized" does not simply mean "not prohibited." To conclude otherwise would be to create a gap in enforcement in those areas not covered by government regulation.

Applying these principles to the present case, the Court must determine what the "general transaction" was. Defendant argues, "The general transaction at issue here-the provision of wireless communications services-is subject to comprehensive federal regulation." (Br. of Def. 17.) Defendant essentially makes the same argument as the defendant pharmacy in *Baker,* which sought protection for all of its conduct pursuant to regulation by the Michigan Board of Pharmacy, though advertising fell outside of the Board's authority. Just as in *Baker,* Defendant's description is far too broad.

Plaintiff, on the other hand, states that he "is not complaining about the reasonableness of the rates charged by Defendant-a subject clearly preempted by the Federal Communications Act-but rather Defendant's deception and failure to provide the benefits promised." (Br. of Pl. 21 n. 6.) Plaintiff therefore wishes to describe the pertinent transaction simply as Defendant's wrongful acts, but as the court in *Smith* explained, the focus is not on the "specific misconduct alleged," but on the "general transaction." 597 N.W.2d at 38. Thus, Plaintiff also misses the mark.

***8** In truth, several general transactions take place under the umbrella of providing cellular services, but this case concerns only one: billing. Plaintiff alleges that Defendant double-billed him for a service he had already paid for. The Court must therefore determine whether Defendant's billing practices are "specifically authorized."

In arguing that they are, Defendant cites the Federal Communications Act, which asserts federal control over all interstate radio communications. *See* 47 U.S.C. § 151 *et seq.* Defendant also cites the Federal Communications Commission's "pervasive body of regulations governing virtually every aspect of wireless communications" (Br. of Def.18), such as cellular service requirements, geographic coverage, emissions, and licensing requirements. *See* 47 C.F.R. § 22.901, 22.911, 22.913, 22.917, 22.929. While these regulations are extensive, none of them govern the billing practices of cellular telephone companies.

More persuasively, Defendant notes that a federal statute requires that charges for any radio-based communications be reasonable. *See* 47 U.S.C. § 201, 202. Furthermore, the FCC has created the Wireless Telecommunications Bureau, which "develops, recommends and administers the programs and policies for the regulation of the terms and conditions under which communications entities offer domestic wireless telecommunications services...." 47 C.F.R. § 0.131. Among its duties, this bureau "[r]egulates the charges, practices, classifications, terms and conditions for, and facilities used to provide, wireless telecommunications services." 47 C.F.R. § 0.131(d). Thus, according to the regulations that Defendant cites, the FCC appears to take an active role in regulating cellular telephone contracts.

Plaintiff takes issue with this characterization, however, and offers a wealth of authority painting a much different picture. In 1993, for example, the Federal Communications Act's preemption provision was amended to provide that while state and local governments may not regulate the rates charged for cellular telephone service, the Act "shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A). The FCC itself has interpreted this section as follows:

> We do not agree ... that state contract or consumer fraud laws relating to the disclosure of rates and rate practices have generally been preempted with respect to [cellular providers]. Such preemption by Section 332(c)(3)(A) is not supported by its language or legislative history.... [T]he legislative history of Section 332 clarifies that billing information, practices and disputes-all of which might be regulated by state contract or consumer fraud laws-fall within "other terms and conditions" which states are allowed to regulate. Thus, state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332.

***9** *In re Southwestern Bell Mobile Systems, Inc.,* 14 F.C.C.R. 19898, 19908 (Nov. 24, 1999) (footnotes omitted). The FCC's consumer information website also makes clear, in its "commonly asked questions" section, that it does not regulate contractual matters between providers and customers:

> I'm having billing problems with my cellular provider; who can help me?
>
> The FCC does not regulate contractual arrangements with cellular providers, but does handle complaints about wireless service.

FCC Consumer & Governmental Affairs Bureau, http://www.fcc.gov/cgb/cellular.html.

Another federal district court, applying the Connecticut Unfair Trade Practices Act, found that

> the Federal Communications Act expressly reserves to the states the ability to regulate "terms and conditions of commercial mobile services" other than their rates. 47 U.S.C. § 332(c)(3)(A). Therefore ..., there is no alternative statutory scheme, either in Connecticut or at the federal level, to govern the non-rate setting business practices of [cellular] carriers.

In re Conn. Mobilecom, Inc., 2003 U.S. Dist. LEXIS 23063, at *15-16 (S.D.N.Y. Dec. 23, 2003).

Although this case is tangentially related to Defendant's rates, and state regulation of rates is preempted, 47 U.S.C. § 332(c)(3)(A), Plaintiff does not contest those rates generally. Rather, Plaintiff contends that Defendant double-billed him for a service he had already paid for. Thus, as described above, this is a dispute over Defendant's billing practices, an area over which the FCC has expressly arrogated to the states through laws such as the MCPA.

The "general transaction" at issue here was not "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Mich. Comp. Laws § 445.904(1)(a); *Smith,* 597 N.W.2d at 38. Therefore, Defendant's alleged misconduct is not exempt from the MCPA.

III. Conclusion

This case illustrates the importance of both the Michigan Consumer Protection Act and its class action mechanism. Because the class action waiver in Defendant's contract prevents the effective vindication of Plaintiff's statutory rights under the MCPA, it is unenforceable. The parties have agreed that upon such a finding, this case shall not be subject to arbitration.

Being fully advised in the premises, having read the pleadings, and for the reasons set forth above, the Court hereby DENIES Defendant's Motion to Compel Arbitration.

All Citations

Not Reported in F.Supp.2d, 2006 WL 2042512

Footnotes

1 The Court cited a commentary lamenting *Smith's* effect on what was once "one of the broadest and most powerful consumer protection acts in the country.... As a result of *[Smith],* the MCPA has entered a new era. Indeed, there may be little left of the power to protect consumers that the legislature had in mind when it passed the act." Gary M. Victor, *The Michigan Consumer Protection Act: What's Left after Smith v. Globe?,* 82 Mich. B.J. 22, 23-25 (2003). The Court also agreed with the Michigan Court of Appeals's decision in *Smith* "that under 'a common-sense reading' of the MCPA, 'authorized' should not include 'illegal.' " 2005 U.S. Dist. LEXIS 24644, at *21 (quoting *Smith v. Globe Life Ins. Co.,* 565 N.W.2d 877, 884 (Mich.Ct.App.1997), *rev'd,* 597 N .W.2d 28). But the Court recognized that "that is not the law in Michigan," and that "the Michigan courts' liberal definition of 'specifically authorized' under the MCPA's exemption provision" left very little room for consumer lawsuits under the MCPA. Recently, a panel of the Michigan Court of Appeals has "question[ed] the wisdom of ... *Smith,*" noting that it "liberally interpreted the phrase 'transaction or conduct specifically

authorized' to include any activity or arrangement permitted by statute." *Hartman & Eichhorn Bldg. Co. v. Dailey,* 701 N.W.2d 749, 753 (Mich.Ct.App.2005), *leave granted,* 712 N.W.2d 724 (Mich.2006).

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EXHIBIT 9

2006 WL 659347
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

John MCENTEE and Scott Ouellette, Plaintiffs–Appellants,
v.
INCREDIBLE TECHNOLOGIES, INC., Defendant–Appellee.

No. 263818.
|
March 16, 2006.

Synopsis
Background: Players of electronic golf game brought action against supplier of game to recover money lost while participating in contest that also provided an opportunity to win money. The Wayne Circuit Court dismissed players' claims for lack of standing. Players appealed.

Holdings: The Court of Appeals held that:

[1] claim under statute providing a civil remedy for money lost playing or betting on cards or dice was preempted by Gaming Control and Revenue Act, and

[2] Consumer Protection Act did not apply.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (2)

[1] Gaming and Lotteries Particular Contexts

Statute providing a civil remedy to gamblers for money lost "by playing or betting on cards, dice or by any other device in the nature of such playing or betting" did not enable players of electronic golf game to recover from supplier of the game the money they lost while participating in contest that also provided an opportunity to win money, even if contest constituted illegal gambling; golf game was a "gambling game" to the extent it was played for money, such that any claim for recovery of gambling losses under statute was preempted by the Gaming Control and Revenue Act. M.C.L.A. §§ 432.202(v), 432.203(3), 432.204a(1)(e), 432.207a, 750.315.

1 Case that cites this headnote

[2] Antitrust and Trade Regulation Exemptions and safe harbors
Gaming and Lotteries Trial

Players of electronic golf game who lost money while participating in gambling contest involving game could not bring action against supplier of game under Consumer Protection Act; golf game was subject to the exclusive regulatory authority of Gaming Control Board to the extent it was played for money, and Consumer Protection Act exempted any transaction or conduct specifically authorized under laws administered by a regulatory board. M.C.L.A. §§ 432.202(v), 432.207a, 445.904(1)(a).

Before: DAVIS, P.J., and CAVANAGH and TALBOT, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** In this action to recover monies allegedly lost to defendant through gambling, plaintiffs appeal as of right from the trial court's order dismissing plaintiffs' claims on the basis that plaintiffs lacked standing to bring this action under either MCL 750 .315 or the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* We affirm.

Defendant Incredible Technologies, Inc. (IT) develops, manufactures, markets, and sells electronic Golden Tee® arcade games, which are based on the sport of golf. The games feature a "Hole–n–Win" contest, in which a player

who pays to participate in the contest receives a specific sum of money for achieving a hole-in-one on a designated hole. Plaintiffs initiated this action to recover monies allegedly lost while playing Hole–n–Win, an activity that plaintiffs allege constitutes illegal gambling.

[1] Plaintiffs contend that they have standing to bring this action under MCL 750.315. We disagree.

A standing defense may be raised by a trial court *sua sponte,* as it was in this case. *46th Circuit Trial Court v. Crawford Co.,* 266 Mich.App. 150, 177–178, 702 N.W.2d 588 (2005). Whether a party has standing is a question of law this Court reviews de novo. *Rohde v. Ann Arbor Public Schools,* 265 Mich.App. 702, 705, 698 N.W.2d 402 (2005). Where a party's claim is governed by statute, the party must have standing as bestowed by statute. *46th Circuit Trial Court, supra* at 177, 702 N.W.2d 588, citing *In re Foster,* 226 Mich.App. 348, 358, 573 N.W.2d 324 (1997).

In addition, the interpretation and application of a statute is a question of law this Court reviews de novo. *Eggleston v. Bio–Medical Applications of Detroit, Inc.,* 468 Mich. 29, 32, 658 N.W.2d 139 (2003). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Title Office, Inc. v. Van Buren Co. Treasurer,* 469 Mich. 516, 519, 676 N.W.2d 207 (2004), quoting *In re MCI,* 460 Mich. 396, 411, 596 N.W.2d 164 (1999). In construing a statute, the court must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose. *Morris & Doherty, PC v. Lockwood,* 259 Mich.App. 38, 44, 672 N.W.2d 884 (2003) (citations omitted).

The language in MCL 750.315 expressly provides a civil remedy for a plaintiff who loses money to a defendant through playing or betting on cards, dice, or by any other device in the nature of such playing or betting. See *Raymond v. Green,* 194 Mich. 639, 161 N.W. 857 (1917); *Lassen v. Karrer,* 117 Mich. 512, 76 N.W. 73 (1898). However, where a plaintiff's cause of action arises out the playing of a game, machine, or equipment for money, we hold that the plaintiff's cause of action under MCL 750.315 is preempted by the Michigan Gaming Control and Revenue Act (MGCRA), MCL 432.201 *et seq.*

Under the MGCRA, the Legislature vested the Michigan gaming control board (MGCB) with exclusive jurisdiction over all matters relating in any way to the licensing, regulating, monitoring, and control of the non-Indian casino industry. *Papas v. Gaming Control Bd.,* 257 Mich.App. 647, 658–659, 669 N.W.2d 326 (2003). Under the MGCRA, the MGCB has expansive and exclusive authority to regulate all aspects of casino gambling in Michigan, including the duty to review casino license applications, promulgate rules and regulations to implement and enforce the act, provide for the levy and collection of penalties and fines for violation of the act or administrative rules, receive complaints from the public, and conduct investigations into the conduct of gambling operations to assure compliance with the act and to protect the integrity of casino gaming. MCL 432.204(17). And, under MCL 432.204a(1)(e), the MGCB has the power to "[a]dopt standards for the licensing of all person under this act, as well as for electronic or mechanical gambling games or gambling games, and to establish fees for the licenses."

***2** Further, the MGCRA applies to "all persons who are licensed *or otherwise participate in gaming under this act,"* MCL 432.203(4) (emphasis added). Under the MGCRA, "casino" is broadly defined as "a building in which gaming is conducted." MCL 432.202(g). "Gaming" means "to deal, operate, carry on, conduct, maintain, or expose or offer for play any gambling game or gambling operation." MCL 432.202(x). Further,

> "Gambling game" means any game played with cards, dice, equipment or a machine, including any mechanical, electromechanical or electronic device ... for money, credit, or for any representative of value ... but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player. [MCL 432.202(v).]

And, "gambling operation" means the conduct of authorized gambling games in a casino. MCL 432.202(w).

To the extent the Golden Tee games are played for money, the Golden Tee games are considered "gambling games" under the plain language of MCL 432.202(v). Consequently, the Golden Tee games, as well as the suppliers of the games, are governed by the MGCRA. MCL 432.207a. And, any building in which the Golden Tee games are operated, maintained, or exposed or offered for play is considered a casino and is

subject to the regulations promulgated by the MGCB under the MGCRA. MCL 432.202(g); MCL 432.202(x).

Any law that is inconsistent with the MGCRA does not apply to casino gaming. MCL 432.203(3). Thus, this Court has held that the MGCRA preempts inconsistent laws, including common law. *Kraft v. Detroit Entertainment, LLC,* 261 Mich.App. 534, 551–552, 683 N.W.2d 200 (2004). Therefore, we hold that plaintiffs' cause of action under MCL 750.315 is preempted by the MGCRA.

[2] Plaintiffs also contend that they have standing to bring this action under the MCPA. We disagree. The MCPA expressly exempts from its reach "[a] transaction or conduct specifically authorized under laws administered by a regulatory board ... acting under statutory authority of this state...." MCL 445.904(1)(a); *Kraft, supra* at 540, 683 N.W.2d 200. And, to the extent the Golden Tee games are played for money, the games and suppliers of the games are subject to the exclusive regulatory authority of the MGCB. Therefore, we hold that defendant is exempt from plaintiffs' MCPA claims.

We affirm.

All Citations

Not Reported in N.W.2d, 2006 WL 659347

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EXHIBIT 10

2019 WL 360732
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Steven HINDERER and Kathleen Hinderer, Plaintiffs-Appellants,
v.
Marcus SNYDER, Chelsea Builders, Inc., and Jason Eason, Defendants-Appellees,
and
Donald Barker, Defendant.

No. 339759
|
January 29, 2019

Washtenaw Circuit Court, LC No. 15-001131-CK

Before: Cameron, P.J., and Beckering and Ronayne Krause, JJ.

Opinion

Per Curiam.

***1** In this dispute arising from the construction of a substantial addition to a residential home, plaintiffs, Steven and Kathleen Hinderer, appeal the trial court's orders dismissing their claims against defendants Marcus Snyder, Chelsea Builders, Inc., and Jason Eason, for their work and involvement in the construction of the addition in 2009. [1] By March 2010, the Hinderers identified numerous problems with Chelsea Builders' work, and according to the Hinderers, Chelsea Builders refused to rectify the problems and did not complete the project. On November 6, 2015, the Hinderers filed their complaint against defendants. The trial court granted defendants' motion for summary disposition based on the applicable statute of limitations and laches. For the reasons more fully explained below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. PERIOD OF LIMITATIONS

The Hinderers first argue that the trial court erred when it dismissed their claims for breach of contract (Count I); breach of warranty (Count II); violation of the builders' trust fund act (Count III); fraud (Count IV); negligent construction (Count VII); and violation of the Michigan Consumer Protection Act (MCPA), see MCL 445.901 *et seq.* (Count VIII); on the ground that those claims were each barred by the applicable statutes of limitations.

A. STANDARD OF REVIEW AND LAW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg. Co., Inc. v. Gates Performance Engineering, Inc.*, 285 Mich. App. 362, 369; 775 N.W.2d 618 (2009). We also review de novo whether the trial court properly interpreted and applied the relevant statutes. *Pransky v. Falcon Group, Inc.*, 311 Mich. App. 164, 173; 874 N.W.2d 367 (2015).

A party is entitled to have the trial court dismiss a plaintiff's action when the claim is barred by the applicable statute of limitations. See MCR 2.116(C)(7). As this Court has explained, a party can establish that it is entitled to summary disposition under MCR 2.116(C)(7) in two distinct ways: it can show that immunity is apparent on the face of the pleadings or it can present evidence to establish that, notwithstanding the allegations in the plaintiff's complaint, there is no factual dispute that he or she is entitled to immunity as a matter of law. *Yono v. Dep't of Transp. (On Remand)*, 306 Mich. App. 671, 678-680; 858 N.W.2d 128 (2014), rev'd on other grounds, 499 Mich. 636 (2016).

B. CONTRACT AND WARRANTY CLAIMS

A person cannot "bring or maintain an action to recover damages or money due for breach of contract" unless the party brings the action within six years. MCL 600.5807(1), (9). [2] A breach of contract claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. That is, a breach occurs when the breaching party fails to perform as required under the agreement. See *Cordova Chemical Co. v. Dep't of*

Natural Resources, 212 Mich. App. 144, 153; 536 N.W.2d 860 (1995).

***2** In this case, the Hinderers alleged that the parties entered into an oral agreement for the construction of an addition to the Hinderers' home using the "broad outline of the draft contract dated November 16, 2009," but with the understanding that additional terms applied. Although the Hinderers alleged that the parties entered into the agreement, they did not allege that Snyder participated in any capacity other than as the duly authorized representative of Chelsea Builders. Indeed, even the alleged draft agreement the Hinderers attached to the complaint showed that the agreement was between Chelsea Builders and the Hinderers.[3] The Hinderers then alleged that "[d]efendants" breached the agreement in the "numerous ways" stated under their factual allegations, which included—but was not limited to—"refusing to complete the project," "demanding payments in excess of the amount agreed," "refusing to correct code violations," "failing to perform the work under the contractual standards," and by "failing to work in a manner so as to prevent damage to the existing structure and addition." The Hinderers similarly alleged, in relevant part, that "[d]efendants" expressly warranted the quality of the materials and workmanship and warranted that the materials and workmanship would comply with building codes and standards. The Hinderers further alleged that "[d]efendants" breached the warranties by providing substandard materials and performing substandard work.

The Hinderers allege that these acts or omissions occurred after the parties orally agreed to begin the project and after construction commenced on November 9, 2009. Assuming these allegations to be true and construing them in favor of the Hinderers, which this Court must do, see *Maiden v. Rozwood*, 461 Mich. 109, 119; 597 N.W.2d 817 (1999), the Hinderers alleged that the breach of the agreement and the warranties occurred on or after November 9, 2009. The Hinderers filed their original complaint on November 6, 2015, which means that—as alleged—their breach of contract and warranty claims were timely. See MCL 600.5807(9); MCL 600.5827. Therefore, to the extent that the trial court dismissed the Hinderers' breach of contract and warranty claims as untimely, it erred.

C. BUILDERS' TRUST FUND ACT

As for their claim under the builders' trust fund act, see MCL 570.151 *et seq.*, the Hinderers alleged that Chelsea Builders and Snyder were contractors for purposes of the act and that the Hinderers paid them more than $ 43,000 to purchase materials in the spring of 2009. They wrote that they continued to make scheduled payments, which totaled over $ 98,000. They further alleged that Chelsea Builders and Snyder did not use the money to purchase the materials that were to be used in the project or to pay laborers, subcontractors, or materialmen, and that they also appropriated the money for their own use in violation of the builders' trust fund act. More specifically, the Hinderers alleged that Chelsea Builders and Snyder failed to pay two subcontractors and failed to return the funds to the Hinderers.

This Court has held that the six-year period of limitations stated under MCL 600.5813 applies to a claim under the builders' trust fund act. See *DiPonio Constr. Co., Inc. v. Rosati Masonry Co., Inc.*, 246 Mich. App. 43, 56; 631 N.W.2d 59 (2001). A claim under the builders' trust fund act accrues when the contractor receives money for either the labor or materials necessary to make an improvement, appropriates the money to his or her own use, and fails to pay subcontractors or materialmen that the contractor engaged to furnish labor or provide materials. *Id.* at 57-58; see also *BC Tile & Marble Co., Inc. v. Multi Bldg. Co., Inc*, 288 Mich. App. 576, 585; 794 N.W.2d 76 (2010) (stating the elements of a claim under the builders' trust fund act).

On appeal, Chelsea Builders and Snyder argue that the Hinderers' claim under the act had to have accrued in the spring of 2009 because that was the period within which the Hinderers alleged that Chelsea Builders and Snyder received the funds to purchase materials for the project. The Hinderers, by contrast, argue that the claim accrued when Chelsea Builders and Snyder refused to refund the money or transfer the materials that it had purchased. Neither position is correct. Although the Hinderers suggested that Chelsea Builders and Snyder could be liable under the act for failing to purchase the materials that they agreed to purchase, or by failing to return the funds that were paid for that purpose, the act applies only when the contractor or subcontractor appropriates the money for his or her own use after having engaged a subcontractor or materialman to provide services or materials and leaves the subcontractor or materialman unpaid. See *BC Tile*, 288 Mich. App. at 585; see also MCL 570.152 (providing that it is unlawful for a contractor or subcontractor to appropriate funds paid to him or her for any purpose other than to first pay laborers, subcontractors, or materialmen). As such,

neither the failure to purchase the materials in advance of the project, nor the failure to return any funds that were not needed to pay laborers, subcontractors, or materialmen were a violation of the act. Because a contractor's failure to engage a subcontractor or purchase materials from a materialman does not violate the act, those failures cannot serve as the point at which such a claim accrues. See MCL 600.5827 (stating that a claim accrues when the wrong is complete). Therefore, to the extent that the Hinderers rely on those allegations to establish their claim under the builders' trust find act, they failed to state a claim upon which relief could be granted. See MCR 2.116(C)(8).

***3** Nevertheless, the Hinderers did allege that Chelsea Builders and Snyder accepted the money, appropriated it to their own use, and left two subcontractors unpaid. If Chelsea Builders or Snyder engaged the services of a subcontractor and used the money for a purpose other than to pay the contractors first, it violated the act. See *BC Tile*, 288 Mich. App. at 585; MCL 570.152. Because the Hinderers alleged that the two subcontractors provided services during the construction project, which they alleged to have begun on or after November 9, 2009, the Hinderers alleged a timely claim under the builders' trust fund act with regard to the failure to pay those two subcontractors. As such, the trial court erred to the extent that it determined that the Hinderers claim under the builders' trust fund act was untimely under the applicable six-year period of limitation. MCL 600.5813.

D. FRAUD

The Hinderers' fraud claims were also subject to a six-year period of limitations. See MCL 600.5813; *Boyle v. Gen. Motors Corp.*, 468 Mich. 226, 228 n.2; 661 N.W.2d 557 (2003). A claim of fraud accrues when the wrong was done—not when it was discovered, *Boyle*, 468 Mich. at 231-232, and the wrong is done when the plaintiff is harmed, *id.* at 231 n.5.

The Hinderers did not state with particularity whether and when they suffered any harm from the alleged misrepresentations. See MCR 2.112(B)(1) (providing that the party alleging fraud must state the circumstances constituting the fraud with particularity); *Cooper v. Auto Club Ins. Ass'n*, 481 Mich. 399, 414; 751 N.W.2d 443 (2008) (stating that every element of the fraud claim must be pleaded with particularity); see also *Frank v. Linkner*, 500 Mich. 133, 150; 894 N.W.2d 574 (2017) (stating that, to determine when a claim accrued under MCL 600.5827, courts must look to the harm alleged in the plaintiff's cause of action). The Hinderers did allege that some misrepresentations occurred before construction began and that others occurred after construction began. Construing the allegations in the light most favorable to the Hinderers, see *Maiden*, 461 Mich. at 119, any harm from the misrepresentations alleged to have occurred after construction began would have had to have occurred on or after November 9, 2009. Thus, the Hinderers' claims of fraud—while lacking in particularity with regard to the nature and timing of the harm actually suffered—nevertheless were timely to the extent that they involved misrepresentations that occurred during the construction project. See MCL 600.5813; *Boyle*, 468 Mich. 231-232. Moreover, as for the misrepresentations that the Hinderers alleged to have occurred before the construction began, they may have been able to amend their pleadings to more clearly state when the harm occurred, and leave to amend should be freely given to correct such deficiencies. See MCR 2.118(A)(2). Consequently, on this record, the trial court erred to the extent that it dismissed as untimely the Hinderers' claims of fraud that occurred during the construction project.

E. NEGLIGENT CONSTRUCTION OF AN IMPROVEMENT

Our Legislature provided that no "person" can "maintain an action to recover damages for injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of an improvement to real property ... against any contractor making the improvement, unless the action is commenced within" "[s]ix years after the time of occupancy of the completed improvement, use, or acceptance of the improvement." MCL 600.5839(1)(a). This period of limitations applies to tort actions; it does not apply to contract actions. See *Miller-Davis Co. v. Ahrens Constr., Inc.*, 489 Mich. 355, 370; 802 N.W.2d 33 (2011). In order for a claim to sound in tort when acting pursuant to a contract, the tortfeasor must have breached a duty that was separate and distinct from the duties imposed under the contract. See *Bailey v. Schaaf (On Remand)*, 304 Mich. App. 324, 332-340; 852 N.W.2d 180 (2014) (examining the distinction between contractual liability and tort liability), vacated on other grounds 497 Mich. 927 (2014). Indeed, our Supreme Court explained that it was error for this Court to expand the application of MCL 600.5839(1) to all actions brought against a contractor involving an improvement, including those brought for damage to the improvement itself. *Miller-Davis Co.*, 489 Mich. at 367.

***4** Under Count VII, which was titled "Negligence in Construction," the Hinderers alleged numerous breaches that they claimed caused various harms. The Hinderers alleged that Chelsea Builders and Snyder harmed their property through negligent construction practices. Specifically, they alleged that Chelsea Builders and Snyder failed to properly protect the property from the elements during construction, which harmed both the original structure and the improvements made. They similarly claimed that Chelsea Builders and Snyder used "excessive, damaging force," which damaged the property, and used "unsafe methods" in demolishing the sunporch to make room for the new addition. These claims, and similar ones stated under Count VII, to the extent that they state a claim at all, do not appear to involve harms "arising out of the defective or unsafe condition of an improvement." MCL 600.5839(1). Rather, as Chelsea Builders and Snyder argue on appeal, these claims appear to involve ordinary negligence, which would be subject to the three-year period of limitations stated under MCL 600.5805, as amended by 2011 PA 162, in addition to the statute of repose stated under MCL 600.5839(1).

Notwithstanding the apparent application of former MCL 600.5805(10), currently MCL 600.5805(2), to the defective or unsafe condition of an improvement, this Court has held that MCL 600.5839 established a six-year period of limitations and period of repose for all claims involving negligent workmanship during the construction of an improvement. See *Citizens Ins. Co. v. Scholz*, 268 Mich. App. 659, 665-671; 709 N.W.2d 164 (2005) (discussing what constitutes a defective or dangerous improvement subject to the six-year statute of repose and what constitutes ordinary negligence). The Court in *Citizens* relied heavily on MCL 600.5805, as amended by 2002 PA 715, and our Supreme Court's interpretation of that provision in *Ostroth v. Warren Regency, GP, LLC* (*Ostroth I*), 263 Mich. App. 1; 687 N.W.2d 309 (2004), aff'd 474 Mich. 36 (2006), to conclude that the Legislature intended MCL 600.5839 to apply to all actions arising from the construction of an improvement in addition to actions arising from the defective nature of the improvement itself. See *Citizens*, 268 Mich. App. at 664-665. Our Supreme Court noted that, under MCL 600.5805(14), as amended by 2002 PA 715, the Legislature stated that all claims against contractors shall be "as provided" in MCL 600.5839. *Ostroth v. Warren Regency, GP, LLC* (*Ostroth II*), 474 Mich. 36, 41; 709 N.W.2d 589 (2006), quoting former MCL 600.5804(14) (quotation marks omitted). Relying on that language, our Supreme Court concluded that the Legislature intended MCL 600.5839 to serve as both a statute of limitations and a statute of repose. *Id.* at 44-45.

Since the decisions in *Ostroth II* and *Citizens Ins.*, the Legislature amended MCL 600.5805 to no longer state that the claims against contractors shall be "as provided" by MCL 600.5839. Instead, MCL 600.5805, as amended by 2011 PA 162, stated under MCL 600.5805(15), currently MCL 600.5805(14), that the "periods of limitation under this section are subject to any applicable period of repose established in section [MCL 600.]5838a, [MCL 600.]5838b, or [MCL 600.]5839." With this amendment, the Legislature modified the statutory scheme to preclude MCL 600.5839 from being applied as a statute of limitations, clarifying that it was a statute of repose that should be applied in addition to any applicable period of limitations. Cf. *Ostroth II*, 474 Mich. at 44-45 (stating that there was no evidence that the Legislature intended MCL 600.5839 to be only a statute of repose and instead concluding that the Legislature intended that provision to be both a statute of limitations and repose). Because the periods of limitations are now subject to the period of repose stated under MCL 600.5839, see former MCL 600.5805(15), courts must apply both the applicable period of limitations and the applicable period of repose. As such, the Hinderers could not bring a claim involving negligent construction of an improvement against a contractor unless they brought the claim within three years after the claim first accrued, see former MCL 600.5805(1) and (10), and within six years "after the time of occupancy of the completed improvement, use, or acceptance of the improvement," MCL 600.5839(1)(a). Because any tort claim involving negligence during the construction of the improvement necessarily accrued before Chelsea Builders and Snyder stopped working on the property in April 2010, and the Hinderers did not bring the claims until November 2015, the claims stated under Count VII were untimely. See former MCL 600.5805(10).

***5** The trial court did not err to the extent that it dismissed the Hinderers' claims under Count VII as untimely under MCR 2.116(C)(7).

F. MICHIGAN CONSUMER PROTECTION ACT

The Hinderers also argue on appeal that their claims under the MCPA were timely under the applicable statute of limitation. The trial court, however, did not dismiss these claims as untimely under the applicable period of limitations. Instead,

it determined that Chelsea Builders and Snyder were exempt from the requirements of the MCPA and that the MCPA claims were barred by the doctrine of laches. Consequently, we need not address whether these claims were barred by the applicable period of limitations.

II. LACHES

A. STANDARD OF REVIEW

The Hinderers next argue that the trial court erred when it dismissed their claims under the equitable doctrine of laches. This Court reviews de novo a trial court's decision on a motion for summary disposition and reviews de novo whether the trial court properly applied an equitable doctrine to the facts of the case. See *Knight v. Northpointe Bank*, 300 Mich. App. 109, 113; 832 N.W.2d 439 (2013). "A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Dextrom v. Wexford Co.*, 287 Mich. App. 406, 416; 789 N.W.2d 211 (2010). This Court reviews a trial court's findings of fact in support of the application of the doctrine of laches for clear error. *Shelby Charter Twp. v. Papesh*, 267 Mich. App. 92, 108; 704 N.W.2d 92 (2005).

B. ANALYSIS

The doctrine of laches arose from the requirement that a complainant in equity must come to the court with a clean conscience, in good faith, and after acting with reasonable diligence. *Knight*, 300 Mich. App. at 114. "If a plaintiff has not exercised reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches." *Id.* Although timing is important, laches is not triggered by the passage of time alone; rather, it is the prejudice occasioned by the delay that justifies application of the doctrine to bar a claim. *Id.* at 114-115. The defendant bears the burden of proving that the plaintiff's lack of diligence prejudiced the defendant sufficiently to warrant application of the doctrine of laches. See *Yankee Springs Twp. v. Fox*, 264 Mich. App. 604, 612; 692 N.W.2d 728 (2004).

In their original motion for summary disposition, Chelsea Builders and Snyder argued that the doctrine of laches applied to bar all of the Hinderers' claims because the documentation the Hinderers submitted to the trial court and the other record evidence showed that, although they were aware of their claims six years earlier, they had inexplicably delayed bringing them. During that time, they proceeded to have contractors perform work and alterations to the home. In that way, the delay resulted in the loss of evidence, which prejudiced the defense.

In response, the Hinderers stated that photos, scans, and reports documenting the defects existed. Further, they had submitted some photos and reports that they claim document the condition of the property before any changes were made and offered Kathleen Hinderer's affidavit in which she averred that there was further documentation establishing the defective condition of the improvements. They also maintained that they advised Chelsea Builders and Snyder of the defects so as to allow them the opportunity to correct them. Finally, they asserted that the delay was not unreasonable because they were pursuing their claims against Chelsea Builders and Snyder through a state agency.

***6** In ruling on the original motion for summary disposition, the trial court characterized the Hinderers' delay as inexcusable and stated that it was reasonable to infer that significant evidence had been lost. The trial court, however, did not address the evidence that permitted an inference that the Hinderers' delay was reasonable in light of their efforts to secure compensation without proceeding to court, and it did not address the Hinderers' evidence that they sufficiently documented the construction work to allow Chelsea Builders and Snyder to present a reasonable defense, which implicated whether the delay prejudiced Chelsea Builders. The trial court also did not discuss whether Chelsea Builders and Snyder had the ability to obtain additional evidence in their defense by deposing the persons involved in the original and subsequent improvements.

In their second motion for summary disposition, Chelsea Builders and Snyder did not specifically raise the doctrine of laches. They argued that the trial court should dismiss the Hinderers' breach of contract, warranty, and fraud claims for the same reasons argued in their first motion for summary disposition, which included laches. The trial court granted the second motion for summary disposition and dismissed all of the Hinderers' claims except their MCPA claim. In granting the motion, the trial court mentioned laches, but it did not address the evidence in support of applying the doctrine of laches to bar the claims. It also did not discuss the possible factual dispute involving whether the doctrine could be properly applied.

Chelsea Builders and Snyder did address the issue of laches in their supplemental brief as it might apply to the Hinderers' claims under the MCPA. And the Hinderers reiterated their earlier arguments with regard to the doctrine of laches as it might apply to their MCPA claim. Specifically, they maintained that they had taken reasonable steps to assert their rights before resorting to the courts, which included filing a claim with Chelsea Builders' insurer and preserving the evidence before proceeding to complete the project. Chelsea Builders also discussed the prejudice prong of the doctrine of laches and presented evidence that the Hinderers' dramatically altered the property.

At the hearing to consider whether to dismiss the Hinderers' MCPA claims, the trial court discussed its decision to apply laches more specifically. It stated that it had not "seen and probably won't ever see another case as clear an example of laches." It agreed with defense counsel and stated that it believed that the Hinderers had "lulled" Chelsea Builders and Snyder into believing that they were just going to pursue their complaints with the state agency and the insurer. The trial court again did not carefully analyze the evidence implicating whether the Hinderers' delay in filing suit was reasonable and did not discuss the evidence tending to show that Chelsea Builders and Snyder were not prejudiced by the delay.

Chelsea Builders and Snyder had the burden to demonstrate that the Hinderers' claim should be barred under the doctrine of laches. *Yankee Springs Twp.*, 264 Mich. App. at 612. And whether to apply the doctrine of laches may depend on the resolution of factual disputes about the reasonableness of the delay and the prejudice occasioned by the delay. See *Eberhard v. Harper-Grace Hosps.*, 179 Mich. App. 24, 39-40; 445 N.W.2d 469 (1989). In this case, there was evidence that would permit a trial court sitting in equity to find that the Hinderers' delay was unreasonable and prejudiced Chelsea Builders and Snyder. But there was also evidence from which the trial court could have found that the Hinderers proceeded with due diligence or that the delay did not prevent Chelsea Builders or Snyder from defending the claims. Whether treated as a decision on a motion for summary disposition under MCR 2.116(C)(7) or (C)(10), there was a factual dispute on which reasonable minds may differ about whether the doctrine of laches should apply, and as such, this issue cannot be resolved on a motion for summary disposition. See *White v. Taylor Distributing Co., Inc.*, 275 Mich. App. 615, 630; 739 N.W.2d 132 (2007) (stating that trial courts may not resolve factual disputes or determine credibility in ruling on a motion for summary disposition).

***7** For the same reason, we decline to consider the Hinderers' argument that the doctrine of unclean hands bars Chelsea Builders and Snyder from asserting laches as a defense. See *Attorney General v. PowerPick Players' Club of Mich., LLC*, 287 Mich. App. 13, 52; 783 N.W.2d 515 (2010) (stating that one with unclean hands may not assert the equitable defense of laches). The record requires further factual development to determine whether that equitable doctrine might apply. See, e.g., *Mudge v. Macomb Co.*, 458 Mich. 87, 109; 580 N.W.2d 845 (1998). Further, although this Court has held that the equitable doctrine of laches applies to actions at law, see *Tenneco Inc. v. Amerisure Mut. Ins. Co.*, 281 Mich. App. 429, 456; 761 N.W.2d 846 (2008), our Supreme Court has stated that the equitable doctrine of unclean hands "is only relevant in equitable actions," see *Rose v. Nat'l Auction Group*, 466 Mich. 453, 467-468; 646 N.W.2d 455 (2002). Hence, it is unclear whether the equitable doctrine of unclean hands can be used in an action at law to defeat the application of laches.

The trial court erred to the extent that it applied the doctrine of laches to bar the Hinderers' claims without first holding a trial or evidentiary hearing to resolve the factual disputes underlying the proper application of that doctrine.

III. MCPA

A. STANDARD OF REVIEW

The Hinderers next argue that the trial court erred when it determined that Chelsea Builders and Snyder were exempt from the requirements of the MCPA and dismissed their MCPA claims in part on that basis. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg.*, 285 Mich. App. at 369. This Court also reviews de novo whether the trial court properly interpreted and applied the relevant statutes. *Pransky*, 311 Mich. App. at 173.

B. ANALYSIS

The Legislature prohibited certain "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade

or commerce" in the MCPA. MCL 445.903(1). However, it also provided that the MCPA does not apply to a "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1). The party claiming the exemption has the burden of proving it. MCL 445.904(4).

Our Supreme Court first examined the scope of this exemption in *Attorney General v. Diamond Mtg. Co.*, 414 Mich. 603; 327 N.W.2d 805 (1982). In that case, the Court had to determine whether Diamond Mortgage was exempt from the MCPA for claims involving home loans because it was licensed as a real estate broker, and the licensing act at the time, MCL 451.201 *et seq.*, as repealed by 1980 PA 299, contemplated that real estate brokers would negotiate such loans. *Id.* at 606, 616. The *Diamond* Court held that Diamond Mortgage was not exempt because, "[w]hile the license generally authorizes Diamond to engage in the activities of a real estate broker," it did not specifically authorize the conduct at issue. *Id.* at 617. The Court acknowledged that no act specifically authorizes "misrepresentations or false promises," but it disagreed that its construction rendered the exemption meaningless. *Id.* It explained that the exemption would apply even when a party attached such labels to a transaction or conduct if the underlying transaction or conduct had been specifically authorized under the laws administered by a regulatory board. *Id.*

In *Smith v. Globe Life Ins. Co.*, 460 Mich. 446; 597 N.W.2d 28 (1999), our Supreme Court returned to the exemption stated under MCL 445.904(1) and again rejected the contention that the exemption only applies when the allegedly wrongful conduct was itself authorized by law. The Court explained that the "relevant inquiry is not whether the specific misconduct alleged by the plaintiff" is specifically authorized by law, but rather "whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Id.* at 465.

***8** Our Supreme Court examined the meaning of the term "specifically authorized" as it applied to residential builders in *Liss v. Lewiston-Richards, Inc.*, 478 Mich. 203; 732 N.W.2d 514 (2007). The Court reiterated that the focus must be on the "general transaction" and whether it has been "explicitly sanctioned" by law and not whether the specific misconduct had been prohibited. See *id.* at 212-213. The Court concluded that residential home building was conduct that was exempt from the MCPA because the occupational code, specifically MCL 339.2401 *et seq.*, authorized residential home building. *Liss*, 478 Mich. at 214. The Court clarified that residential homebuilding was authorized under the occupational code because the code required the home builder to have a license and a license constituted formal permission to do something or carry on some business. *Id.* at 214 n.39. The Court also noted that there were only a limited number of instances where a "non-licensed builder" was permitted to act as a residential builder. *Id.* at 214. The Court concluded that, with limited exceptions, residential home building was a transaction specifically authorized under the occupational code:

> The clear import of the statutory scheme is that there are only a few instances where one can engage in the business of a residential home builder without having a license. Therefore, with limited exceptions, contracting to build a residential home is a transaction "specifically authorized" under the [Michigan Occupational Code], subject to the administration of the Residential Builders' and Maintenance and Alteration Contractors' Board. [*Id.* at 215.]

Notably, in both *Diamond Mtg.* and *Liss*, our Supreme Court emphasized that the defendant was either exempt or not exempt from the MCPA on the basis of the conduct that was specifically authorized for someone holding the relevant license. In *Diamond Mtg.*, the Court concluded that Diamond Mortgage was not exempt from the MCPA because its real estate broker's license did not authorize it to make loans. *Diamond Mtg.*, 414 Mich. at 617; see also *Smith*, 460 Mich. at 464 (recognizing that the transaction at issue in *Diamond Mtg.* was not exempt from the MCPA because the conduct was not specifically authorized under the defendant's real estate broker's license). By contrast, in *Liss*, the builder had a residential builder's license, which specifically authorized it to engage in the business of residential building and so it was exempt from the MCPA when engaged in such conduct. *Liss*, 478 Mich. at 214-215, 214 n.39.

In this case, the Hinderers alleged that Chelsea Builders and Snyder were engaged in the business of residential

construction and alteration but did not have a residential builder's license. Accepting those allegations to be true, see *Maiden*, 461 Mich. at 119, Chelsea Builders and Snyder were not specifically authorized by the occupational code to engage in residential building. As such, the exemption stated under MCL 445.904(1)(a) did not apply to the conduct at issue. *Liss*, 478 Mich. at 214-215; *Diamond Mtg.*, 414 Mich. at 617. Consequently, the trial court erred when it determined that the exemption stated under MCL 445.904(1)(a) applied because the "transaction or conduct" was "specifically authorized under laws administered by a regulatory board ...." The occupational code does not authorize persons to conduct residential building without a license.

On appeal, Chelsea Builders and Snyder maintain that the case law must be read to examine whether the conduct or transaction at issue was authorized under some regulatory scheme without regard to whether the individual engaging in the conduct or transaction held the requisite license that would allow him or her to engage in the conduct or transaction. We disagree. In *Diamond Mtg.*, our Supreme Court did not examine whether the issuing of loans secured by mortgages was an activity that was authorized under any regulatory scheme; rather, it examined whether the license held by the defendant in that case authorized the issuing of loans secured by mortgages and determined that it did not. Similarly, in *Liss*, our Supreme Court explained that it is the holding of a license that confers the authority to act under the regulatory scheme. Consequently, the relevant inquiry is not whether the conduct was authorized generally under some regulatory scheme, but whether the license actually held by the defendant authorized the general conduct or transaction at issue. It follows that a person who does not hold the license to engage in the relevant conduct cannot claim the exemption under MCL 445.904(1)(a). See *Liss*, 478 Mich. at 214-215; *Diamond Mtg.*, 414 Mich. at 617.

***9** The trial court erred when it determined that the exemption stated under MCL 445.904(1)(a) applied to the facts as alleged in this case. Therefore, it erred to the extent that it dismissed the Hinderers' claims on that basis, and we reverse this aspect of the trial court's decision.

IV. PIERCING THE CORPORATE VEIL

The Hinderers also argue that the trial court erred by dismissing their claim for piercing the corporate veil as stated under Count V of their complaint.

Corporations and other artificial entities are legal fictions. *Green v. Ziegelman*, 310 Mich. App. 436, 450; 873 N.W.2d 794 (2015). Courts indulge a presumption that the entity is separate and distinct from its owners absent some abuse of the corporate form. *Id.* at 451. A court sitting in equity may, however, pierce the veil of corporate structure and impose liability on the owners to prevent fraud or injustice. *Id.* "[P]iercing the veil of a corporate entity is an equitable remedy sparingly invoked to cure certain injustices" and not a separate cause of action. *Gallagher v. Persha*, 315 Mich. App. 647, 654; 891 N.W.2d 505 (2016). Whether to pierce the corporate veil depends on the specific facts of the each case, see *Rymal v. Baergen*, 262 Mich. App. 274, 293-294; 686 N.W.2d 241 (2004), and the proponent seeking to disregard the separate existence of the entity bears the burden to prove facts that would justify doing so, see *Green*, 310 Mich. App. at 454 (discussing the elements that the complainant must establish to justify disregarding an entity's separate existence). The party asking the trial court to disregard the separate existence of an entity may do so in his or her original complaint or may do so in a subsequent complaint after a judgment has been entered against the entity. See *Gallagher*, 315 Mich. App. at 665-666. Thus, a plaintiff must specifically ask the trial court to disregard the separate existence of an entity and must allege facts that, if true, would justify doing so.

In a separate count (Count V) of their third amended complaint, the Hinderers alleged that Snyder could be personally liable for the wrongs committed by Chelsea Builders because he was Chelsea Builders' officer at the time. They also alleged that the trial court could impose personal liability on Snyder because Snyder used Chelsea Builders as a "mere instrumentality" to commit frauds and wrongs on the Hinderers, which caused them to suffer an "unjust loss." They further alleged that he failed to maintain Chelsea Builders' corporate form, mingled his personal funds with the corporation's funds, and made improper distributions that left Chelsea Builders without assets to pay creditors. If found to be true, these allegations might justify the trial court's exercise of equitable power to disregard the separate existence of Chelsea Builders and impose personal liability on Snyder for any judgment against Chelsea Builders. See *Green*, 310 Mich. App. at 454. Accordingly, because we have concluded that the trial court erred when it dismissed some of the Hinderers' claims against Chelsea Builders, we agree that their claim that the trial court should disregard Chelsea Builders' separate existence remains a viable remedy.

V. CLAIMS AGAINST EASON

A. STANDARD OF REVIEW

Finally, the Hinderers argue that the trial court erred when it dismissed their claims against Eason, as stated under Count VI of their complaint, for failure to state a claim. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg.*, 285 Mich. App. at 369.

B. ANALYSIS

***10** A trial court should dismiss a claim under MCR 2.116(C)(8) when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. See *Maiden*, 461 Mich. at 119.

Under Count VI of their complaint, the Hinderers alleged generally that Eason participated in the events at issue by signing a draft version of an agreement on Chelsea Builders' behalf and by applying for the building permit that Chelsea Builders used in the improvement project at issue. They then conclude from these general allegations that Eason could be held personally liable for the "portion of the work not done and for the defects of the work actually done for which he pulled the permit as well as for all code violations and violations of law which occurred during the construction regarding the Plaintiff's project."

In Count VI, the Hinderers did not identify any viable common law or statutory cause of action against Eason. Although they alleged that Eason's signature appeared on a draft agreement, the Hinderers also alleged that they did not accept the draft agreement. As such, they failed to state a contract claim against Eason. See *Huntington Nat'l Bank v. Daniel J. Aronoff Living Trust*, 305 Mich. App. 496, 508; 853 N.W.2d 481 (2014) (stating that an essential element of a breach of contract claim involves proving that the parties actually entered into a binding agreement).

Similarly, although the Hinderers alleged that Eason engaged in wrongful conduct by applying for the building permit, they did not identify any common law or statutory cause of action that could make Eason liable for any and all harms arising from the project associated with the building permit. On appeal, the Hinderers suggest that Eason might be liable under MCL 339.2405(1), which provides that a corporation or other entity may obtain a license through a qualifying officer and states that the "qualifying officer is responsible for exercising the supervision or control of the building or construction operations" by the entity. However, the Hinderers did not make any allegations against Eason involving MCL 339.2405(1), and on appeal they maintain that Eason was not in fact a qualifying officer. Consequently, as alleged under Count VI, the Hinderers failed to state any claim against Eason that was cognizable under Michigan law.

Although the trial court did not specifically discuss the grounds for dismissing the claim against Eason, it had the authority to dismiss the claim against Eason on its own initiative because it was evident from the pleadings that he was entitled to judgment as a matter of law under MCR 2.116(C)(8). See MCR 2.116(I)(1) (providing that a trial court must "render judgment without delay" when the "pleadings show that a party is entitled to judgment as a matter of law").

The trial court did not err when it dismissed Count VI of the Hinderers' third amended complaint.

VI. CONCLUSION

For the reasons stated, we reverse the trial court's decision to dismiss the Hinderers' breach of contract, warranty, and fraud claims as untimely. We also reverse the trial court's decision to dismiss the Hinderers' claim under the builders' trust fund act to the extent that they alleged that Chelsea Builders and Snyder appropriated the funds for their own use. We affirm the trial court's decision to dismiss the Hinderers' negligent construction claims as untimely.

***11** We also reverse the trial court's decision to grant summary disposition on the ground that the Hinderers were guilty of laches; there is a question of fact as to whether laches apply, which could not be resolved on a motion for summary disposition. We also reverse the trial court's determination that Chelsea Builders and Snyder were exempt from application of the MCPA. The Hinderers' may continue to demand to pierce the corporate veil to the extent that the Hinderers have viable remaining claims against Chelsea Builders. Finally, we affirm the trial court's decision to dismiss Count VI of the Hinderers' complaint for failure to state a claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Because none of the parties prevailed in full, we order that none may tax costs. See MCR 7.219(A).

All Citations

Not Reported in N.W. Rptr., 2019 WL 360732

Footnotes

1 The Hinderers also named Donald Barker as a defendant on their original complaint, but they never served him. The trial court later dismissed him from the case, and he is not a party to this appeal.

2 The Legislature amended the statute effective May 7, 2018. The changes affected the numbering and wording of the relevant provisions but did not alter the substance. See 2018 PA 15.

3 The Hinderers did not allege that Eason entered into any agreement with them.