

STATE OF MICHIGAN
IN THE SUPREME COURT

MILJEVICH CORPORATION,

Plaintiff/Appellant,

v

NORTH COUNTRY BANK & TRUST,
a Michigan banking corporation,

Defendant/Appellee,

Supreme Court Docket No. _____
Court of Appeals Docket No. 268356
Trial Court File No. 04-000094-CK

David M. Savu (P19921)
Attorney for Plaintiff/Appellant
2001 Deer Lake Avenue, #5
Ishpeming, Michigan 49849
(906) 486-8394

Joseph C. Fisher (P24061)
Lawrence K. Kustra (P26005)
Brandt, Fisher, Alward & Roy, P.C.
Attorneys for Defendant/Appellee
1241 E. Eighth Street, Post Office Box 5817
Traverse City, Michigan 49696-5817
(231) 941-9660

134780

**DEFENDANT/APPELLEE'S BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE
TO APPEAL**

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DEFENDANT /APPELLEE'S COUNTER-STATEMENT OF QUESTION PRESENTED

1. Did the Court of Appeals correctly decide that Plaintiff/Appellant failed to establish a claim for relief on its breach of contract claim because it did not suffer any measurable damages as a result of Defendant/Appellee's breach of the agreement?

Plaintiff/Appellant answers "No."

Defendant/Appellee answers "Yes."

The Court of Appeals answers "Yes."

**DEFENDANT/APPELLEE'S COUNTER-STATEMENT IDENTIFYING JUDGMENT
APPEALED FROM AND RELIEF SOUGHT**

Defendant/Appellee accepts Plaintiff/Appellant's statement of the judgment appealed from.

The relief sought by Defendant/Appellee is a denial of Plaintiff/Appellant's Application for Leave to Appeal and an affirmation of the decision of the Court of Appeals dated August 16, 2007.

I. COUNTER-STATEMENT OF MATERIAL PROCEEDINGS

A. INTRODUCTION

This action concerns the trial court's interpretation and modification of a loan transaction between the parties. After paying the loan in full, Plaintiff/Appellant Miljevich Corporation (hereinafter "Miljevich") filed suit against Defendant/Appellee North County Bank and Trust, now known as mBank (hereinafter "Bank"), claiming that it had breached the loan agreement by failing to publish its internal prime rate of interest. The trial court concluded that the Bank had breached the loan agreement and was liable to Miljevich in an amount equal to the difference between the Wall Street Journal prime interest rate plus one and a half percent (1.5%) and the amount of interest charged by the Bank. The trial court entered a judgment against the Bank on January 31, 2006.

The Bank appealed the trial court's judgment to the Court of Appeals. In an unpublished opinion dated August 16, 2007 (Exhibit 1), the Court of Appeals reversed the trial court's decision and remanded for entry of a judgment of no cause of action in favor of Defendant/Appellee. The trial court entered a judgment of no cause of action in favor of Defendant/Appellee on August 22, 2007.

B. STATEMENT OF FACTS

Miljevich borrowed \$1,464,650 from the Bank pursuant to a Term Loan Agreement ("Loan Agreement") and an Installment Business Loan Note ("Note") dated December 21, 1998. The Note provided that Miljevich would pay interest on the unpaid principal balance of the Note at the rate of one and one-half percent (1.5%) above the Bank's internal prime rate as published by the Bank from time to time. Miljevich paid what the Note required for principal and interest, and satisfied the Note in full on September 3, 2003. (Tr. pg. 57, ln. 20-22; and pg. 59, ln. 6-8).

Miljevich's current President, Kathleen Miljevich ("Kathleen"), testified at trial that her husband, Eli Miljevich ("Eli"), created Miljevich in 1978. (Tr. pg. 31, ln. 16-18). Eli was the President of Miljevich until he passed away on October 27, 1999. (Tr. pg. 32, ln. 12, 15-16). Kathleen testified that Eli signed the Note on behalf of Miljevich (Tr. pg. 37, ln. 14-16), and Kathleen signed the Note as a guarantor. (Tr. pg. 34, ln. 15-16).

Kathleen made the Note payments to the Bank on behalf of Miljevich on a weekly basis because it was easier than paying the required \$28,000 per month. (Tr. pgs. 39-42). Kathleen typically paid \$7,300 per week, but would pay more if she could. (Tr. pg. 42). Kathleen also opened the mail for Miljevich that was mailed to 506 Brotherton in Wakefield, Michigan. She claimed, however, never to have seen the "Advice of Rate Change" notices that the Bank sent to Miljevich (Tr. pg. 45, ln. 22-24), notifying Miljevich of the changes to the Bank's internal prime interest rate and the corresponding changes to the Note interest rate.

Mr. Anthony Palumbo, a senior lender for the Bank, testified that the Bank had an internal prime interest rate in December of 1998, the month and year that the Bank and Miljevich executed the subject Loan Agreement. Mr. Palumbo explained that the Board of Directors of the Bank, on recommendation of the Bank's President, set the Bank's internal prime interest rate monthly. (Tr. pg. 69, ln. 5-10). Mr. Palumbo also testified that the Bank's internal prime interest rate differed from the Wall Street Journal prime interest rate in that the Bank's rate was always higher. (Tr. pgs. 69, ln. 22-25 and 77, ln. 20-22).

Mr. Palumbo further testified that when the Bank's prime interest rate was set each month, the changes were made in the Bank's computer system. The Bank then would issue notices to its senior loan officers and the Bank branches that the prime rate had changed. (Tr. pgs. 70, 77-78). He testified that the Bank's customers also could find out the Bank's prime interest rate by asking

a commercial lender who would know it. (Tr. pg. 116). The Bank's prime interest rate was not published in advertisements that ran on television or in a newspaper, nor was it advertised on the radio or displayed in the Bank's lobby. (Tr. pg. 118).

Nicole Tryan, Senior Loan Administrator for the Bank, testified that the Bank's prime interest rate would be input into the Bank's computer system whenever it changed. The computer system would then search for any note tied to the index that had been changed and generate a notice to the respective customers that the interest rate on their notes had changed. (Tr. pg. 123).

Despite the fact that Kathleen could not recall having received any rate change notices from the Bank, Miljevich paid exactly what it was supposed to pay under the Loan Agreement and Note. The certified public accountant for Miljevich, Thomas Richard Fleury, Sr. testified that he "tested some of the transactions to make sure that what they [the Bank] said their last rate increase was the same as what they were charging." (Tr. pg. 184, ln. 11-14). Of the transactions he tested, Mr. Fleury found *no* discrepancies. They were all correct. (Tr. pg. 184, ln. 15-16). In other words, the amount of interest paid by Miljevich is exactly what it had agreed to pay pursuant to the terms of the Note. Miljevich omits this information in its Application for Leave to Appeal.

After paying the loan in full, Miljevich filed suit against the Bank, alleging that it had breached the terms of the Note by failing to publish its internal prime interest rate as required by the Note. After conducting a bench trial, the trial court agreed that the Bank had failed to publish its prime interest rate. (Tr. pg. 197, ln. 1-4). The trial court then concluded that because the Bank did not publish its prime rate, this rate could not be applied as a matter of law. (Tr. pg. 204, ln. 15-20). As a result, the trial court applied a new rate and entered a judgment in Miljevich's favor for \$100,531.14, representing the difference between the Bank's internal prime rate and the Wall Street Journal's prime rate. (Tr. pg. 207, ln. 18-25).

In its ruling from the bench, the trial court found that the documents most germane to the issue before it were the Loan Agreement, the Note, and a third document (unidentified) that contained “the published prime rate of the Bank.” (Tr. pg. 197, ln. 9-13). The trial court found that the Loan Agreement and Note unambiguously provided that the interest to be paid on the loan was “[o]ne and one half percent per annum above the prime rate as published from time to time by the Bank as its prime rate.” (Tr. pg. 197, ln. 14-16, 23-25; and pg. 198, ln. 2-4 and 7).

The trial court, however, “considered and discarded” the unambiguously stated interest rate, finding “simply it would do violence to the agreement of the parties” to apply the interest rate set forth in the Loan Agreement and Note because it had never been published. (Tr. pg. 204, ln. 15-20). Having concluded that the Bank never published its prime rate (Tr. pg. 198, ln. 11-12), the trial court stated that it was “the court's duty. . . to supply a reasonable interest rate in the absence of a published interest rate as indicated by the definition contained in the Note.” (Tr. pg. 199, ln. 6-10.) The reasonable interest rate set by the trial court was the “Wall Street Journal Prime, plus 1.5 percent.” (Tr. pg. 203, ln. 6.) The trial court placed a higher degree of credibility on “Plaintiff's Exhibit number 10” (Tr. pg. 202, ln. 14-18), a document done by the Bank's loan review department (Tr. pg. 75, ln. 21-22), in arriving at an interest rate. Plaintiff's Exhibit 10 showed “a rate of Wall Street Journal Prime, plus 1.5 percent under the commitment information.” (Tr. pg. 203, ln. 3-6.) The trial court found “that that is a good indication from the Bank's perspective of what could be a reasonable interest rate to complete the loan agreement. . .” (Tr. pg. 203, ln. 6-9.) The trial court also found as supportive Mr. Palumbo's testimony “that New York equates to Wall Street Journal Prime, which is the industry standard.” (Tr. pg. 203, ln. 10-14.) Based upon these findings, the trial court changed the index interest rate set forth in the Loan Agreement and Note to the Wall Street Journal's prime rate and awarded Plaintiff the sum of \$100,531.14, “the difference between the Wall

Street Journal prime rate, and the amount of interest actually taking (sic) by the Bank.” (Tr. pg. 207, ln. 19-25).

The Court of Appeals reversed the trial court's decision finding that “the trial court failed to apply the plain language of the contract itself, and, thereby, failed to honor the intent of the parties.” *COA Opinion*, pg. 3. The Court of Appeals also concluded that Miljevich “failed to establish that it was entitled to any relief on its breach of contract claim” because it did not suffer any “measurable damages as a result of [the Bank's] breach of the agreement”, i.e. failure to publish its internal interest rate. *COA Opinion*, pgs. 4 and 5.

II. ARGUMENT

Did the Court of Appeals correctly decide that Plaintiff/Appellant failed to establish a claim for relief on its breach of contract claim because it did not suffer any measurable damages as a result of Defendant/Appellee's breach of the agreement?

A. STANDARDS OF REVIEW

Factual findings are reviewed for clear error, and conclusions of law are reviewed de novo. Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n, 264 Mich App 523, 531; 695 NW2d 508 (2004).

Issues concerning the proper interpretation of contracts and whether the contract language is ambiguous are questions of law that are subject to de novo review. Henderson v State Farm Fire & Casualty, Co., 460 Mich 348, 353, 596 NW2d 190 (1999); Archambo v Lawyers Title Ins. Corp., 466 Mich 402, 408, 646 NW2d 170 (2002); Port Huron Ed. Ass'n v Port Huron Area School Dist., 452 Mich 309, 323, 550 NW2d 228 (1996).

When a trial court has determined the issue of damages following a bench trial, appellate courts review the award for clear error which exists when the appellate court is left with a firm and

definite conviction that a mistake has been made. Marshall Lasser, P.C. v George, 252 Mich App 104, 110, 651 NW2d 158 (2002).

B. LAW AND ARGUMENT

The unambiguous language in the Note does not limit the Bank to a 1½% interest charge. No where in the Note does it state that the interest rate reverts to 1½% if the Bank defaults on any of the terms of the Note. Miljevich's arguments to the contrary are without merit.

The parties, the trial court and the Court of Appeals all agree that the Note is unambiguous. In its ruling, the trial court specifically found “no ambiguity in the language of the Note regarding the interest rate.” (Tr. pg. 197, ln. 14-16). Notwithstanding this unambiguity, the trial court adopted a completely diametrical opinion and erroneously “considered and discarded that [the interest rate] should be the internal published prime rate of the Bank because simply it would do violence to the agreement of the parties, in that that (sic) prime rate the Court has found as a matter of fact to have never been published, and therefore could not be applied.” (Tr. pg. 204, ln. 15-20.) The trial court found, as a matter of law, that the Bank had breached the Loan Agreement by failing to publish its internal prime interest rate. The Bank concedes it failed to publish its internal rate of interest. Notwithstanding the Bank's failure to publish, “[n]othing in the parties' agreement suggests that the parties intended any other interest rate to apply to the loan, even in the event [the Bank] failed to publish” its internal interest rate. *COA Opinion*, pg. 2. A plain reading of the unambiguous Note clearly reveals that no such default provision exists. If there is no ambiguity, the terms of a contract must be enforced as written. Stine v Continental Casualty Co., 419 Mich 89, 114, 349 NW2d 127 (1984). The Note expressly provided that the interest rate was the Bank's internal prime rate plus 1½% regardless of the Bank's failure to publish.

The Bank was not “limited to collecting interest at the rate of 1½% under the Note.” The unambiguous terms of the Note never contemplated such a result as is evidenced by the complete absence of any language to the contrary. The Bank’s breach of the Note in failing to publish its internal prime interest rate is, as to Miljevich, *damnum absque injuria* because the breach did not result in damages. Spiek v Michigan Department of Transportation, 456 Mich 331, 346, 572 NW2d 201 (1998). The common law doctrine of *damnum absque injuria* is a loss or injury which does not give rise to an action for damages against the person causing it. *Id.* at 346. This doctrine applies to the instant matter because Miljevich is in the same position today had the Bank published its interest rate or not. Miljevich paid exactly what it had contracted to pay in interest.

Miljevich's own expert witness, Thomas Richard Fleury, Sr., a certified public accountant, testified that of the transactions he tested, no discrepancy existed between the actual interest rate charged and what the Bank said was the interest rate. (Tr. pg 184, ln. 11-16). According to Mr. Fleury, the interest Miljevich paid on the loan was consistent with the Bank's prime rate plus 1½%, which is the rate the parties intended to apply to the loan. Miljevich paid no more in interest than it would have had the Bank published its internal prime interest rate to the general public. Miljevich omits any reference to Mr. Fleury's testimony in its Application for Leave to Appeal.

The instant matter is analogous to the Michigan Supreme Court case of Crawford v Cicotte, 186 Mich 269, 152 NW 1065 (1915), wherein it did not affirmatively appear that the plaintiff had lost any profits as a result of the breach of the contract by the defendants. The defendants’ breach of the contract was, as to the plaintiff, *damnum absque injuria* because there was “no intelligent basis upon which the jury could be instructed to measure the damages suffered by the plaintiff by reason of said breach.” *Id.* at 272. Also analogous is the case of Smith v Wiener, 267 Mich 36, 255 NW 157 (1934). In Smith, former partners in a partnership were not entitled to recover damages for

alleged fraud in disposition of partnership assets under the rule of *damnum absque injuria*. The Supreme Court opined that the former partners lost nothing of value because the partnership property, even if fairly appraised, would have been insufficient to liquidate the partnership debts. *Id.* at 39. As a result, it was a case of *damnum absque injuria*.

Likewise, Miljevich lost nothing of value and suffered no measurable damages by reason of the Bank's alleged breach of the Note. Even though the trial court concluded that Miljevich was entitled to damages, it did so erroneously by disregarding the unambiguous language of the Note and computing what it thought should have been the rate of interest. As a result of its errors, the trial court arrived at a purely subjective and fabricated amount of damages. Damages would be appropriate only if Miljevich had paid more than the rate stated in the Note, but this simply is not the case. Miljevich, along with all of the other non-defaulting customers whose loans had a similar interest rate, paid exactly what it was supposed to pay according to the Loan Agreement and the Note.

Anthony Palumbo, a senior lender for Bank, testified that during the pertinent period the Bank had primarily two interest rate indexes for its commercial loans – the Bank's internal prime rate and the Wall Street Journal prime rate. The Bank wrote some commercial loans using other interest rates, but mostly used its prime rate or the Wall Street Journal prime rate. (Tr. pg. 78, ln. 22-25; and pg. 79, ln. 1-4). Mr. Palumbo's testimony points out that the Miljevich loan was not the only one that utilized the Bank's internal prime rate as a basis for computing the interest to be charged against the loan. The Bank's Board of Directors systematically reviewed and revised its internal prime rate and issued notices to both its borrowers who were affected by the rate change and to its senior loan officers and the Bank branches that the prime rate had changed. (Tr. pgs. 70, 77-78 and 123). Mr. Palumbo's testimony further demonstrates that Miljevich did not suffer any damages

as a result of the Bank's alleged breach. Miljevich repaid its loan based upon the Bank's internal prime interest rate set forth in the Loan Agreement and Note, just as all of the Bank's other non-defaulting commercial borrowers with similar interest rate provisions did.

A fundamental precept of contract law is that the remedy for breach of contract focuses on making the non-breaching party whole. Corl v Huron Castings, Inc., 450 Mich 620, 544 NW2d 278, 280 (1996), *see also* Kewin v Massachusetts Mut., 409 Mich 401, 415, 295 NW2d 50 (1980). Miljevich did not need to be made whole because it did not suffer any loss as a result of the Bank's alleged failure to publish its interest rate. By awarding damages to Miljevich, the trial court refunded Miljevich \$100,531.14 of the interest it had paid and which the Bank was legally entitled to retain pursuant to the Loan Agreement. Miljevich was not made whole; it received a windfall by the trial court applying the Wall Street Journal interest rate. According to Michigan law, recovery on a breach of contract claim is allowed only for those damages that are proven with reasonable certainty. Joerger v Gordon Food Service, 224 Mich App 167, 175, 568 NW2d 365 (1997). Any uncertainty as to the fact of legal damages is fatal to recovery. Wolverine Upholstery Co. v Ammerman, 1 Mich App 235, 244, 135 NW2d 572 (1965).

The trial court clearly erred in determining that Miljevich suffered legal damages in this matter. In fact, Miljevich suffered no damages at all. Under the doctrine of *damnum absque injuria* Miljevich is not entitled to any amount of damages from the Bank, because it suffered no harm from the Bank's application of the expressly stated interest rate set forth unambiguously in the Note. The factual record developed during the trial in this matter supports this conclusion. Miljevich did not present any evidence of damages, i.e. detrimental reliance or lost opportunity, other than the interest rate differential, which is not a basis for damages because Miljevich paid exactly what it had

contracted with the Bank to pay. The Court of Appeals correctly concluded that Miljevich “failed to establish that it was entitled to any relief on its breach of contract claim.” *COA Opinion*, pg.5.

III. CONCLUSION

Miljevich borrowed in excess of one million dollars from the Bank. The parties executed a Loan Agreement and a Note, both of which the parties, the trial court and the Court of Appeals found to be unambiguous. The amount of interest charged against the Miljevich loan was the Bank’s internal prime rate plus one and one-half percent (1.5%), a rate commonly used by the Bank at that time for its commercial loans. Miljevich paid consistently on the loan until it was paid in full in September of 2003. The total amount of principal and interest paid by Miljevich was exactly that to which the parties had expressly agreed in the Loan Agreement and Note. Miljevich paid neither too much, nor too little.

After satisfying the Note in full, Miljevich sued the Bank for breach of contract, claiming that the Bank had failed to publish its prime rate. After a bench trial, the trial court agreed with the legally unsupportable argument of Miljevich and awarded it \$100,531.14. In arriving at this amount of damages, the trial court erroneously modified the interest rate charged in the Loan Agreement and Note after finding no ambiguity in either document concerning the interest rate or its method of calculation.

The Court of Appeals reversed the decision of the trial court concluding that Miljevich did not suffer any measurable damages as a result of the Bank's failure to publish its internal prime interest rate, and thus failed to establish that it was entitled to any relief on its breach of contract claim. The decision of the Court of Appeals is not clearly erroneous and will not cause material injustice to Miljevich. The Application for Leave to Appeal filed by Miljevich fails to state a ground upon which appeal to this Court is warranted by court rule or otherwise.

IV. REQUEST FOR RELIEF

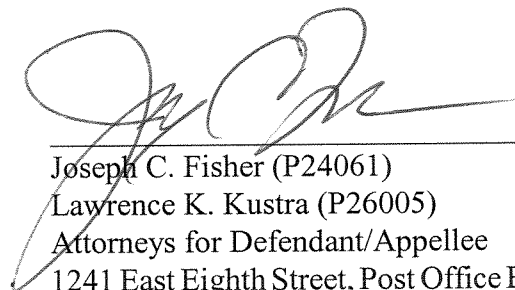
WHEREFORE, Defendant/Appellee respectfully requests this Honorable Court to deny Plaintiff/Appellant's Application for Leave to Appeal and affirm the decision of the Court of Appeals.

Respectfully submitted,

BRANDT, FISHER, ALWARD & ROY, P.C.

Dated: September 14, 2007

By:



Joseph C. Fisher (P24061)
Lawrence K. Kustra (P26005)
Attorneys for Defendant/Appellee
1241 East Eighth Street, Post Office Box 5817
Traverse City, Michigan 49696-5817
(231) 941-9660