

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. 134780
Court of Appeals Docket No. 268356
Trial Court File No. 04-000094-CK

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

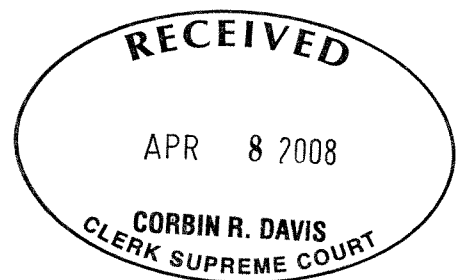


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I. DEFENDANT/APPELLEE'S ISSUES TO BE PRESENTED

The Supreme Court ordered oral argument on two issues:

1. Whether the Plaintiff/Appellant was damaged by the Defendant/Appellee's failure to publish its interest rate.

Plaintiff/Appellant answers, "Yes."

Defendant/Appellee answers, "No."

Court of Appeals answers, "No."

2. Whether the Defendant/Appellee indirectly published its interest rate by telling the Plaintiff/Appellant that the Wall Street Journal prime rate was the applicable interest rate.

Plaintiff/Appellant's answer is unknown to Defendant/Appellee.

Defendant/Appellee answers, "No."

The Court of Appeals did not address this issue.

II. ARGUMENT AND DISCUSSION

A. **Whether the Plaintiff/Appellant was damaged by the Defendant/Appellee's failure to publish its interest rate.**

The Court of Appeals found that the trial court committed error by applying a different rate of interest after finding the note to be unambiguous. The Court of Appeals determined that the rate of interest, though not published to the Plaintiff/Appellant ("Plaintiff"), was correctly applied to the note according to the calculations of Plaintiff's expert witness.

Both the trial court and the Court of Appeals found Defendant/Appellant ("Defendant") in breach of contract for failure to publish the rate of interest to the Plaintiff. The remedy for a breach of contract according to the Court of Appeals "is to place the non-breaching party in as good a position as if the contract had been fully performed." The Court of Appeals noted at page four of its decision that "Plaintiff alleges that it suffered damages because it was overcharged interest." The Court of Appeals went on to state, "However, the evidence does not support Plaintiff's assertion." Plaintiff has proven no damages because it did not pay an interest rate higher than which it had agreed to pay in signing the note.

The Court of Appeals recognized another assertion of Plaintiff, that being, "Had Plaintiff published its internal prime rate, the Plaintiff very well would have refinanced it's [sic] loan sooner than it did." The Court of Appeals concluded that the Plaintiff failed to present any evidence to support this assertion. The argument of the Plaintiff concerning this latter issue of had it known the interest rate, it very well would have gone elsewhere, is contradicted by the fact that Plaintiff did in fact go elsewhere to refinance the note. The record at the trial court is void of any mention of the new interest rate charged by the new lender, i.e. John Deere Credit Corp. It would be speculative to judge why Plaintiff refinanced, but worthwhile to note that it did so for whatever reason.

Plaintiff was not damaged. Plaintiff never proved any damages to the trial judge, and the trial judge never concluded that Plaintiff had been damaged. Rather, the trial judge concluded that he had to decide

“what damages to apply” as though the trial court had options. The trial judge failed to apply proper law in looking for a damage award because had he simply applied the calculations provided by Plaintiff's own expert witness, the trial judge would have found no damages.

In summary, the issue of damages is easily resolved despite Plaintiff's attempt to make it complicated. Both the trial court and the Court of Appeals found a breach of contract. Notwithstanding the breach, the Court of Appeals correctly found damages without injury because Plaintiff paid the exact amount it had agreed to pay.

B. Whether the Defendant/Appellee indirectly published its interest rate by telling the Plaintiff/Appellant that the Wall Street Journal prime rate was the applicable interest rate.

Defendant assumes from the manner in which this Court has framed the question that Plaintiff knew or learned of the Wall Street Journal prime rate in some roundabout manner other than a direct communication from Defendant. There is nothing in the record before this Court that Defendant ever communicated in any way (directly or indirectly) to the Plaintiff at any time prior to the signing of the note, nor at any time while the note was unpaid, that the Wall Street Journal prime rate was the applicable interest rate.

There are two occasions when the Wall Street Journal prime rate is mentioned in the record. The first occasion is during the testimony of Anthony Palumbo, a former employee of Defendant, who discussed what occurs in a “loan review”, which takes place *prior* to the signing of the note by the customer. Most importantly, Plaintiff never saw its “loan review”. (Please see Appendix F to Appellant's Application For Leave To Appeal.)

When Plaintiff signed the subject note, the agreed upon interest rate was:

“one and one-half percent (1½%) per annum above the “prime” rate as published from time to time by the Bank as its “prime rate” (the “Note Rate”), which rate may not be the lowest rate charged by the Bank to any of its customers, until maturity, whether by acceleration or otherwise, and at the rate of three percent (3%) per annum above the Note

Rate on overdue principal from the date when due until paid. Each change in the “prime” rate will immediately change the Note Rate.

The only other time the Wall Street Journal prime rate is mentioned in the record is in a letter from Defendant's counsel to Plaintiff's counsel erroneously stating that the Wall Street Journal prime rate was the effective rate. (Please see Appendix C to Appellant's Application For Leave To Appeal.) It should be noted that this information, although incorrect, was communicated to Plaintiff's attorney more than five years *after* the note was signed by Plaintiff and more than four months *after* the note was fully paid.

For the above stated reasons, Defendant asserts that Defendant did not “indirectly publish” its interest rate by telling Plaintiff (at any relevant time) that the Wall Street Journal prime rate was the applicable interest rate.

REQUEST FOR RELIEF

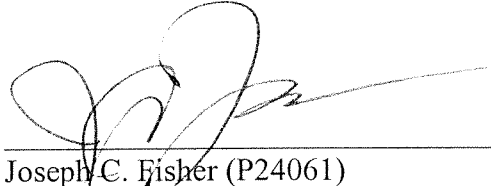
WHEREFORE, Defendant/Appellee respectfully requests this Honorable Court to deny Plaintiff/Appellant's Application for Leave to Appeal and affirm the decision of the Court of Appeals.

Respectfully submitted,

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

Dated: April 3, 2008

By:



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