S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

KATHRYN MEKLIR, Trustee of the KATHRYN MEKLIR REVOCABLE LIVING TRUST, JAMES GINZLER, HILLARY SHAW, Trustee of the HILLARY SHAW REVOCABLE LIVING TRUST, LINDA WINKELMAN, individually and as parent and guardian of JACKLYN WINKELMAN and JULIE WINKELMAN, ROGER WINKELMAN, individually and as parent and guardian of JACKLYN WINKELMAN and JULIE WINKELMAN, BRENDA WORTH PASSER, SANDFORD PASSER, NORMAN HUBERT, ESTHER HUBERT, WENDY HUBERT, IRA MONDRY, REX LANYI, and KOLMAN VERONA,

UNPUBLISHED
July 5, 2005

Plaintiffs-Appellants,

v

No. 253089
Oakland Circuit Court
LC No. 2001-031248-NZ

J.C. PENNEY COMPANY, INC., STANLEY G. FELDMAN, and STANLEY LTD, INC.,

Defendants-Appellees,

and

ROBERT J. BALL, individually and d/b/a RJB SALES, INC.,

Defendants.

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court’s order granting summary disposition in favor of defendants J.C. Penney Company, Inc., Stanley Feldman, and Stanley Ltd., Inc. (Stanley). We affirm in part, reverse in part, and remand.

Plaintiffs invested in the "J.C. Penney Investment Program," which was organized by defendants Feldman and Robert J. Ball, a retired J.C. Penney executive. Plaintiffs believed this was a legitimate program that had been organized for temporarily financing the purchase of merchandise pending its resale to defendant J.C. Penney Company, Inc. Ball and Feldman allegedly advised investors that J.C. Penney orders its merchandise from manufacturers outside the United States and that it had a strict cancellation policy whereby orders were automatically cancelled if the merchandise did not arrive by the scheduled date. In that instance, the manufacturers were left with the merchandise. According to plaintiffs, Ball and Feldman explained to them that J.C. Penney would still accept the late merchandise if it could purchase it at a discount from a third party, who first acquired it from the manufacturers. Ball acted as the intermediary in these transactions and created defendant RJB Sales, Inc. to conduct the transactions. Ball and Feldman informed plaintiffs that Thomas Hutchens, J.C. Penney's president and chief operating officer, was participating in this operation on behalf of J.C. Penney.

In their complaint, plaintiffs explained how their contributions were to be used to finance these transactions:

> K) Inasmuch as JC Penney would not pay for the merchandise for about six or seven weeks after RJB's cash purchase from the vendors, RJB would finance these transactions by getting investors. Accordingly, RJB needed investors to finance the cash purchases for the initial six to seven week period.
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> L) The JC Penney Investment Program was created as a means to finance these purchases until JC Penney would reimburse Ball/RJB for the transaction.
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> M) According to the JC Penney Investment Program, each investor would receive a 4% return on their investment for each transaction or seven week cycle, and an additional 1% would go to Feldman for administrative costs.
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> N) Depending on the availability of JC Penney merchandise purchase transactions, the total amount of returns would be approximately 28% over a period of one year.
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> O) Feldman would provide each investor a post-dated check for the profit, dated approximately six to seven weeks after the investment. At any time, an investor could either demand the return of their principal upon two weeks notice or just roll the principal amount over into the next merchandise purchase transaction.
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> P) Occasionally, JC Penney would demand a special quick turn around purchase which would generate a 4% return within one month followed by another 4% return the following month, totaling 8% return in an eight week period. Such opportunities occurred rather infrequently and on short notice, therefore, an investor would have to make an immediate decision to take advantage of such a transaction if it was presented.

Plaintiffs alleged that Feldman assured them that in the event the investment program ended, they would receive one hundred percent of their investment back without delay.

Plaintiffs allege that the investment program was in reality a Ponzi scheme[1] and that none of their money was ever invested in the program. In May 2000, plaintiffs were advised that RJB Sales had terminated operations. Although plaintiffs made formal demands for the return of their investment monies in December 2000, they did not receive their money back.

In 1997, the FBI and IRS launched an investigation into the J.C. Penney Investment Program. In approximately July 1998, the FBI and IRS informed J.C. Penney about Ball's and Feldman's use of J.C. Penney's name and Hutchens' involvement, as an agent, in the investment program. Plaintiffs allege that J.C. Penney had actual knowledge that Ball, Feldman, and Hutchens were operating the investment program to perpetrate a fraud on unsuspecting investors, and that J.C. Penney failed to warn the public about the fraudulent use of its corporate name.

Plaintiffs commenced this action against Ball and RJB Sales (the "Ball defendants"), Feldman, J.C. Penney, and Stanley, requesting compensatory damages of $3,700,016 for virtually every one of the claims asserted.

Plaintiffs moved for entry of a default judgment against the Ball defendants based on discovery violations. The trial court granted plaintiffs' motion and entered a default judgment against the Ball defendants in the requested amount of $11,737,908.72.[2] Defendants J.C. Penney, Feldman, and Stanley subsequently moved for summary disposition, arguing that because plaintiffs had obtained a default judgment against the Ball defendants for the entire amount of their damages, they were not entitled to pursue their tort claims against the remaining defendants.[3] Feldman and Stanley further argued that plaintiffs' contract claims should be dismissed because the alleged contract was unenforceable, inasmuch as it contained a usurious rate of interest. The trial court agreed and granted defendants' motions.

Plaintiffs first argue that the trial court erred in granting defendants summary disposition of their tort claims based on the prior default judgment against the Ball defendants. We review a trial court's decision on a motion for summary disposition de novo. *Pierson Sand and Gravel Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). The trial court granted defendants summary disposition on this issue, apparently under MCR 2.116(C)(7). Summary disposition may be granted under MCR 2.116(C)(7) when an action is barred due to the entry of a prior judgment. The standard for reviewing a motion under MCR 2.116(C)(7) is as follows.

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[1] A "Ponzi" or "Ponzi scheme" is defined as "a swindle in which a quick return on an initial investment paid out of funds from new investors lures the victim into bigger risks." *Random House Webster's College Dictionary* (1997). It is named after Charles Ponzi, who was the organizer of such a scheme during 1919 and 1920. *Id.*

[2] The court trebled plaintiffs' damages of $3,700,016, for a total of $11,100,048, and awarded $637,860.72 in prejudgment interest.

[3] Because the Ball defendants are not parties to this appeal, the term "defendants" shall collectively refer only to defendants J.C. Penney, Feldman, and Stanley.

> A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman,* 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 6; 687 NW2d 309 (2004), quoting *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).]

If the pleadings or other documentary evidence reveal that there is no genuine issue of material fact, the court must decide as a matter of law whether the claim is barred. *Holmes v Michigan Capital Medical Center,* 242 Mich App 703, 706; 620 NW2d 319 (2000).

Relying on MCL 600.2956 and MCL 600.2957, the trial court reasoned that plaintiffs could not apportion any of their damages to J.C. Penney, Feldman, or Stanley for the following reasons: 1) the liability of each defendant in a tort action is no longer joint, but several only; 2) liability among multiple defendants must be allocated in direct proportion to each defendant’s fault; and 3) plaintiffs obtained a default judgment against the Ball defendants for the full amount of their damages.

MCL 600.2956 provides that the liability of defendants in a tort action is several only, not joint. MCL 600.2957 provides that the trier of fact "shall" allocate the fault of each party. The term "shall" designates a mandatory provision. *Salter v Patton,* 261 Mich App 559, 565; 682 NW2d 537 (2004).

MCL 600.6304 provides that if there is no jury, the trial court is required to make findings regarding the total amount of each plaintiff’s damages, and the percentage of total fault of each responsible person. The statute provides, in relevant part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
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> (a) The total amount of each plaintiff's damages.
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> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under [MCL 600.2925d] regardless of whether the person was or could have been named as a party to the action.
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> (2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages

claimed.

> (3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or [MCL 600.2955a] or [MCL 600.6303] and shall enter judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in [MCL 600.2925d].
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> (4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). . . .
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> (8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

In the instant case, plaintiffs requested and received a default judgment against the Ball defendants in the total amount of their damages, but there was never any determination that the Ball defendants were solely at fault. Indeed, Feldman's attorney admitted that it was not clear to what extent each party was at fault because discovery had not been completed. Although the court may have determined the total amount of plaintiffs' damages as required by subsection MCL 600.6304(1)(a), it never made any findings concerning the percentage of the total fault of all persons who contributed to plaintiffs' damages as required by subsection (1)(b). Ultimately, it was the trial court's duty to allocate fault. See also *Holton v A+ Ins Associates, Inc*, 255 Mich App 318, 323-324; 661 NW2d 248 (2003). Because the trial court did not consider MCL 600.6304 when it entered the default judgment against the Ball defendants, that judgment did not preclude plaintiffs from proceeding on their claims against the remaining defendants.

This conclusion is reinforced by the Michigan Supreme Court's recent decision in *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44; 693 NW2d 149 (2005). The Court in *Gerling* concluded that while the forgoing statutes, adopted as part of tort reform legislation in 1995, eliminated joint and several liability in certain tort actions, they do not preclude every type of contribution claim. The Court held that a party may still seek contribution under MCL 600.2925a if "judgment has not been recovered against all or any of them," and the party seeking contribution has "paid more than his pro rata share of the common liability." *Gerling, supra* at 53. When the contribution statute is read in conjunction with MCL 600.6304(4), it requires that a party may not be compelled to pay damages in excess of the percentage of his fault, as found by the trier of fact under MCL 600.6304(1).

In *Gerling, supra* at 56-57, the Court clarified that MCL 600.6304

> applies specifically in those cases in which there is common liability among multiple tortfeasors, and it is inaccurate to interpret it as meaning that there is no

> longer any common liability among responsible tortfeasors. Rather, the common liability remains; what differ merely are the terms and conditions by which that liability must be satisfied. That is, by virtue of § 6304, in cases in which there has been a judgment, a tortfeasor need only pay a percentage of the common liability that is proportionate to his fault. Previously, where there had been a judgment, a tortfeasor could have been required to pay the entire amount of common liability and then seek contribution from other tortfeasors according to their degrees of fault.

The fact that this case involves a default judgment against some defendants does not affect the application of MCL 600.6304. That statute requires that, where there is common liability among multiple tortfeasors, each party is responsible only for his pro rata share of liability.

For these reasons, we conclude that the trial court erred when it relied on MCL 600.2956 and MCL 600.2957 to conclude that plaintiffs, having obtained a default judgment against the Ball defendants for the full amount of their requested damages, could not proceed with their action against defendants J.C. Penney, Feldman, and Stanley, where the court never determined, in accordance with MCL 600.6304, the percentage of fault of each party responsible for plaintiffs' damages.[4]

Defendant J.C. Penney argues, as an alternative ground for affirmance, that it was entitled to summary disposition pursuant to MCR 2.116(C)(10). *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). Because the trial court did not address this issue, it is not preserved. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003). We may, however, review it because it is a question of law, and the facts necessary for its resolution have been presented. *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 516; 686 NW2d 506 (2004).

Plaintiffs brought claims for fraud, misrepresentation, securities fraud, innocent misrepresentation, and negligent misrepresentation against J.C. Penney. Plaintiffs alleged that J.C. Penney was liable because it failed to warn plaintiffs that Feldman and Ball were not legitimately doing business with J.C. Penney, and that J.C. Penney had a duty to warn them of the Ponzi scheme upon learning of it from the FBI and the IRS. J.C. Penney sought summary disposition of plaintiffs' claims under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact about whether: 1) it ever made any false statements to plaintiffs concerning Feldman, Ball, or the investment program; and 2) it had a duty to notify plaintiffs of these defendants' activities.

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[4] Plaintiffs also argue that, even if summary disposition was properly granted with respect to their tort claims, the trial court erred in dismissing their claim for unjust enrichment, because such a claim does not sound in tort. Having concluded that the trial court erred in dismissing plaintiffs' tort claims, however, plaintiffs may proceed on their claim for unjust enrichment.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002).

The first element plaintiffs must establish to succeed on their fraudulent misrepresentation claim is that J.C. Penney was responsible for a material misrepresentation that was false. *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004). Plaintiffs have not identified any false statements made by J.C. Penney related to this investment scheme. Rather, plaintiffs only submitted evidence of misrepresentations by Ball and Feldman.

Plaintiffs appear to rely on silent fraud, which requires a duty to make a disclosure. Mere nondisclosure is insufficient. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000). A duty to disclose typically arises when the plaintiff make inquiries, to which the defendant makes incomplete replies that are truthful but omit material information. *Id.*

In the instant case, plaintiffs do not allege that they made any inquiries of J.C. Penney at any time about the investment program. Furthermore, they have not established that J.C. Penney had a duty to disclose the truth about Ball's and Feldman's activities after it became aware of the investment scheme. Indeed, there is no indication in the record that J.C. Penney was aware that plaintiffs were investors in the scheme. At most, J.C. Penney could have made a public announcement disavowing its association with the scheme, but resorting to public notice has no assurance of reaching all affected parties, and, absent any inquiries, we are not persuaded that it had a legal obligation to do so. Therefore, under the circumstances, plaintiffs cannot prevail on a claim of silent fraud.

For the same reasons, plaintiffs cannot establish negligent misrepresentation. Negligent misrepresentation requires justifiable reliance to one's "'detriment on information prepared without reasonable care by one who owed the relying party a duty of care.'" *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 502; 686 NW2d 770 (2004), quoting *Law Offices of Lawrence J Stockler, PC v Rose,* 174 Mich App 14, 30; 436 NW2d 70 (1989). Plaintiffs have not established that J.C. Penney made erroneous representations to them or that J.C. Penney owed them a duty of care.

Plaintiffs' allegations involve misrepresentations made only by Ball and Feldman, not J.C. Penney. Further, there is no basis for concluding that either Ball or Feldman were acting as agents for J.C. Penney. Plaintiffs did not submit any evidence that would allow a trier of fact to find that J.C. Penney performed any affirmative acts to lead plaintiffs to believe that Ball or Feldman were acting as its agent, under either a theory of actual or apparent authority. *Alar v Mercy Memorial Hosp,* 208 Mich App 518, 528; 529 NW2d 318 (1995); see also *Meretta v Peach,* 195 Mich App 695, 699-700; 491 NW2d 278 (1992).

Accordingly, J.C. Penney is entitled to summary disposition of the claims against it. Thus, while we reverse the trial court's order granting summary disposition of plaintiffs' tort claims against defendants Feldman and Stanley, we affirm the order of summary disposition with respect to defendant J.C. Penney, albeit for reasons different than the trial court. *Spiek v Dep't of*

Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998); *Gleason v Michigan Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Plaintiffs also alleged various contract-based claims against defendants Feldman and Stanley. The trial court granted summary disposition of these claims because it concluded that the underlying contract included a usurious rate of interest and, therefore, the entire contract was unenforceable. We conclude that the trial court erred in dismissing these claims in their entirety.

Initially, we agree with the trial court that the parties' agreement should be characterized as a loan because plaintiffs alleged that they were assured that their principal investment would be returned. In *People v Lee*, 447 Mich 552, 558; 526 NW2d 882 (1994), the Court held that "a loan only occurs when there is an obligation to repay." See also *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 588; 683 NW2d 233 (2004)(a loan involves an absolute right to repayment). The trial court also correctly concluded that the loans are subject to the criminal usury statute, MCL 438.41, which prohibits charging a rate of interest in excess of twenty-five percent.

Contrary to what the trial court concluded, however, a contract is not unenforceable because it contains a usurious rate of interest. Where a loan violates the usury statutes, lenders are only barred from recovering any interest, late fees, court costs, or attorney fees. MCL 438.32; *Lawsuit Financial*, *supra* at 590-591. Thus, plaintiffs are only barred from attempting to collect interest at the alleged rate of twenty-eight percent.[5] Because a usurious interest rate does not make an instrument void, plaintiffs are not barred from enforcing other provisions of the agreement, such as the alleged provision requiring the full return of their principal. *Shaw Investment Co v Rollert*, 159 Mich App 575, 580; 407 NW2d 40 (1987).

The trial court also held that because any underlying contract was unenforceable, plaintiffs could not prove privity to maintain their action for innocent misrepresentation. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 119; 313 NW2d 77 (1981). Because the parties' underlying agreement was not void, however, the trial court erred in dismissing plaintiffs' innocent misrepresentation claim against defendants Feldman and Stanley. *Shaw Investment Co, supra* at 580.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard A. Griffin

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[5] We find no merit to plaintiffs' claim that MCL 438.31 authorized the higher rate of interest. Plaintiffs have failed to show that this statute is applicable to this case.