STATE OF MICHIGAN

COURT OF APPEALS

PAOLO SCALICI and VICTORIA SCALICI,

Plaintiffs-Appellants,

v

BANK ONE, NA and AMY OKOROAFO,

Defendants-Appellees.

UNPUBLISHED
September 20, 2005

No. 254632
Kent Circuit Court
LC No. 03-001356-CK

THEODORE FORMAN, THOMAS FOWLER, RODNEY MCGRAIN, JUANITA MCGRAIN, JAMES A. ROPICKY, SUSAN SCALICI, BRADLEY WILDBERG, KRISTAN WILDBERG, BRUCE OLLMAN, and SUSAN OLLMAN,

Plaintiffs-Appellants,

v

BANK ONE, NA and AMY OKOROAFO,

Defendants-Appellees.

No. 254633
Kent Circuit Court
LC No. 03-001355-CK

TERRY PALAZZOLO, JESSEE BAYS, AND GARY MIDDLETON,

Plaintiffs-Appellants,

v

BANK ONE, NA and AMY OKOROAFO,

Defendants-Appellees.

No. 254634
Kent Circuit Court
LC No. 03-001289-CK

Before: Smolenski, P.J., and Murphy and Davis, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs appeal as of right the trial court's dismissal of their claims with prejudice for failure to state a claim on which relief could be granted. MCR 2.116(C)(8). We affirm.

I. Facts and Procedural History

Plaintiffs' claims against defendants arose out of their participation in an investment scheme with Daniel Broucek, who was doing business under the name of Pupler Distributing Company (Pupler). Pursuant to the investment scheme, plaintiffs would lend money to Pupler in exchange for a promissory note and a post-dated check. Under the terms of the promissory note, plaintiffs would receive the principal amount of the loan along with a "financing fee" on the maturity date of the loan. The checks issued with the promissory notes were written for the full amount of the principal plus the "financing fee" and were post-dated to the maturity date of the loan. The post-dated checks were drawn on Pupler's account with defendant Bank One, NA (Bank One). By November of 2002, Pupler's account with Bank One was frozen and, after Broucek entered involuntary bankruptcy, plaintiffs were left holding worthless promissory notes and checks.

In February of 2003, plaintiffs filed their respective suits against defendants. Plaintiffs claimed they would not have "invested" with Pupler had it not been for the misrepresentations of Bank One's employees, including primarily the representations of defendant Amy Okoroafo, who was the banking center manager for one of Bank One's branches. Based on the alleged misrepresentations and other theories, plaintiffs argued defendants should be liable for the losses plaintiffs sustained as a result of investing in Pupler. In each case, Bank One responded by filing a motion for a more definite statement wherein it asked the court to require plaintiffs to attach copies of the notes and checks upon which plaintiffs based their claims, as required by MCR 2.113(F)(1). After plaintiffs filed amended complaints with copies of the promissory notes and, in some cases, copies of the checks attached, Bank One filed a motion for summary disposition under MCR 2.116(C)(8).[1] In these motions, Bank One argued plaintiffs' claims were based on losses sustained after their criminally usurious loans became uncollectible and, therefore, the claims were unenforceable under Michigan's wrongful conduct rule. On July 10, 2003, the trial court held a joint hearing on this issue.[2] The trial court agreed that plaintiffs' claims were barred by the wrongful conduct rule and granted summary disposition in favor of defendants under MCR 2.116(C)(8). Plaintiffs then appealed as of right.

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[1] In each case, Okoroafo filed a motion under MCR 2.116(C)(8), which relied upon Bank One's law and arguments.

[2] While the three cases were not consolidated until this appeal, see *Scalici v Bank One*, unpublished order of the Court of Appeals, entered May 10, 2004 (Docket No 254632), all three were assigned to the same trial court and were handled jointly for judicial efficiency.

II. Standards of Review

This Court reviews de novo the resolution of a summary disposition motion. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Id.*; MCR 2.116(G)(5). All well-pleaded factual allegations in support of the claim are accepted as true and construed in the light most favorable to the nonmoving party. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

This Court also reviews de novo the proper interpretation of a statute. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 157; 627 NW2d 247 (2001). This Court begins the interpretation of a statute by examining the language of the statute itself. *Id.* at 158. If the language is not ambiguous, the court shall not construe it, but rather will enforce it as written. *Id.* Where ambiguity exists, "this Court seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished." *Id.* Furthermore, an act must be construed as a "whole to harmonize provisions and carry out the purpose of the Legislature." *Id.*

III. Analysis

As a preliminary matter, we note that the wrongful conduct rule does not attack plaintiffs' prima facie cases, but rather seeks to foreclose plaintiffs from proceeding for reasons unrelated to their prima facie cases. For this reason, the wrongful conduct rule is properly understood to be an affirmative defense. *Campbell v St John Hosp*, 434 Mich 608, 615-616; 455 NW2d 695 (1990). Normally, the defendant has the burden of establishing the existence of an affirmative defense. *Nationwide Mut Ins Co v Quality Builders, Inc*, 192 Mich App 643, 646; 482 NW2d 474 (1992). However, where a complaint shows on its face that relief is barred by an affirmative defense, the trial court may dismiss the complaint for failing to state a claim on which relief can be granted. See *Rauch v Day and Night Mfg Corp*, 576 F2d 697, 702 (CA 6, 1978); see also, e.g., *Glazier v Lee*, 171 Mich App 216; 429 NW2d 857 (1988) (granting summary disposition under MCR 2.116(C)(8) based on the wrongful conduct rule). In the present case, the promissory notes, which are the basis of plaintiffs' losses, were attached to their respective amended complaints and became part of the pleadings. See MCR 2.113(F)(2). Consequently, the trial court could properly consider whether the wrongful conduct rule barred plaintiffs' claims when ruling on defendants' motions for summary disposition under MCR 2.116(C)(8). However, the relevant inquiry remains whether any factual development under the facts pleaded by plaintiffs could possibly justify recovery. *Maiden*, *supra* at 119.

A. The Wrongful Conduct Rule

Under Michigan's wrongful conduct rule, a plaintiff's claim will be barred if it is based, in whole or in part, on the plaintiff's own illegal conduct. *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995). This is true even where the defendant has participated equally in the illegal activity. *Id.* at 559. In *Manning v Bishop of Marquette*, 345 Mich 130, 133; 76 NW2d 75 (1956), our Supreme Court succinctly stated the rule: "Our doors are open to both the

virtuous and the villainous. We do not, however, lend our aid to the furtherance of an unlawful project, nor do we decide, as between 2 scoundrels, who cheated whom the more." The Court in *Orzel* noted that the rationale behind the wrongful conduct rule is rooted in public policy considerations. *Orzel*, *supra* at 559. The Court explained,

> If courts chose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties. [*Id.* at 559-560 (citations omitted).]

However, the Court in *Orzel* also noted that the wrongful conduct rule is a general rule and that there are limitations and exceptions to its application. *Id.* at 561.

There are two limitations on the application of the wrongful conduct rule. First, the plaintiff's conduct must be mostly or entirely prohibited by a penal or criminal statute and must constitute sufficiently serious misconduct to warrant application of the wrongful conduct rule. *Id.* at 561. Where the plaintiff's conduct amounts to a violation of a safety statute, that violation will not be sufficient to bar his or her claim. *Id.* Second, "a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." *Id.* at 564.

In addition to these limitations, there are two exceptions that will preclude application of the wrongful conduct rule to bar a plaintiff's claims: the differing degrees of culpability exception and the statutory basis for recovery exception. Under the first exception, where the "plaintiff has engaged in serious illegal conduct and the illegal conduct has proximately caused the plaintiff's injuries, a plaintiff may still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries . . . ." *Id.* at 569. The second exception applies where the plaintiff alleges the defendant violated a statute, which, either explicitly or implicitly, allows the plaintiff to recover for injuries suffered as a result of the violation. *Id.* at 570.

B. The Application of the Wrongful Conduct Rule

Plaintiffs first argue that the trial court erred by granting summary disposition under MCR 2.116(C)(8) based on the wrongful conduct rule where facts could be developed that would demonstrate that the criminal usury statute, MCL 438.41, did not prohibit their conduct. Specifically, plaintiffs state, because the promissory notes did not mention an interest rate, but rather referred to a "financing fee" and because they thought they were dealing with a corporation, they could not be found to have knowingly charged simple interest in excess of 25% per year without being authorized or permitted by law to do so. Consequently, plaintiffs contend, the first requirement for application of the wrongful conduct rule could not be met. We disagree.

Under MCL 438.41,

> [a] person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both.

Hence, according to its plain language, a person is guilty of violating MCL 438.41 when they charge, take or receive money or other property as interest on a loan, while knowing that the interest charged, taken or received exceeded a simple interest rate of 25% per year.

In the present case, plaintiffs claim they were unaware that the "financing fee" referenced in the promissory notes attached to their amended complaints, constituted interest and, therefore, did not knowingly charge, take or receive simple interest in excess of 25% per year. We find this argument to be disingenuous. According to plain usage, a "fee" is "a sum charged or paid, as for professional services or for a privilege." *Random House Webster's College Dictionary* (1992). Likewise, "financing" is the "act of obtaining or furnishing funds for a purchase or enterprise." *Id.* Hence, in the context of these promissory notes, which clearly involve the lending of money,[3] the "financing fee" is a sum charged by the lender (i.e. plaintiffs) for the furnishing of funds to the borrower (i.e. Pupler). This is synonymous with the charging of interest on a loan. See *id.* (defining the word "interest" as "a sum paid or charged for the use of money or for borrowing money."). Furthermore, many of the promissory notes have a notation at the bottom that clearly identifies the portion of the payment that constitutes the repayment of principal and the portion that constitutes the payment of interest. Finally, while the notes do not directly state the applicable annual percentage rate, the fact that the rate of return invariably exceeded an annual rate of 25% was self-evident from the amounts listed on the notes.[4] Consequently, the promissory notes attached to the pleadings clearly indicate that plaintiffs knowingly charged, took or received interest on a loan at a rate exceeding 25% at simple interest per annum contrary to MCL 438.41.

Plaintiffs also state that they were unaware that Pupler was not a valid corporate entity when the notes were executed. Plaintiffs argue that, because they believed Pupler was a corporate entity and corporations are permitted by MCL 450.1275 to agree in writing to rates of interest in excess of the legal rate, the notes did not violate MCL 438.41. We disagree.

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[3] While plaintiffs repeatedly refer to these transactions as "investments", the promissory notes clearly state that Pupler will be in default if it fails to pay the principal and "financing fee" upon the maturity of the note. The use of the word principal contemplates the repayment of a loan.

[4] By way of example, in a note executed on October 28, 2002, Pupler promised to pay plaintiff Susan Scalici $880,000 on November 14, 2002. The note identified $80,000 of the payment as the "financing fee." Hence, on its face the note purports to pay a 10% return on the principal amount over a loan period of 17 days. No reasonable person could be unaware that a 10% return over a period of 17 days amounted to an annual rate of return in excess of 25%.

MCL 450.1275, which is part of the Business Corporation Act, MCL 450.1101 *et seq*, states:

> A domestic or foreign corporation, whether or not formed at the request of a lender or in furtherance of a business enterprise, may by agreement in writing, and not otherwise, agree to pay a rate of interest in excess of the legal rate and the defense of usury shall be prohibited.

Under the plain meaning of this statute, one of the powers possessed by corporations is the power to agree to pay a rate of interest in excess of the legal rate. However, while the statute permits corporations to agree to pay potentially usurious interest, nothing within this language necessarily absolves the corporation's lenders of criminal liability under MCL 438.41. Furthermore, this grant of power is consistent with MCL 438.61, which creates exceptions to the usury statutes for loans made to a business entities. Under MCL 438.61(2), a limited class of lenders, such as banks, may lawfully charge a business entity any rate of interest, notwithstanding both the civil and criminal usury statutes.[5] Conversely, while MCL 438.61(3) does allow persons other than those identified in MCL 438.61(2) to charge a business entity an interest rate in excess of the civil usury statutes, it also provides that the interest rate charged may not exceed the criminal usury limits. Thus, while corporations do have the power to agree to pay a rate in excess of the legal rate, only certain classes of lenders may actually charge a rate in excess of the rate provided by MCL 438.41 without incurring criminal liability. The provision for continued criminal liability under MCL 438.61(3) for persons who charge business entities an interest rate in violation of MCL 438.41 directly contradicts plaintiffs' contention that MCL 450.1275 removes plaintiffs' loans from operation of the criminal usury laws. Consequently, the trial court properly determined that plaintiffs violated MCL 438.41 and that this violation warranted application of the wrongful conduct rule.

Plaintiffs next argue there was an insufficient causal nexus between the charging of interest in excess of 25% and their losses to warrant application of the wrongful conduct rule. Specifically, plaintiffs contend that their losses were incurred because Pupler was a bad investment and not because of the rate of interest charged. We disagree.

In order to bar a plaintiff from recovery under the wrongful conduct rule, the injury suffered "'must be traceable to his own breach of the law and the breach must be an integral and essential part of his case.'" *Manning*, *supra* at 136, quoting *Meador v Hotel Grover*, 193 Miss 392, 405, 406; 9 So2d 782 (1942). In the present case, plaintiffs' losses directly resulted from their inability to collect the sums due on the promissory notes received from Pupler. While plaintiffs claim the notes are merely evidence of their "investment" in Pupler and that the actual losses were sustained because Pupler was not a sound investment, the reality is plaintiffs' entire case arises out of their decision to lend Pupler money, which loans Pupler was unable to repay. Indeed, plaintiffs cannot even establish their losses without the notes. In addition, plaintiffs' attempt to minimize the role the usurious interest rate played in the investment scheme by

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[5] The civil usury statutes are MCL 438.31 and MCL 438.32. The criminal usury statutes are MCL 438.41 and MCL 438.42.

emphasizing the role of Bank One's employees in convincing plaintiffs to loan the money to Pupler is unconvincing. Even accepting that Bank One's employees influenced plaintiffs' decisions to loan money to Pupler, a significant factor in any decision to loan money will be the rate of return. Given the staggeringly high rate of return for most of the notes, one can reasonably conclude that the rate of return was a significant motivational factor for plaintiffs. As the trial court aptly noted, "—a lot of money can be made if you're willing to trip over a few penal statutes along the way." Hence, we conclude that plaintiffs' claims are directly and causally related to their decision to engage in usurious lending. Therefore, there is a sufficient causal nexus between plaintiffs' illegal conduct and the losses suffered to warrant application of the wrongful conduct rule.

Because it is clear from plaintiffs' pleadings that their losses are causally linked to their engagement in serious misconduct prohibited by a penal or criminal statute, the trial court properly concluded that the wrongful conduct rule applied to their claims.

C. The Exceptions to the Wrongful Conduct Rule

Plaintiffs next argue that, even if a penal or criminal statute prohibited their conduct and there were a causal connection between that conduct and their losses, their claims should not be barred because both exceptions to the wrongful conduct rule apply. Specifically, plaintiffs claim defendants' conduct is more culpable than their own and recovery is explicitly or implicitly permitted by statute. We disagree.

In discussing the nature of the culpability exception to the application of the wrongful conduct rule, the Court in *Orzel* noted that a plaintiff might still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries. *Orzel*, *supra* at 569. However, the Court explained that such cases arise when the plaintiff has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age. *Id.* In interpreting this language, the Court in *Stopera v DiMarco*, 218 Mich App 565, 571-572 n 5; 554 NW2d 379 (1996) stated,

> As we stressed in the preceding paragraph, this case involves a defendant who was significantly more culpable than the plaintiff. We consider this necessary for application of the culpability exception. In its discussion of the applicability of the exception, the *Orzel* Court listed only situations where a defendant was egregiously more at fault than a plaintiff, *Orzel*, *supra* at 569, without suggesting that a slight difference in the degree of culpability would be sufficient for its application. Further, to apply the culpability exception in cases where a defendant is only slightly more blameworthy would likely eviscerate the wrongful conduct rule entirely; presumably, a plaintiff will almost always be able to argue that, if the allegations of a complaint are proved, a defendant's misconduct will be shown to be at least somewhat greater than the plaintiff's. . . .

Hence, in order for plaintiffs to assert this exception, defendants must be significantly more culpable than plaintiffs for the losses suffered by plaintiffs.

In the present case, plaintiffs cannot demonstrate that defendants' actions make them more culpable than plaintiffs, let alone significantly more culpable. First, as the trial court noted,

plaintiffs pleaded that defendants' conduct was tortious whereas plaintiffs' conduct was clearly felonious. In addition, defendants' culpability is limited to their role in convincing defendants to participate in the Pupler investment scheme. However, the final decisions to enter into usurious loan agreements with Pupler and continue to reinvest with Pupler, were made by the individual plaintiffs. Therefore, while plaintiffs might be able to develop facts that demonstrate defendants' culpability, and may even be able to demonstrate that defendants were equally culpable, we conclude that there are no factual developments which could lead to the conclusion that defendants were significantly more culpable than plaintiffs. Therefore, the trial court properly rejected this exception to the application of the wrongful conduct rule.

Plaintiffs next argue that there is a statutory basis for recovery from defendants. Plaintiffs contend that, because MCL 438.32 prevents a usurious lender from recovering usurious interest charges, it must necessarily permit the recovery of the principal. Hence, MCL 438.32 implicitly permits recovery against defendants. We disagree.

In order for the statutory basis exception to apply, plaintiffs must allege defendants violated a statute, which, either explicitly or implicitly, allows them to recover for injuries suffered as a result of defendants' violation. *Orzel*, *supra* at 570. Yet plaintiffs have not pleaded that defendants violated a statute, which either explicitly or implicitly, permits them to recover their loan losses from defendants. Indeed, plaintiffs' argument relies solely on their own violations of the usury statutes to implicitly find authority for recovery of their losses. Even if reliance on their own violation of a statute were sufficient, because MCL 438.32 seeks to punish lenders who violate the civil usury law, we cannot conclude that the statutory purpose of MCL 438.32 was to protect the usurious lender's principal. See *Orzel*, *supra* at 571. Therefore, the statutory basis exception does not apply to plaintiffs' claims.

D. Motion to Amend

Finally, plaintiffs argue that the trial court should have given them leave to amend their respective complaints to plead facts, which would establish the existence of greater culpability on the part of defendants. We decline to address this issue because it was not raised in the statement of the questions presented, *People v Miller,* 238 Mich App 168, 172; 604 NW2d 781 (1999), and was inadequately briefed and, therefore, abandoned on appeal, *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002). Furthermore, as noted above, we have determined that no factual development could establish that defendants were significantly more culpable for plaintiffs' losses than plaintiffs. Therefore, leave to amend would have been futile and was properly denied. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

IV. Conclusion

The trial court properly determined plaintiffs' claims against defendants, as pleaded, were based on losses proximately caused by plaintiffs' own criminal conduct and, therefore, were subject to the wrongful conduct rule. In addition, the trial court correctly determined that neither exception to the wrongful conduct rule applied to plaintiffs' claims. Consequently, the trial court

did not err when it dismissed plaintiffs' claims for failing to state a claim on which relief can be granted.

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Alton T. Davis