STATE OF MICHIGAN

COURT OF APPEALS

K-MART CORPORATION,

Plaintiff-Appellee,

v

LAVERNE D. LOGAN, a/k/a LAVERNE D. HENSEN, LESLIE ANNE LOGAN, ORLAND FRANK GARZONI, LAKESIDE AUTO SPA, INC., a/k/a LAS, INC., and PETER A. GARZONI,

Defendants/Third-Party Plaintiffs-Appellants,

and

CORE COMMERCIAL REALTY, INC.,

Defendant/Third-Party Plaintiff,

and

MICHAEL J. GARZONI,

Third-Party Defendant.

UNPUBLISHED
July 10, 2003

No. 232393
Oakland Circuit Court
LC No. 99-011841-CZ

Before: Smolenski, P.J., and White and Wilder, JJ.

PER CURIAM.

Michael Garzoni,[1] a former real estate lawyer for plaintiff K-Mart Corporation from 1987-1992, was involved in leasing and selling properties formerly utilized for K-Mart stores. At some point during his employment, Michael Garzoni developed an embezzlement scheme in which he established fictitious real estate brokers to receive commissions in transactions where

[1] Because Michael Garzoni is not a party to this appeal, we will refer to him by name. The defendants-appellants will collectively be referred to as "defendants."

no broker was ever involved. Plaintiff would then pay these non-existent brokers commission payments.

In 1996, criminal charges were brought against Michael Garzoni and two of his co-conspirators, neither of who are a party to this lawsuit, in connection with the embezzlement scheme. Michael Garzoni pleaded guilty and was ordered to pay $150,000 in restitution to plaintiff. In May 1996, plaintiff filed a civil suit against Michael Garzoni and others in federal court, which was dismissed in November 1998. Plaintiff appealed, but later voluntarily dismissed the case in April 1999 before the appeal decision was issued.

On January 14, 1999, plaintiff filed this action in Oakland Circuit Court against defendants, who include Michael Garzoni's ex-wife and members of his family. In the latter part of 1999, Michael Garzoni was added to this lawsuit as a defendant. Plaintiff contended that defendants assisted Michael Garzoni in laundering the ill-gotten commission money. Plaintiff's complaint alleged three claims: fraud, unjust enrichment, and civil conspiracy.

Defendants moved for a declaratory judgment that MCL 600.2956 required any liability of defendants to be several, but not joint. Plaintiff argued that the statute was not applicable to this case because it was not seeking damages for personal injury, property damages, or wrongful death. Defendants also moved for summary disposition on the grounds that the suit was barred by the statute of limitations and laches, there was an insufficient legal and factual basis for the suit, and plaintiff failed to comply with discovery orders.

After a hearing on December 14, 2000, the trial court concluded that MCL 600.2956 was not applicable to the instant case, plaintiff's complaint was legally and factually sufficient to survive a motion under MCR 2.116(C)(8) and (10), and "substantial issues [were] raised to defeat" the statute of limitations defense. The trial court denied defendants' motions for declaratory judgment and summary disposition, and entered its orders on January 19, 2001.

On February 2, 2001, defendants filed an interlocutory appeal in this Court raising the same issues they had in their motion for summary disposition and motion for declaratory judgment.[2] In its March 9, 2001 order, this Court stated that the Revised Judicature Act applied to the torts at issue in this case and MCL 600.2956 abolished joint and several liability, replacing it with several liability only; thus, reversing the trial court's decision. The Court remanded the case to the trial court and declined to address defendants' other issues, stating that it was not convinced of the need for immediate appellate review of these issues.

Plaintiff then appealed to our Supreme Court. On December 4, 2001, in lieu of granting leave, the Supreme Court vacated the Court of Appeals' order and remanded the case to us for plenary consideration. We reverse.

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[2] Defendant Leslie Logan also filed a motion to sever trial, which the trial court denied. In the questions presented section of defendants' first appellate brief, defendants raise the issue of whether the trial court abused its discretion in denying the motion. However, defendants present no correlating argument. Instead, defendants' argue that the trial court erred in concluding that MCL 600.2956 was inapplicable to this case. Therefore, we consider the issue regarding defendant Logan's motion to sever abandoned.

I

Defendants first argue that the trial court erred in determining that MCL 600.2956, which abolishes joint and several liability in certain types of actions, is not applicable to this case. Plaintiff asserts that the trial court correctly interpreted the statute as applying only to actions where the plaintiff is "seeking damages for personal injury, property damage, or wrongful death." Because this case does not involve an injury to a person or property, plaintiff contends that the statute is inapplicable and defendants can be held jointly and severally liable.

The question before us is whether MCL 600.2956 applies to all torts or only those seeking damages for personal injury, property damage, or wrongful death. This Court recently answered this question in *Holton v A Ins Assoc, Inc*, 255 Mich App 318; 661 NW2d 248 (2003). In *Holton*, the plaintiffs had a new roof installed on their home, and contacted their insurance agent to increase their insurance coverage due to the home's increased value. *Id*. at 319. When an ice dam built up on their roof, the plaintiffs placed a heater on the roof to melt the ice, resulting in a fire. The damage was so extensive that there was a shortfall in the plaintiffs' insurance coverage. The insurance company refused to compensate the plaintiffs for the shortfall, and the plaintiffs filed suit. *Id.* at 320.

The issue presented in *Holton* was "whether a defendant insurer is entitled to an allocation of fault for conduct in an underlying property loss, when a plaintiff seeks recovery for a shortfall in insurance coverage on the basis of the insurer's negligence in procuring insurance." *Id*. at 321. However, as a preliminary matter, the Court had to determine if the comparative fault principles under Michigan's tort reform legislation applied to the plaintiffs' cause of action. *Id*. The defendants had tried unsuccessfully to introduce evidence of a non-party's fault and had given notice as required by MCR 2.112(K).

In concluding that MCL 600.2957 applied to a tort action for negligent procurement of insurance coverage, the *Holton* Court stated:

> MCR 2.112(K) states that it "applies to actions for personal injury, property damage, and wrongful death to which MCL 600.2957; MSA 27A.2957 and MCL 600.6304; MSA 27A.6304, as amended by 1995 PA 249, apply." MCR 2.112(K)(1). Plaintiffs correctly note that the rule, by its language, appears to limit its application to three types of actions, arguably excluding plaintiffs' action for lost insurance proceeds. However, we conclude that the rule's applicability is not strictly limited to those three actions, given the qualifying language and reference to MCL 600.2957 and MCL 600.6304, which expressly provide for broader applicability of comparative fault. MCL 600.2957 and MCL 600.6304 apply the comparative negligence allocation of fault to "an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death...." MCL 600.2957(1) and MCL 600.6304(1).[4] Pursuant to the referenced statutory provisions, the trier of fact in a *tort-based action* must allocate liability among those at fault. *Jones v Enertel, Inc*, 254 Mich App 432, 436; 656 NW2d 870 (2002) (emphasis added).
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> As this Court observed in *Williams v Arbor Home, Inc*, 254 Mich App 439, 443-4444; 656 NW2d 873 (2002), MCR 2.112(K) was essentially intended

> to implement MCL 600.2957. Reading the court rule and the statutory provisions in conjunction, *Williams, supra*, we conclude that the provisions for comparative negligence apply to plaintiffs' action because it is a tort- based action. [*Id*. at 323-324.]

[4] This interpretation is in keeping with the general rules of statutory interpretation, which direct that, generally, a modifying clause will be construed to modify only the last antecedent, unless a contrary intent is indicated. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Thus, the phrase, "personal injury, property damage, or wrongful death" modifies only the phrase "or another legal theory seeking damages."

Thus, the *Holton* Court's reasoning relied mainly on its determination that the phrase "personal injury, property damage, or wrongful death" in MCL 600.2957 only modifies the phrase "or another legal theory seeking damages" and not "an action based on tort."

Although *Holton* involved MCL 600.2957, not MCL 600.2956, the entire phrase at issue, "an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death," is identical in both statutes and is also used repeatedly in other provisions in the tort reform legislation. Pursuant to MCR 7.215(I), we must follow *Holton's* precedent and find that MCL 600.2956 does apply to plaintiff's claims.[3] Accordingly,

[3] Defendants assert that this issue had already been decided by this Court in *Kokx v Bylenga*, 241 Mich App 655; 617 NW2d 368 (2000). In *Kokx*, the plaintiff hired the defendants to assist them in exercising their stock options after being terminated from a job. *Id*. at 657. Later, the plaintiffs retained new counsel, the law firm of Miller, Canfield, Paddock & Stone, and sued the defendants for legal malpractice, but subsequently agreed to dismiss the case. After the tort reform legislation became effective, the plaintiffs filed a second legal malpractice suit against the defendants, and the defendants in turn added Miller Canfield as a third-party defendant. *Id*.

One of the issues *Kokx* addressed was "whether the circuit court erred in concluding that this case is governed by the 1995 tort reform legislation," and the Court concluded that the circuit court did not err. *Id*. at 660-661. Defendants interpret this to mean that the Court implicitly determined that MCL 600.2956 applied to a legal malpractice claim, an action that does not involve injury to or death of a person or property damage. However, after closely scrutinizing the Court's analysis, we disagree with defendants' contention.

The *Kokx* Court was concerned with whether the tort reform legislation applied to the case because of the timing of the two suits which the plaintiffs filed. The defendants argued that the legislation did not apply because the first suit was filed before its enactment, the second suit was actually just a continuation of the first suit, and the parties had agreed when the first suit was dismissed that the law in effect at the time would apply to any subsequent suits. *Id*. at 660. The Court disagreed and held that the legislation did apply because the second suit was filed after its enactment. *Id*. at 661. The Court was not focused on whether the tort reform legislation applied to the subject matter of the case, i.e., a legal malpractice claim, and did not engage in any

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defendants' liability is several only. Because plaintiff has already received a judgment against Michael Garzoni assessing all liability to him for plaintiff's damages, there is no liability to be apportioned among defendants; therefore, this case must be dismissed. Although resolution of this issue is dispositive, in light of our Supreme Court's order to give this case plenary consideration, we address most of defendants' remaining arguments below.

II

Defendants also argue that plaintiff is collaterally estopped from relitigating this suit because fault has already been assessed against Michael Garzoni. We find this argument to be without merit. Plaintiff only filed one lawsuit in Michigan against defendants, not including Michael Garzoni. It was granted summary disposition as to all claims against Michael Garzoni, and the case is still pending as to defendants. Plaintiff is not "relitigating" the case as to defendants.

III

Defendants additionally argue that the trial court erred in denying their motion for summary disposition brought pursuant to MCR 2.116(C)(8) and (10). Defendants contend that the complaint is legally and factually insufficient and that plaintiff has provided no factual assertions sufficient to establish a genuine issue of material fact regarding any of its claims. We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Roberts*, *supra* at 62.

A

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The motion may not be supported with documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Id.* However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden*, *supra* at 119.

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analysis to this effect. Thus, we decline defendants' invitation to interpret the *Kokx* Court's holding as binding on this case.

Defendants also cite *Smiley v Corrigan*, 248 Mich App 51; 638 NW2d 151 (2001), as dispositive of this issue. However, *Smiley* is irrelevant to the question at hand. Simply because the *Smiley* Court, in discussing the concept of fair share liability, referred to the fact that liability is shared by each "tortfeasor" does not mean that it concluded that the statute applied to all torts. *Id*. at 55-56. In *Smiley*, any reference to the defendants specifically as "tortfeasors" was correct because the case involved the personal injury of the plaintiff.

Defendants argue that the trial court erred in denying their motion for summary disposition because plaintiff did not plead any of its claims with sufficient specificity. Generally, a complaint must contain a statement of the facts and allegations specific enough to reasonably inform the adverse party of the nature of the claims against him. MCR 2.111(B); *Smith v Stolberg*, 231 Mich App 256, 259; 586 NW2d 103 (1998). The purpose of the requirement is to avoid both extremely formalistic pleadings and ambiguous and uninformative pleadings. *Smith*, *supra* at 259. However, the circumstances constituting fraud or mistake must be stated "with particularity." MCR 2.112(B)(1).

Plaintiff generally alleged that the unearned commission funds received by Michael Garzoni were "laundered through various bank accounts owned by Defendants Logan, Logan & Associates which was a d/b/a controlled by Leslie Logan, Orland Garzoni, Lakeside Auto Spa, and others. Correspondence was diverted through fake addresses with the help of Aronds, Savage, Gould, Foote, and Defendants Hensen and Peter Garzoni." Plaintiff also generally alleged that "[t]he acts of Defendants were purposely concealed from Plaintiff and remained secret and undetected until 1996, when Defendant Garzoni was indicted."

Common-law fraud consists of the following elements: (1) defendant made a material representation, (2) the representation was false, (3) defendant knew that it was false when made or made it recklessly, as a positive assertion, without knowledge of its truth, (4) defendant intended plaintiff to act upon the representation, (5) plaintiff acted in reliance on it and (6) plaintiff suffered injury as a result. *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). Actual fraud is the intentional use of deception for one's advantage, while constructive fraud only requires a misrepresentation, which need not amount to a purposeful design to defraud. *General Electric Credit Corp v Wolverine Ins Co*, 420 Mich 176, 188-189; 362 NW2d 595 (1984).

In regards to its fraud claim, plaintiff alleged that defendants "knowingly and/or recklessly made material representations" regarding the real estate transactions listed in the complaint on which they intended for plaintiff to rely, plaintiff relied on these representations to its detriment, defendants' acts amounted to a direct and constructive fraud, and plaintiff suffered damages as a result of defendants' fraud. At first read, it appears that the fraud claim is insufficiently pleaded because plaintiff did not specifically identify the alleged material representations made by defendants. However, plaintiff's fraud claim is based on a conspiracy theory. Because the illegal acts of one conspirator can be attributed to all,[4] the materially false representations plaintiff specifically alleged were made by Michael Garzoni are also considered to have been made by defendants. Thus, reading the allegations incorporated into the fraud claim by reference, we find that plaintiff sufficiently pleaded its fraud claim.

In regards to its unjust enrichment claim,[5] plaintiff alleged that defendants accepted benefits as a result of plaintiff paying Michael Garzoni unearned commissions and that

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[4] *People v Grant*, 455 Mich 221, 236; 565 NW2d 389 (1997).

[5] The elements of unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993).

defendants refused to repay these commissions after a demand made by plaintiff. While plaintiff could have been more specific, such was not necessary, and we find these allegations sufficient to reasonably inform defendants of the nature of the claim against them.

Lastly, in regards to its civil conspiracy claim, plaintiff alleged that defendants conspired with Michael Garzoni and others to defraud plaintiff of its money, the conspiracy was "wrongful, illegal, and tortious," and plaintiff suffered monetary damages as a result of the conspiracy. The essential elements of a civil conspiracy are (1) a concerted action (2) by a combination of two or more persons (3) to accomplish an unlawful purpose (4) or a lawful purpose by unlawful means. *Admiral Ins Co v Columbia Casualty Ins Co,* 194 Mich App 300, 313; 486 NW2d 351 (1992).

Defendants assert that this claim is insufficiently pleaded because plaintiff failed to identify what act each defendant allegedly committed as part of the conspiracy. However, to survive summary disposition, a plaintiff need only to allege that the defendants "were jointly engaged in tortious activity as a result of which the plaintiff was harmed." *Abel v Eli Lilly & Co,* 418 Mich 311, 338; 343 NW2d 164 (1984). We find that plaintiff met this threshold and the allegations were sufficient to inform defendants as to the nature of the claim against them.

Therefore, after reviewing the complaint, we find that plaintiff's allegations were sufficient to state a cause of action as to each of its claims. The trial court properly denied defendants' summary disposition motion pursuant to MCR 2.116(C)(8).

B

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, where the trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the summary disposition motion. *Maiden, supra* at 119. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*. This Court is liberal in finding a genuine issue of material fact. *Zine v Chrysler Corp,* 236 Mich App 261, 270; 600 NW2d 384 (1999).

Below, plaintiff presented the trial testimony of Michael Garzoni given in one of his co-conspirator's trial. Michael Garzoni admitted that he laundered money through the bank accounts of all defendants in this case. Michael Garzoni explained that defendants would deposit checks into their accounts and then disburse the money back to him in either check or cash form. His testimony was equivocal as to whether his family members ever kept any portion of the laundered money. Specifically, Michael Garzoni testified that he deposited money from unearned commissions in Peter Garzoni's bank account, Leslie Logan's bank account, as well as in her law firm's, Logan & Associates, general and client trust accounts, and also had his father Orland Garzoni deposit a check into his business account. Michael Garzoni also testified that he directed his mother-in-law, Laverne Hensen, a/k/a Laverne Logan, to open a business bank account for Core Properties, which was a dummy corporation. Plaintiff sent an unearned commission check to Core Properties that Hensen deposited into Core Properties' bank account. However, Michael Garzoni maintained that defendants did not know the money was illegally obtained.

Plaintiff also presented the testimony of Geoffrey Gould, another of Michael Garzoni's co-conspirators, which detailed his part in these transactions. Gould explained that he established the dummy corporation KLM, which never had any legitimate business purpose. After the company sent plaintiff a fraudulent brokerage services invoice, plaintiff wrote KLM the commission check. Gould would then write checks at Michael Garzoni's direction.

Apparently, Gould provided an affidavit to plaintiff in connection with a settlement agreement. The parties vaguely dispute the admissibility of this document; however, the trial court did not decide the issue, nor do the parties brief it on appeal. Regardless, the conflicting testimony was revealed at Gould's deposition, which no one disputes is admissible. Gould admitted that he previously stated that he wrote checks to Orland Garzoni's business, Lakeside Auto Spa, a/k/a LAS, Inc, a check to Logan & Associates for $29,000 in legal services even though no services were performed, and checks to himself which he deposited in his personal account and then wrote checks from that account to Michael Garzoni, Leslie Logan, and Logan & Associates. Gould also wrote a check to Logan & Associates' trust account for $20,200. Logan later gave Gould a promissory note to "repay the loan," but Gould stated that the check was never meant to be a loan. Plaintiff provided copies of the checks Gould discussed writing.

When Gould was deposed several years later he recanted his statements that implicated Leslie Logan in any wrongdoing. The changes he made to his testimony comported with Leslie Logan's deposition testimony one month earlier. Gould testified that the $29,000 check he wrote to Logan & Associates was for legal services Leslie Logan had performed for him personally over the years. He did this at Michael Garzoni's request. He also testified that $25,000 was returned to him as excessive payment; it was not payment for his past bookkeeping services as he had previously stated. Lastly, Gould stated the $20,200 check to Logan & Associates really was a loan. Gould further testified that he realized these errors after discussing the transactions with Michael Garzoni, who helped clarify the details. Interestingly, Leslie Logan, her kids, mother, and brother were all living with Gould at the time he was deposed.

In regards to the fraud claim, defendants assert that plaintiff presented no evidence to support any of the elements of fraud. However, plaintiff presented the testimony of Michael Garzoni himself who admitted making false representations to plaintiff in order to obtain commission payments and plaintiff relied on these representations to its detriment as evidenced by the checks it wrote to the dummy corporations. His fraudulent acts are attributed to defendants by virtue of the conspiracy. Thus, the fraud claim against defendants stands or falls with the conspiracy claim.

Defendants argue that there is no evidence that defendants conspired with Michael Garzoni or that defendants knew the funds they were depositing were not legitimate. It is true that each defendant denied knowing that the checks he/she cashed were fraudulently obtained from plaintiff. However, while there is no direct evidence, evidence of a conspiracy can be reasonably inferred from the circumstances, acts or conduct of the parties. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). Defendants deposited unearned commission money, checks for tens of thousands of dollars, into their bank accounts and disbursed the funds to Michael Garzoni at his request, apparently never questioning the source of the money or the legality of the transaction. It is possible that defendants were either naive or purposely blind regarding Michael Garzoni's actions. However, it is just as possible that

defendants were assisting Michael Garzoni in laundering the money and received a part of the proceeds in cash or gifts.

We find that, viewing the above evidence in the light most favorable to plaintiff, reasonable minds could differ as to the extent of defendants' knowledge of the fraud and participation in the conspiracy; therefore, summary disposition in favor of defendants in regards to these claims is inappropriate. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Furthermore, summary disposition is rarely appropriate in cases involving questions of credibility, intent or state of mind. *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). Whose testimony is to be believed is a question for the trier of fact.

In regards to the unjust enrichment claim, defendants contend that plaintiff presented no evidence that defendants received any benefit. However, Michael Garzoni admitted that money was laundered through each defendants' bank account. Also, his testimony as to whether any family members kept part of the money was equivocal and contradictory. We find this sufficient to establish the genuine issue of material fact. Therefore, summary disposition is not proper on this claim either.

IV

Next, defendants argue that this case is barred by the statute of limitations. We agree. Summary disposition of all or part of a claim or defense may be granted when a claim is barred because it was filed outside the period set forth in the applicable statute of limitations. MCR 2.116(C)(7).

In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence, and construe them in the plaintiff's favor. *Brennan v Edwards D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001). Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision as to whether a plaintiff's claim is barred by the statute of limitations is a question of law that this Court reviews de novo. *Id.* Defendants bear the burden of establishing that the case was filed outside the limitations period. *Kuebler v Equitable Life Assurance Society of the United States*, 219 Mich App 1, 5; 555 NW2d 496 (1996).

Plaintiff alleged fraud, unjust enrichment, and civil conspiracy. "[I]n a civil action for damages resulting from wrongful acts alleged to have been committed in pursuance of a conspiracy, the gist or gravamen of the action is not the conspiracy but is the wrongful acts causing the damages." *Roche v Blair*, 305 Mich 608, 613-614; 9 NW2d 861 (1943); see also *Gilbert v Grand Trunk Western R*, 95 Mich App 308, 313; 290 NW2d 426 (1980). Civil conspiracy alone is not an actionable tort. *Roche, supra* at 614; *Gilbert, supra* at 313. The cause of action results from the acts that produced plaintiff's damages. *Roche, supra* at 614-616; *Gilbert, supra* at 313. In this case, the underlying cause of action is the fraud, which plaintiff also pleaded. Therefore, the applicable limitation period is six years. MCL 600.5813. By analogy, we also apply this limitations period to plaintiff's unjust enrichment claim. MCL 600.5815; see *Lothian v Detroit*, 414 Mich 160, 169-170; 324 NW2d 9 (1982).

Plaintiff argues that this limitation period began when it discovered defendants' involvement in the fraud scheme. In *Boyle v General Motors Corp*, 468 Mich 226; 661 NW2d 557 (2003), our Supreme Court recently answered the question of when the statute of limitations begins to run on a fraud claim. The *Boyle* Court held that the six-year statute of limitations begins to run when the claim accrues, which occurs when the wrong is done. *Id*. at 231. The Court further stated, "The wrong is done when the plaintiff is harmed rather than when the defendant acted. *Id*. at 231 n 5, citing *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995).

In this case, any harm plaintiff suffered occurred during the time Michael Garzoni was engaging in his embezzlement scheme, which ceased, at the latest, in 1992 when his employment with plaintiff ended. Thus, the statute of limitations expired in 1998, and this action was not filed until January 14, 1999. Accordingly, plaintiff's claims are barred.[6]

In addition, we decline to address defendants' argument that this action is barred pursuant to MCR 2.116(C)(7) by the doctrine of res judicata, as the result of plaintiff voluntarily dismissing its federal appeal, because defendants did not raise this issue in their motion for summary disposition and the trial court did not consider it. *Herald Co, Inc v Ann Arbor Pub Schools*, 224 Mich App 266, 278; 568 NW2d 411 (1997). For the same reason we decline to address defendants' assertion that plaintiff lacks standing to bring this suit because it is not the real interested party, given that it has received an insurance settlement from its insurer. Furthermore, defendants failed to adequately brief the issue. *Mudge v Macomb Co*, 458 Mich 98, 105; 580 NW2d 845 (1998).

Finally, given our conclusion that plaintiff's action cannot be maintained because of (1) the applicability of MCL 600.2956 and (2) the expiration of the statute of limitations before the instant action was filed, we decline to address defendants' contention that this suit is barred by the doctrine of laches.

Reversed.

/s/ Michael R. Smolenski

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[6] We note that even if we construed plaintiff's complaint to allege fraudulent concealment, its claims would still be barred. The fraudulent concealment statute, MCL 600.5855, allows a plaintiff to file suit within two years of discovering the cause of action, where the applicable limitation period began to run at the time the wrong occurred and expired before the cause of action was discovered. Here, plaintiff concedes that it discovered defendants involvement in the embezzlement scheme in 1996 when Michael Garzoni was indicted, before the statute of limitations expired in 1998.

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LC No. 99-011841-CZ

Before: Smolenski, P.J., and White and Wilder, JJ.

WHITE, J. (*concurring*).

I concur on the basis that *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318; 661 NW2d 248 (2003), is controlling.

/s/ Helene N. White

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WILDER, J., (*concurring*).

I join in part I of the lead opinion. Additionally, I agree that the applicable limitation period for plaintiff's fraud and civil conspiracy claims is six years, MCL 600.5813, and that the applicable limitation period for plaintiff's claim for unjust enrichment is also six years because

this claim is "dependent on the existence of contract or contract principles."[1] *Hutala v Travelers Ins Co*, 401 Mich 118, 125; 257 NW2d 640 (1977).

I further agree that pursuant to MCL 600.5827, the claims asserted in plaintiff's first amended complaint accrued "when the wrong [was] done," *Boyle v General Motors Corp*, 486 Mich 226; 661 NW2d 557 (2003), and that in this case the "wrong" occurred no later than 1992. Therefore, I also concur in the lead opinion's conclusion in part IV that plaintiff's claims in this case are time-barred.

/s/ Kurtis T. Wilder

[1] The first amended complaint alleges that pursuant to fraudulent listing agreements and fictitious brokers, plaintiff paid real estate commissions that were not earned, constituting an unjust enrichment to defendants. Thus, plaintiff's unjust enrichment claim is clearly dependent on the existence of contracts.