

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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FRED PARKER, JR.,

Plaintiff-Appellant,

and

GILBERT KLOSS and JANET BALENT,

Plaintiffs,

v

HOWARD KLAASSEN, KAREN KLAASSEN,  
SOCRATES SOUYIAS, RICK ABBEY, FOUR  
STAR CONSTRUCTION COMPANY and  
MIRAN SARKISSIAN,

Defendants-Appellees.

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UNPUBLISHED

December 28, 1999

No. 207410

Oakland Circuit Court

LC No. 96-528217 CZ

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Plaintiff Fred Parker, Jr.,<sup>1</sup> appeals as of right the order of the trial court granting summary disposition pursuant to MCR 2.116(C)(8) of plaintiffs' claims of embezzlement, fraudulent misrepresentation, breach of fiduciary duty, and waste of corporate assets. We affirm in part, reverse in part, and remand for further proceedings.

**I. Basic Facts And Procedural History**

Plaintiffs, shareholders of Infinetrac Corporation, brought suit against four officers and directors and one employee of Infinetrac.<sup>2</sup> Plaintiffs alleged that defendants had wrongfully removed funds from Infinetrac, including capital contributed by plaintiffs, without the shareholders' knowledge or consent. Plaintiffs further alleged that the defendant officers and directors made false representations to Infinetrac's shareholders for the purpose of soliciting additional capital contributions. The trial court

determined that plaintiffs lacked standing to bring a direct action against defendants, and granted defendants' motions for summary disposition of all of plaintiffs' claims pursuant to MCR 2.116(C)(8).

## II. Standing

### A. Standard Of Review

This Court reviews a summary disposition determination de novo as a question of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Id.* at 119. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id.* “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.’ ” *Id.*, quoting *Wade v Dep’t of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

### B. The General Rule

An action must be prosecuted in the name of the real party in interest. MCR 2.201(B); *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 292; 475 NW2d 366 (1991). “A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another.” *Id.*, citing *Stillman v Goldfarb*, 172 Mich App 231, 237; 431 NW2d 247 (1988). Accordingly, the standing doctrine provides that “a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer, or employee.” *Id.* This general rule is inapplicable where the individual shows a violation of a duty owed directly to him. *Michigan Nat’l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). However,

[t]his exception does not arise . . . merely because the acts complained of resulted in damage both to the corporation and to the individual, but is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally. . . . Thus, where the alleged injury to the individual results only from the injury to the corporation, the injury is merely derivative and the individual does not have a right of action . . . .  
[*Id.* at 679-680.]

### C. Injuries To The Corporation

Parker, as a shareholder of Infinitrac, clearly lacked standing to bring a direct suit against defendants to redress injury to Infinitrac arising from the alleged embezzlement and waste of corporate funds; these claims involve injuries to Parker which “result[ed] only from the injury to the corporation.” *Michigan Nat’l Bank*, *supra* at 680. Additionally, Parker’s claim of breach of fiduciary duty—which is based directly on allegations of embezzlement and waste of corporate assets—clearly alleges injury to Parker which is merely derivative of injury suffered by the corporation, and he does not have standing to

pursue this claim individually. *Id.* We conclude that the trial court correctly granted summary disposition for these counts.

#### D. Fraudulent Misrepresentation

With respect to the count alleging fraudulent misrepresentation, however, we hold that Parker set forth a claim on which relief could be granted and that the trial court improperly granted summary disposition of this claim pursuant to MCR 2.116(C)(8). The elements of fraud are: (1) the defendant made a material representation; (2) the representation was false; (3) when making the representation, the defendant knew or should have known that it was false; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on it; and (6) the plaintiff suffered damage. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976); *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).

Here, Parker alleged in Count II of his complaint that “Klaassen, Sarkissian, Souyias and Abbey, as officers and directors of Infinetrac, made numerous representations to its shareholders from 1993 to present for the purpose of soliciting additional capital contributions from shareholders and investors”; that, at the time they were made, defendants knew, or should have known, that these representations were false; and that Parker relied on these statements, with the result that he sustained substantial damages.

Accepting these allegations as true and construing them in a light most favorable to plaintiffs, *Maiden, supra* at 119, we find that Parker pleaded a valid claim of fraudulent misrepresentation. Further, this claim pertains to a “wrong done [that] amounts to a breach of duty owed to the individual personally,” such that Parker has standing to pursue the claim individually. *Michigan Nat'l Bank, supra* at 680. While it is uncertain whether Parker will be able to substantiate this claim, a motion under MCR 2.116(C)(8) may be granted only where the claim alleged is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Maiden, supra* at 119. Accordingly, because the injuries alleged to have resulted from defendants’ misrepresentations were not merely derivative of injuries to the corporation, but were allegedly suffered by Parker personally, we conclude that Parker pleaded a valid fraudulent misrepresentation claim to the extent that the grant of summary disposition of this claim pursuant to MCR 2.116(C)(8) was inappropriate.

### III. Amending The Complaint

#### A. Standard Of Review

Parker argues that the trial court erred in denying his request to amend his complaint. This Court will not reverse a trial court’s decision regarding leave to amend pleadings unless it constituted an abuse of discretion which resulted in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the ruling. *Carpenter v Consumers Power Co*, 230 Mich App 547, 562; 584 NW2d 375 (1998).

## B. Amending A Complaint

A court should freely grant leave to amend a complaint when justice so requires, MCR 2.118(A)(2); *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997), and a motion to amend should ordinarily be denied only for particularized reasons, *id.*; *Lane v Kindercare Learning Centers, Inc.*, 231 Mich App 689, 697; 588 NW2d 715 (1998). Reasons justifying denial of leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility. *Weymers, supra* at 658; *Lane, supra* at 697.

Here, the trial court did not specify why it denied leave to amend. A trial court's failure to specify particularized reasons for denying leave to amend ordinarily requires reversal unless the amendment would be futile. *Dowerk v Oxford Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). However, the court did not enter a written order regarding Parker's request to amend. "A court speaks through its orders, and the jurisdiction of this Court is confined to judgments and orders." *Lown v JJ Eaton Place*, 235 Mich App 721, 725-726; 598 NW2d 633 (1999). Because the lower court did not decide this issue, it is not properly before this Court. *Id.* at 725. Furthermore, MCR 2.118(A)(4) provides that "[a]mendments must be filed in writing . . . ." Parker did not file an amendment in writing. The record is bereft of any explanation concerning Parker's proposed amendments to his complaint, and no such explanation has been provided on appeal. Accordingly, we cannot say that the trial court abused its discretion in denying the request to amend. See *Lown, supra* at 726; *Burse v Wayne Co Medical Examiner*, 151 Mich App 761, 767-768; 391 NW2d 479 (1986).

## IV. Conclusion

We reverse that portion of the trial court's order granting summary disposition pursuant to MCR 2.116(C)(8) of Parker's fraudulent misrepresentation claim against defendants, and remand for further proceedings concerning this claim only. We affirm the trial court's order in all other respects. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Brian K. Zahra

<sup>1</sup> Plaintiffs Kloss and Balent are not participating in this appeal.

<sup>2</sup> Defendants Howard Klaassen and Karen Klaassen owned an additional defendant, Four Star Construction Company; plaintiffs claimed that Infinitrac funds had been illegally diverted to Four Star. Claims against Michael Reynolds, counsel for Infinitrac, were disposed of below and are not at issue in this appeal.