STATE OF MICHIGAN

COURT OF APPEALS

DALE CHIMENTI, LIZABETH CHIMENTI, JOEY CHIMENTI, and STEPHANIE CHIMENTI, Plaintiffs-Appellants,	UNPUBLISHED November 17, 2000
v	No. 208446 Macomb Circuit Court
APPLE VACATIONS, INC. and KIMERLY TRAVEL, INC., Defendants-Appellees.	LC No. 94-005355-NO

Before: Zahra, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants. We affirm, but for reasons different than those articulated by the trial court.

I.

FACTS AND PROCEDURE

Plaintiff[1] Dale Chimenti booked a family vacation through defendant Kimberly Travel. The vacation was facilitated by defendant Apple Vacations, a tour operator, and included lodging at the Sol Caribe Hotel located on the island of Cozumel, Mexico. The hotel, which was rated as a five-star hotel by defendants, provided a brochure that depicted people jet skiing. Plaintiff claims he booked the particular vacation because he was interested in jet skiing and the travel agent stated that jet skiing was available at the hotel. The vacation package did not include jet ski rental.

Plaintiff and his family arrived late at the hotel and missed the reception hosted by an Apple representative. At the reception, the representative customarily warned guests of a strong current located fifty yards offshore. The morning following their arrival, plaintiff and his cousin

[1] Because the other plaintiffs' claims are derivative, we will use the term "plaintiff" to refer to Dale.

rented jet skis from a jet ski rental concession, which was located in the hotel, though not owned or managed by the hotel.[2] The jet ski rental operator warned plaintiff of the dangerous offshore current. Plaintiff and his cousin had ridden the jet skis approximately one mile from shore when plaintiff's jet ski stopped running. Rather than ride back to shore with his cousin, plaintiff chose to stay with the disabled jet ski until help arrived. The strong current carried him out to sea, however, and he was adrift on the mostly-submersed jet ski for more than two days before being rescued fortuitously by a passing freighter.

Plaintiff filed this action under the Michigan Consumer Protection Act ("MCPA"), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq*, alleging fraudulent misrepresentations regarding the jet ski equipment and services available at the hotel "upon which Plaintiffs relied to their detriment."[3] Defendants filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10), on the grounds that they were not responsible for the acts of independent suppliers and that defendants had no duty to investigate independent suppliers like the jet ski operation where plaintiff rented the jet ski. In his response to defendants' motion for summary disposition, plaintiff relied on the MCPA and also argued that defendants were negligent in failing to warn him of the strong current and by misrepresenting that the jet ski rental concession was part of the hotel's operations. Defendants replied that plaintiff failed to proffer any authority in support of finding travel agent liability under the MCPA based on a photograph in a travel brochure, and that travel agents owed no duty to warn of dangers on the high seas. Defendants briefly addressed the MCPA at oral argument, though plaintiff did not. The trial court did not address the MCPA either from the bench or in its written opinion and order granting summary disposition. Instead, the trial court ruled that, under the Fair Trade Contract, defendants were not liable for the acts or omissions of independent suppliers, that defendants had not guaranteed that no harm would befall plaintiff, and cited authority under common law principles of tort and contract law finding no travel agent liability in negligence for injuries suffered under circumstances such as those presented here.[4]

II.

ANALYSIS

A. Standard of Review

We review a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(8) tests the legal

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[2] The vacation agreement included a Fair Trade Contract, which contained a disclaimer for damages attributable to acts or omissions of independent suppliers over whom Apple had no control. The jet ski rental operation was such a supplier.

[3] This action was removed to federal district court and was later addressed by the Sixth Circuit, which recognized this as an action under the MCPA only.

[4] The trial court relied on *Lavine v General Mills, Inc*, 519 F Supp 332, 336-337 (ND Ga, 1981), which addressed travel agent liability for injury to its patrons while on a tour it sold or arranged, and where the court refused to impose liability.

sufficiency of a claim by the pleadings alone. 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. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998). 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; *Kuhn*, *supra* at 324. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

B. Duty Under the MCPA

Plaintiff stated only one cause of action in his complaint – a violation of the MCPA. Plaintiff's claim for damages is based on defendants' alleged "unfair, unconscionable or deceptive practices," not on a theory of common law negligence or breach of warranty. Indeed, the words "duty" and "negligence" appear nowhere in the complaint. In fact, plaintiff has not alleged proximate cause in the negligence sense, but instead has alleged that defendants' violation of the MCPA "caused or contributed to" plaintiff's damages. Plaintiff never sought leave to amend the complaint to add the tort of negligence or breach of warranty claim and, accordingly, plaintiff's claim will be treated as one brought solely under the MCPA, not on common law negligence theories.

This Court recently addressed the purpose of the MCPA:

> The MCPA prohibits the use of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce. MCL 445.903(1); MSA 19.418(3)(1). It defines the term "trade or commerce" as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity." MCL 445.902(d); MSA 19.418(2)(d). The intent of the act is "to protect consumers in their purchases of goods which are primarily used for personal, family or household purposes." *Noggles v Battle Creek Wrecking, Inc*, 153 Mich App 363, 367; 395 NW2d 322 (1986) [*Zine v Chrysler Corp*, 236 Mich App 261, 270-271; 600 NW2d 384 (1999).]

In *Zine*, the defendant, Chrysler Corporation, provided its automobile dealerships with "lemon law" booklets to distribute to customers. The plaintiff argued that the booklet was misleading in violation of the MCPA. The court held that automobile manufacturers have no duty to provide lemon law information to their customers and that no such duty is imposed by the MCPA. The MCPA provides instead that, "when such information is provided, it not be done in a misleading or confusing or otherwise deceptive manner." *Zine*, *supra* at 276.

The trial court in *Zine* ruled that Chrysler voluntarily assumed the duty to provide lemon law information and that its failure to provide information specific to Michigan could be a

violation of the MCPA. This Court saw two problems with the trial court's reasoning: (1) Chrysler did not voluntarily undertake to provide information to Michigan customers, but merely fulfilled its obligation to provide such information in those states requiring notice by including a lemon law booklet with all vehicles sold, and (2) voluntary assumption is a concept applicable to negligence law. Like plaintiff here, Zine did not claim that Chrysler was negligent under common law. Zine's claim that Chrysler failed to include information specific to its Michigan customers was predicated on an alleged duty to provide such information. Because Chrysler was under no duty to provide the information and did not purport to do so by providing all customers with a lemon law booklet, the trial court erred in granting Chrysler summary disposition on a breach of duty theory. Specifically, the *Zine* Court observed that duty is a concept applicable to negligence law, a concept that has little applicability in a case brought under the MCPA. *Id.* at 277.

Similarly, here, defendants had no duty under the MCPA to include information on its brochures about the dangers of ocean currents, nor did defendants' depiction of a jet skier on a brochure constitute unconscionable or deceptive practices under the MCPA.

Absent any authority to the contrary, we decline to impose a duty of the type urged by plaintiff on travel agents or tour guides under the MCPA. Following *Zine*, we hold that the MCPA does not create the type of liability sought to be imposed by plaintiff.

Affirmed.

/s/ Henry William Saad