

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

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RODGER SPENCER and ROSE SPENCER,

Plaintiffs-Appellants,

v

ISAW INC.,

Defendant,<sup>1</sup>

and

JOHN F. BURNS,

Defendant-Appellee.

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UNPUBLISHED

May 22, 2001

No. 218138

Oakland Circuit Court

LC No. 97-001288-CK

Before: Talbot, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition for defendant-appellant. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiffs contracted with defendant ISAW, Inc., (hereinafter ISAW) for construction work at plaintiffs' home. Plaintiffs dealt and negotiated with defendant John F. Burns, ISAW's president and shareholder, on behalf of ISAW. The subject of the contract was the conversion of plaintiffs' two-car garage into a four-car garage, as well as miscellaneous work on plaintiffs' house. The parties signed a written agreement detailing the work to be performed. The contract contained no completion date. The contract recited that the agreement "constitutes the entire understanding of the parties and no other understanding, collateral or otherwise, shall be binding unless in writing signed by both parties." ISAW commenced work on plaintiffs' garage. As a result of many delays, plaintiffs became dissatisfied with the slow progress of the project. Ultimately, plaintiffs terminated their contract with ISAW.

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<sup>1</sup> ISAW is no longer a party to this action. ISAW filed bankruptcy, and the circuit court case was administratively closed pursuant to the bankruptcy stay.

Plaintiffs initiated this action against ISAW and against Burns individually. Plaintiffs alleged breach of contract, fraudulent misrepresentation, conversion, and violation of the Michigan consumer protection act, MCL 445.901; MSA 19.418(1). Plaintiffs asserted that ISAW breached its contract with them by failing to complete the construction project in a timely manner as contemplated by the parties, and also by failing to perform the work in a workmanlike manner according to standard practices. Additionally, plaintiffs claimed that Burns falsely represented the size of his work crew and the length of time required to complete the project. Plaintiffs' conversion claim was based on their allegations that Burns removed lumber, cement blocks, and other construction materials from the site which had been paid for by plaintiffs.

Defendants asserted counterclaims, alleging breach of contract, quantum meruit, and fraud. Defendants alleged that plaintiffs orally modified the project and enlarged the scope of the project, and that these changes necessitated the delays in completing the work. On plaintiffs' motion, the trial court granted summary disposition of defendants' claims on the basis that the written contract stated that any changes to the agreement must be made in writing.<sup>2</sup>

Plaintiffs then brought a motion for summary disposition pursuant to MCR 2.116(C)(9) and MCR 2.116(C)(10). Plaintiffs argued that based upon the trial court's grant of summary disposition of defendants' counterclaims, defendants could not maintain their defense that delays were caused by plaintiffs' modifications to the plans. In response, defendants requested that the trial court grant summary disposition in their favor pursuant to MCR 2.116(I)(2). Burns requested that the trial court dismiss plaintiffs' consumer protection act claim against him because he was not a party to the contract. Both defendants moved the court to grant summary disposition of plaintiffs' fraud and conversion claims pursuant to MCR 2.116(I)(2).<sup>3</sup>

The trial court denied plaintiffs' motion for summary disposition. The court determined that genuine issues of material fact existed regarding plaintiffs' claims against ISAW. The court granted summary disposition of plaintiffs' claims with respect to Burns and dismissed all claims against him. The court relied upon principles of agency to conclude that Burns could not be held liable as a matter of law. The trial court ruled:

. . . It appears to this Court that Plaintiff has presented no reason for piercing the corporate veil. Defendant was always acting it appears within the scope of his agency as an employee of the corporate Defendant. Moreover, Plaintiffs' claims against the individual Defendant, [ ] for that reason Plaintiffs' claims against the individual Defendant shall be dismissed. However, there is a

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<sup>2</sup> Defendants initially filed a countercomplaint alleging breach of contract. After the trial court granted summary disposition of that claim on the ground that any modifications to the contract must be in writing, defendants thereafter filed an amended countercomplaint alleging quantum meruit and fraud. The trial court granted summary disposition of these claims on the same basis.

<sup>3</sup> MCR 2.116(I)(1) provides: "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." Pursuant to MCR 2.116(I)(2), "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

question of fact as to whether the corporate Defendant intended to defraud Plaintiff and intentionally delay the completion of the contract and what a reasonable time would have been. As such, Plaintiffs' Motion is denied as to the Michigan's Consumers' Protection Act. To summarize the individual Defendant Burns is dismissed, but Plaintiffs' Motion for the, as to Defendant is denied as to all their Counts and as to the corporate Defendant. . . .

On appeal, plaintiffs argue that the trial court erred in dismissing their claims against Burns. This Court reviews a trial court's grant or denial of summary disposition *de novo*. "The trial court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000) (citations omitted). "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." MCR 2.116(I)(1); *Funk v Hover Trucking Co*, 221 Mich App 268, 270-271; 561 NW2d 479 (1997).

We conclude that the trial court properly dismissed plaintiffs' breach of contract claim against Burns based upon the pleadings. Burns was not a party to the contract. The contract identifies the parties as plaintiffs and ISAW. Burns signed the contract in his official capacity as ISAW's president. Plaintiffs acknowledge in their complaint that they dealt with Burns as a representative of ISAW, and that Burns' statements were made "on behalf of Defendant I.S.A.W. Inc." ISAW was the disclosed principal of Burns, and therefore Burns may not be held personally liable on the contract. *PM One, Ltd v Dep't of Treasury*, 240 Mich App 255, 266-267; 611 NW2d 318 (2000); *Penton Pub, Inc v Markey*, 212 Mich App 624, 626; 538 NW2d 104 (1995). Accordingly, the trial court properly granted summary disposition of plaintiffs' breach of contract claim with respect to Burns.

We disagree with the trial court's dismissal of plaintiffs' remaining claims at this stage of the litigation. The trial court erroneously determined that Burns may not be held liable for any claims because Burns was at all times acting in his capacity as an agent for ISAW. Burns may not avoid liability for his own intentional torts on the basis that he was acting as an agent of ISAW. "It is well established that corporate employees and officials are personally liable for all tortious and criminal acts in which they participate, regardless of whether they are acting on their own behalf or on behalf of a corporation." *Joy Management Co v City of Detroit*, 183 Mich App 334, 340; 455 NW2d 55 (1990). See also *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986); *Trail Clinic, P.C. v Bloch*, 114 Mich App 700, 709; 319 NW2d 638 (1982), *Warren Tool Co v Stephenson*, 11 Mich App 274, 300-301; 161 NW2d 133 (1968). Further, "piercing the corporate veil is not necessary to a determination of personal liability for intentional torts." *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986).<sup>4</sup> This Court affirmed this principle in *Citizens Ins Co of America v Delcamp Truck*

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<sup>4</sup> The trial court stated that the record did not warrant "piercing the corporate veil" to impose personal liability on Burns. We note that in their complaint, plaintiffs did not seek to hold Burns liable on that basis.

*Center, Inc.*, 178 Mich App 570, 576; 444 NW2d 210 (1989) in the context of a claim of conversion, and stated:

When conversion is committed by a corporation, the agents and officers of the corporation may also be found personally liable for their active participation in the tort, even though they do not personally benefit thereby. [citations omitted.]

See also *Allen v Morris Bldg Co*, 360 Mich 214, 218; 103 NW2d 491 (1960), citing *Wines v Crosby & Company*, 169 Mich 210; 135 NW 96 (1912). In this case, plaintiffs pleaded facts which state claims of fraudulent misrepresentation and conversion. We conclude that the trial court erred in dismissing plaintiffs' tort claims against Burns based on the pleadings alone.

Plaintiffs' consumer protection act claim presents an issue of first impression in Michigan regarding whether the statute allows for personal liability against an agent of a corporation. In response to plaintiffs' motion for summary disposition, defendants argued that this claim against Burns must be dismissed because Burns was not a party to the contract, and he was a disclosed agent of ISAW. Defendants maintained Burns was not a person "engaged in trade or commerce" within the meaning of MCL 445.902(c) and (d); MSA 19.418(2)(c) and (d). The trial court did not specifically address whether an agent may be held personally liable under the Michigan consumer protection act. Rather, the trial court ruled that all of plaintiffs' claims must fail as a matter of law because Burns may not be held liable because he was at all times acting as an agent of ISAW. As previously discussed, Burns' status as an agent of ISAW does not preclude liability for his own tortious acts.

Although we could resolve this issue because it is a question of law and the facts necessary for its resolution have been presented, see, e.g., *Frericks v Highland Twp*, 228 Mich App 575, 585; 579 NW2d 441 (1998), we decline to do so because the parties have not adequately briefed the issue. Burns has not filed a brief on appeal, and plaintiffs' treatment of this issue is conclusory with little or no citation to authority. To attempt to decide this relatively complex issue of first impression without the benefit of briefing from both sides would force us to construct and then evaluate our own "arguments." That is not a proper role for this Court. See *Candelaria v BC General Contractors, Inc.*, 236 Mich App 67, 83; 600 NW2d 348 (1999).

We affirm the trial court's dismissal of plaintiffs' breach of contract claim. We reverse the trial court's grant of summary disposition with respect to plaintiffs' remaining claims. With respect to these claims, summary disposition was prematurely granted based upon the record as developed thus far. We express no opinion whether, following further factual development, summary disposition may be warranted and leave plaintiffs to their proofs.

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

/s/ Michael J. Talbot  
/s/ Martin M. Doctoroff  
/s/ Helene N. White