

STATE OF MICHIGAN
COURT OF APPEALS

HARTMAN & EICHHORN BUILDING
COMPANY, INC.,

Plaintiff/Counter-Defendant,

v

STEVEN DAILEY and JANINE DAILEY,

Defendants/Counter-
Plaintiffs/Third-Party Appellants,

and

GEORGE H. PRESLEY and ABN AMRO, d/b/a
STANDARD FEDERAL BANK,

Defendants,

and

JEFFRY R. HARTMAN,

Third-Party Defendant-Appellee.

FOR PUBLICATION
May 26, 2005
9:00 a.m.

No. 249847
Oakland Circuit Court
LC No. 2001-032203-CK

Official Reported Version

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

SAWYER, J. (*concurring in part and dissenting in part*).

Although I agree with the majority that there may be individual liability by Hartman on the fraud claim, I disagree that there could be individual liability on the MCPA claim. Furthermore, I would not reach the question whether *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000), was correctly decided as I do not believe we need reach that issue and create a conflict. The only basis for the trial court's grant of summary disposition on the MCPA claim

was that there would be no individual liability by defendant.¹ Whether liability under the MCPA is limited to the business itself or may be extended to an individual employee or agent of the business who actually commits the violation on behalf of the business appears to be a question of first impression in Michigan.

The Daileys alleged in their counter-complaint and third-party complaint various violations of MCL 445.903. That section sets out numerous practices that are unlawful under the act and the initial paragraph provides, "(1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows" The term "trade or commerce" is one of art that is defined by MCL 445.902(d) as follows:

"Trade or commerce" means 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. "Trade or commerce" does not include the purchase or sale of a franchise, but does include pyramid and chain promotions, as "franchise", "pyramid", and "chain promotions" are defined in [MCL 445.1501 to 445.1545].

Resolution of the issue of individual versus company liability under the MCPA can be achieved by looking to the first clause of the definition of "trade or commerce." Specifically, that term is defined as "the conduct of a business" Therefore, the statute addresses "the conduct of a business" rather than the conduct of an individual.

Furthermore, in drafting the MCPA, the Legislature clearly demonstrates that it was cognizant of when it wished a provision to include an individual and when it did not. For example, MCL 445.902(c) defines "person" to include a "natural person" as well as a "corporation" and other business entities. By contrast, the Legislature did not provide a definition of "business" that includes natural persons. Moreover, although MCL 445.903 addresses the conduct of a business, other sections address the conduct of persons. For example, MCL 445.903a defines "company" to mean "a person engaged in trade or commerce who provides a service contract to consumers." Similarly, MCL 445.903c and MCL 445.904d prohibit "a person" from placing a misleading telephone directory entry or advertisement.

Further, the sections dealing with remedies also selectively establish remedies available against "a person." For example, MCL 445.905 authorizes the attorney general to seek a restraining order against "a person" who is violating MCL 445.903. The general remedy section,

¹ The parties do discuss in their briefs whether the MCPA applies to residential builders. Cf. *Forton*, *supra* at 715, and *Winans v Paul and Marlene, Inc*, unpublished opinion per curiam, issued July 8, 2003 (Docket No. 230944). Although I agree with the majority that *Winans* presents the better view of this issue, ultimately the trial court did not decide this question in its opinion and, therefore, we should decline to address it.

MCL 445.911, authorizes under paragraph 1 equitable relief against a person who violates MCL 445.903. But under paragraph 2, which provides for a financial recovery, there is no such language regarding the action being against "a person" who violates the act. The Legislature's use of both the terms "a business" (a specific term) and "a person" (a more general term) reflects an intentional distinction between the two and a very specific scheme by the Legislature: equitable relief against persons violating the act, but no financial damages against those individuals.

Moreover, the majority's reliance on MCL 445.911(7) is misplaced for a number of reasons. First, as noted above, the MCPA defines "person" to include any legal entity, including corporations and partnerships. Therefore, the use of the word "person" in that subsection does not necessarily establish a remedy against an individual. Second, that subsection establishes a period of limitations in which to commence an action under the act and then provides that a *defendant* in a lawsuit may raise a claim under the act as a defense or counterclaim. But who would be suing the consumer that might have a claim under the MCPA? It would be the business with which the consumer contracted, not the individual employee who may have violated the act. Therefore, if anything, MCL 445.911(7) supports the view that financial damages under the act are recoverable against the business entity, not against the individual employee. Third, subsection 7 does not create a remedy. As discussed above, it is subsection 1 that creates a remedy against an individual, and that remedy is only equitable in nature.

Accordingly, it is clear and unambiguous to me that the Legislature provided for equitable relief against the individual who actually engages in the conduct that violates the act in order to stop the conduct, while providing for financial remedies against the business that benefits from that conduct. Therefore, I believe that the trial court correctly concluded that there was no individual liability by Hartman and it properly granted summary disposition for him on the MCPA claim.

/s/ David H. Sawyer