STATE OF MICHIGAN

COURT OF APPEALS

DONALD J. BROWN and NANCY BROWN,

Plaintiffs-Appellants,

v

MALT-O-MEAL COMPANY and ALDI FOODS STORE #077,

Defendants-Appellees.

UNPUBLISHED
November 20, 2003

No. 240793
Wayne Circuit Court
LC No. 01-113037-NO

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants in this action arising out of plaintiffs' consumption of tainted Malt-O-Meal cereal. We affirm.

The trial court granted defendants' motion for summary disposition on the ground that plaintiffs, potential class members of a class action suit in Minnesota brought by persons suffering injuries as a result of the consumption of tainted Malt-O-Meal cereal, failed to opt out of the class action and were therefore barred from filing an individual action. Plaintiffs argue that they are not barred from filing an individual action because they did not receive notice that they were required to take affirmative action to opt out of the class action in order to bring an individual suit. Plaintiffs concede that they had notice of the class action itself.

While defendants asserted below and assert now on appeal that their motion for summary disposition was brought under MCR 2.116(C)(8), the motion is, in fact, a motion for summary disposition under MCR 2.116(C)(10), as it is supported and opposed by documentary evidence. *Kubisz v Cadillac Gage*, 236 Mich App 629, 633 n 4; 601 NW2d 160 (1999). A trial court's decision to grant a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Morris & Doherty, PC v Lockwood*, ___ Mich App ___; ___NW2d ___ (Docket No. 235451, issued October 7, 2003), slip op, p 2. Summary disposition of all or part of a claim or defense may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10).

In reviewing an order granting summary disposition under MCR 2.116(C)(10), we examine all relevant documentary evidence in the light most favorable to the nonmoving party to

determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 673 (1995). All reasonable inferences are to be drawn in favor of the nonmovant. *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999), remanded 465 Mich 919 (2001).

In determining whether plaintiffs received appropriate notice of the Minnesota class action, we must apply Minnesota law. See, e.g., *Nat'l Equipment Rental, Ltd v Miller*, 73 Mich App 421, 425; 251 NW2d 611 (1977). In *Carlson v Independent School District No.623*, 392 NW2d 216 (Minn, 1986), the Supreme Court of Minnesota held that notice of a class action must be reasonably designed to reach all potential class members. *Id.* at 222. Here, there is no dispute that plaintiffs received notice of the class action.

Minnesota Court Rule 23 provides, in pertinent part, that notice in a class action shall advise each member that:

> (1) the court will exclude from the class any person who so requests by a specified date; (2) the judgment, whether favorable or not, will include all members who do not request exclusion.

Here, the notice signed by the judge stated that a person must either register as part of the on-going case or elect to opt out to handle a claim individually. The notice further stated that only if a class member opted out of the suit was that person entitled to bring an individual action. The notice then detailed what steps to take either to register as a class member or to be excluded from the lawsuit.

Once plaintiffs are on notice of the class action suit, failure to opt out prevents their filing an individual suit against defendants under the terms of the notice filed in the class action suit. *Carlson, supra.* See also *Cooper v Federal Reserve Bank of Richmond*, 467 US 867, 874; 104 S Ct 2794; 81 L Ed 2d 718 (1984), which states:

> There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation. See, *e.g., Supreme Tribe of Ben-Hur v Cauble*, 255 US 356, 41 S Ct 338, 65 L Ed 673 (1921); Restatement of Judgments § 86 (1942); Restatement (Second) of Judgments § 41(1)(e) (1982); see also Fed. Rule Civ. Proc. 23(c)(3); see generally Moore & Cohn, Federal Class Actions—Jurisdiction and Effect of Judgments, 32 Ill.L.Rev. 555 (1938). Basic principles of res judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply. A judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief. . . . . A judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment.

Viewed in a light most favorable to plaintiffs, and taking all allowable inferences into account, the evidence presented reveals that plaintiffs were notified of the existence of the class action,

were sent papers regarding the class action, and yet failed to opt out. Under these circumstances, the trial court did not err in granting defendants' motion for summary disposition.

Plaintiffs next contend that they are not bound by the judgment in the class action because the Minnesota court did not have personal jurisdiction over them. We disagree. A class action suit is an exception to the general requirement of minimum contacts with the forum state that usually must support in personam jurisdiction. *Phillips Petroleum Co v Shutts, et al.*, 472 US 797, 811; 105 S Ct 2965; 86 L Ed 2d 628 (1985). A forum state may exercise jurisdiction over the claim of an absent class action plaintiff in an action for money damages if the plaintiff receives notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. *Id* at 811-812. Due process also requires that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" form to the court. *Id.*

As discussed *supra*, not only was the notice in this case reasonably calculated to apprise interested parties of the existence of the class action suit, plaintiffs had actual notice of the suit and an opportunity to opt out of the action. The due process requirements underpinning the concept of personal jurisdiction were satisfied in this case.

Plaintiffs also argue that the existence of a class action suit against Malt-O-Meal does not bar their claim against Aldi Foods. But the Order for Final Judgment and Dismissal in the class action suit orders that class members are deemed to have released Malt-O-Meal as well as all distributors, dealers, and vendors of Malt-O-Meal products. Aldi Foods, as a vendor of the Malt-O-Meal product that allegedly poisoned plaintiffs, was also released. Plaintiffs are therefore barred from bringing an action against Aldi Foods.

Finally, plaintiffs attempt to collaterally attack the validity of the class certification in the Minnesota class action by citing *Zine v Chrysler*, 236 Mich App 261; 600 NW2d 384 (1999); *Jackson v Motel 6 Multipurpose, Inc*, 130 F3d 999 (CA 11, 1997), and *Castano v American Tobacco Company*, 84 F3d 734 (CA 5, 1996), without any accompanying argument. To properly present an appeal, plaintiffs must appropriately argue the merits of the issues they identify in their statement of the questions involved. *Richmond Twp v Erbes*, 195 Mich App 210, 220; 489 NW2d 504 (1992), overruled in part on other grounds *Bechtold v Morris*, 443 Mich 105; 503 NW2d 654 (1993). Plaintiffs may not merely announce their position and leave it to this Court to discover and rationalize the basis for their claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003). Plaintiffs' failure to properly address the merits of their assertion of error constitutes abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Nonetheless, plaintiffs cannot, in this proceeding, collaterally attack the decisions made in the class action suit.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad