

IN THE COURT OF APPEALS 08/20/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00717 COA

**WILLIAM H. AUSTIN, JR., GEORGE F. BARBER, III, BILL FULLER, LARRY JAMES,
BEN SMITH, AND JIMMY D. WEBSTER, JR.**

APPELLANTS

v.

**PEOPLES BANK AND TRUST COMPANY, SUNBURST BANK, H.W. WILLIAMS, RON
WINKLER AND JOE BRYAN**

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ANDREW BAKER

COURT FROM WHICH APPEALED: CIRCUIT COURT OF DESOTO COUNTY

ATTORNEYS FOR APPELLANTS:

F. EWING HENSON, III AND GLEN REID, JR.

ATTORNEYS FOR APPELLEES:

RANDALL D. NOEL, NAT G. TROUTT AND GUY T. GILLESPIE, III

NATURE OF THE CASE: CIVIL -- FRAUD

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT IN FAVOR OF ALL DEFENDANTS

BEFORE BRIDGES, P.J., BARBER, COLEMAN, AND PAYNE, JJ.

BARBER, J., FOR THE COURT:

The Plaintiffs, William H. Austin, Jr., George F. Barber, III, Bill Fuller, Larry James, Ben Smith, and Jimmy D. Webster, Jr., appeal from a judgment of the Circuit Court of DeSoto County granting summary judgment in favor of the Defendants, Sunburst Bank, H.W. Williams and Ron Winkler, and denying the Plaintiffs leave to file their proposed amended complaint. Finding no error in the proceedings below, we affirm.

I. BACKGROUND

Sometime in 1988 or 1989, Joe Bryan, a Southaven real estate developer, conceived the idea for the Stonegate project. Stonegate was a limited partnership formed for the purpose of purchasing three contiguous tracts of property in Southaven for the development of a condominium office park. Bryan approached several businessmen in the Southaven area (the Plaintiffs in this case) about joining the partnership. He also approached H.W. Williams, the president of the Southaven branch of Sunburst Bank, and Ron Winkler, Sunburst's Senior Vice-President, about serving as general partners in the partnership. Initially, Williams and Winkler agreed to fill these roles, but they later withdrew from the partnership in order to avoid a potential conflict of interest -- Stonegate had "presold" five of the condominium units and it was contemplated that Sunburst would be approached about providing financing on these "presales." After Williams and Winkler withdrew from the partnership, Jimmy Webster, the president of Stylecraft Lamps, Inc., purchased their two partnership interests and Bryan and Bryan Associates, Inc. was substituted as the sole general partner.

The final version of the partnership agreement, signed by the limited partners after they had all been informed that Williams and Winkler would no longer be participating in the partnership, provided that each of the limited partners would contribute \$20,000 to the partnership as an initial cash investment. In reality, however, Bryan spared the limited partners from having to actually contribute this money up front by obtaining a \$180,000 certificate of deposit, which would cover the total of the limited partners' capital contributions. The partnership agreement also contained the following clause:

[N]o Limited Partner may be required to accept any liability other than his initial cash investment and the liability of Limited Guaranty Agreement with the Lender for this project.

Before their withdrawal as partners, Williams and Winkler met with Ricky Dilly, of Peoples Bank and Trust Company to inquire as to whether Peoples would be interested in becoming the lender on the Stonegate project. In the Spring of 1989, Peoples committed to loan Stonegate \$1,500,000 for the condominium development. As security for extending this loan to Stonegate, Peoples was able to obtain signed guaranties from each of the limited partners in which the limited partners agreed to be personally liable for the amount lent to the partnership by Peoples.

By early 1990, Bryan was headed for bankruptcy as a result of various personal financial setbacks. His corporation was then replaced as the general partner by Smith. Problems also began to develop with the Stonegate project itself. For various reasons, the "pre-sales" of the condominium units never materialized as originally envisioned and the partnership fell behind on its payments to Peoples. Eventually, Peoples initiated foreclosure proceedings on the Stonegate property. It was sold at a

foreclosure sale held during February of 1991 for \$885,000.

On April 1, 1991, in anticipation that Peoples would attempt to enforce the personal guaranties so that it could cure the deficiency between the \$1,500,000 Peoples loaned on the project and the \$885,000 ultimately collected from the foreclosure, the limited partners initiated this suit against Sunburst, Williams, Winkler, Bryan and Peoples. In their complaint, the Plaintiffs alleged that Bryan, Williams and Winkler formulated a scheme whereby they attempted to bail Bryan and Sunburst out of the precarious financial situation in which they found themselves as the result of Bryan's having become over-leveraged in his real estate investments and Sunburst's imprudent participation as a lender on these investments; that Williams, Winkler and Bryan had used deceit and trickery to get the Plaintiffs involved in the Stonegate project; that Williams, Winkler and Bryan had made numerous material misrepresentations to the Plaintiffs to the effect that the maximum extent of their personal liability would be limited to the \$20,000 initial capital contributions specified in the partnership agreement; that the Plaintiffs had been tricked into signing the personal guaranties without their awareness that the documents that they were signing were in fact personal guaranties; and that the guaranties were then used by the Defendants as a means of obtaining the necessary funds from Peoples to bail Bryan and Sunburst out. These factual allegations supported the Plaintiffs' theories of relief based on fraud and civil conspiracy. The Plaintiffs prayed for compensatory damages (including damages for mental distress, pain and anguish) and punitive damages, as well as declaratory judgments that the personal guaranties were null and void.

As part of its response to the Plaintiffs' complaint, Peoples asserted counterclaims against the Plaintiffs and a cross-claim against Bryan. Of particular note is the fact that Peoples' counterclaims against the limited partners sought recovery on the basis of the personal guaranties.

During the pendency of this litigation, Bryan declared bankruptcy and was dropped from the suit. On June 2, 1994, after the parties engaged in extensive discovery, the trial court heard arguments on Williams' and Sunburst's motions for summary judgment. During the course of these arguments, it was announced to the court that Peoples and the Plaintiffs had arrived at a settlement of their respective claims by way of the Plaintiffs agreeing to pay Peoples an undisclosed amount of money. On June 3, 1994, the Plaintiffs filed a motion for leave to file an amended complaint. The proposed amended complaint would have dropped Peoples as a Defendant while retaining the claims for fraud and civil conspiracy against the remaining Defendants. The amended complaint also would have added causes of action for invasion of privacy and breach of fiduciary duty.

The motion regarding the proposed amended complaint was set for hearing on June 17, 1994. Shortly before the hearing, the court advised all counsel by phone that it was going to grant the pending motions for summary judgment and that it would hold a status conference on June 17, 1994 with regard to the remaining claims against Winkler. On June 15, 1994, Winkler filed a motion for summary judgment, which essentially adopted the arguments and contentions already put forth in Sunburst's motion for summary judgment. Subsequently, at a status conference held on June 17, 1994, the trial court denied the motion for leave to file an amended complaint and granted summary judgment in favor of Winkler. The trial entered its final opinion granting summary judgment in favor of all of the remaining Defendants on June 22, 1994. The Plaintiffs now appeal.

II. DISCUSSION

A) The Appropriateness of Summary Judgment

Rule 56 of the Mississippi Rules of Civil Procedure provides that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact. The moving party is therefore entitled to judgment as a matter of law. M.R.C.P. 56(c). "Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried." *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 362 (Miss. 1983). "The motion for summary judgment challenges the very existence of the legal sufficiency of the claim . . . ; in effect, the moving party takes the

position that he is entitled to prevail as a matter of law because his opponent has no valid claim for relief" *Id.*

"[When a party opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law." *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 684 (Miss. 1987). Mere denial of the movant's allegation that there is no genuine issue of fact is insufficient to create an issue of fact. *Smith v. Sanders*, 485 So. 2d 1051, 1054 (Miss. 1986). The party opposing the motion is required to bring forward significant probative evidence demonstrating the existence of the triable issue of material fact. *Id.* On appeal from a grant of a motion for summary judgment, we review the record *de novo*. *Northern Elec. Co. v. Phillips*, 660 So. 2d 1278, 1281 (Miss. 1995).

The Plaintiffs' claims for relief essentially rest upon the theory that the Defendants conspired to use numerous fraudulent statements and deceitful practices to induce the Plaintiffs to sign the personal guaranties and to enter into the partnership. In order to prevail on a theory of fraud, the burden rests upon the Plaintiffs to prove, by clear and convincing evidence, the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of the truth; (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury. *Spragins v. Sunburst Bank*, 605 So. 2d 777, 780 (Miss. 1992). Without deciding whether the Plaintiffs succeeded in producing evidence sufficient to create triable issues of fact with respect to these elements, we hold that as a matter of law, the Plaintiffs have no claim against the remaining Defendants.

The main thrust of the Plaintiffs complaint concerns the validity of the signatures on the personal guaranties in favor of Peoples. The Plaintiffs have taken the position that they do not remember signing the guaranties and that their signatures were therefore obtained either through their being tricked into signing them without their knowledge or, by implication, through forgery. The plaintiffs, however, have produced no evidence linking either Williams or Winkler (and, by implication, Sunburst) to the procurement of their signatures on the guaranties. The only evidence on the record shows that if there was indeed fraud, deceit or trickery involved in obtaining the Plaintiffs' signatures on the personal guaranties, the only party that could have directly perpetrated it would have been Bryan because the evidence shows that he played a substantial role in obtaining the signatures.

The Plaintiffs settled the claims existing between Peoples and themselves by paying an undisclosed sum to Peoples. In return, Peoples released the Plaintiffs from any liability on the personal guaranties. By continuing to proceed against the Defendants remaining in the suit, the Plaintiffs are attempting to recover for the pecuniary loss they suffered as a result of supposedly being tricked into signing the personal guaranties and being made liable for any deficiency between the money that the Stonegate property brought in at the foreclosure sale and the \$1,500,000 that Peoples loaned to Stonegate. However, as the trial judge correctly noted in his Opinion granting summary judgment:

[B]y voluntarily settling with Peoples Bank, the plaintiffs have erased any colorable claim they might have had [against the remaining Defendants]. Since none of the plaintiffs actually invested any money in the partnership, the only "damage" they have suffered consists of the voluntary settlement payments they have made or will make to Peoples Bank. Essentially, in their oral argument opposing summary judgment, the plaintiffs now seek the remedy of indemnification from Sunburst, Williams, and Winkler.

The case law in Mississippi is clear that a party who makes a payment in settlement of a disputed claim for which he asserts he was not liable (and, in essence, this is the position that the Plaintiffs took when they asserted that they never knowingly signed the personal guaranties and that their signatures were obtained by trickery and deceit) has made a voluntary payment and cannot recover the amount paid from the party actively responsible for the wrong. As the Mississippi Supreme Court has stated:

The authorities hold that to recover indemnity it is necessary for the plaintiff *to allege and prove that he was legally liable to the person injured, and consequently, paid under compulsion*. Otherwise, the payment is a voluntary one for which there can be no recovery.

Southwest Mississippi Elec. Power Ass'n. v. Harrigill, 180 So. 2d 220, 223 (Miss. 1966) (emphasis added). The Plaintiffs, however, have failed to allege and prove that they were legally liable to Peoples. A fundamental inconsistency exists between the Plaintiffs stating that they were tricked into signing the guaranties and therefore were not legally liable to Peoples Bank (fraud, after all, is a valid ground for voiding a contractual obligation) and then proceeding against the remaining Defendants on the theory that the remaining Defendants were responsible for their becoming legally liable to Peoples Bank. To further quote *Harragill*:

This Court has declined to extend aid to those who make voluntary payments for which they were not legally liable. The basic purpose of courts, as far as civil cases are concerned, is to extend aid to those who have not been able by lawful means to aid themselves, and relief is not available to those who have neglected to take care of their interests. If an unjust demand is made upon a party for which he does not owe, when he knows or ought to know all the facts, he must avail himself of the means the law affords and resist the demand.

Id.

In their appellate brief, the Plaintiffs assert that their claim is more than an action merely for indemnity because they also prayed for compensatory damages for the pain, suffering, and mental anguish proximately caused by the Defendants' alleged fraudulent acts and because they also prayed for punitive damages. In other words, the Plaintiffs argue that they are seeking compensation for more than just any amounts that they paid out to Peoples in settlement of the claims. The problem with this argument, however, is that it ignores the fact that the Plaintiffs may not recover compensatory damages or punitive damages for their fraud claim:

One of the essential elements of a cause of action based on fraud or deceit is that the plaintiff suffer injury which is a consequence of and proximately caused by the misrepresentations made to him and upon which he relied. A cause of action for deceit is one which protects the formulation of business judgments without being misled by others. Not all misrepresentations are the subject of a cause of action sounding in fraud. 'In contradistinction with trespass and other direct injuries for which the complainant is awarded nominal damages if he should fail to plead and prove actual damage, *deceit belongs to that class of tort of which pecuniary loss constitutes part of the cause of action.*'

Jurcich v. General Motors Corp., 539 S.W.2d 595, 600-01 (Mo. Ct. App. 1976) (emphasis added) (citations omitted). As the Missouri Appellate Court explained, without proving pecuniary loss, there can be no other type of award of damages. As we have already stated, by making a voluntary payment to Peoples in settlement of the Peoples claims, the Plaintiffs cannot now recover these monies from the Defendants. In effect, the fact that they cannot recover for their voluntary settlement payments precludes the Plaintiffs from proving any pecuniary loss. Without being able to prove and recover for their pecuniary loss, the Plaintiffs may not be awarded compensatory damages for pain and suffering and punitive damages.

In sum, by voluntarily settling with Peoples Bank by paying off an undisclosed amount in settlement of Peoples' contractual claims against them, the Plaintiffs have extinguished any right of recovery from the remaining Defendants. Thus, we affirm the grant of summary judgment in favor of the Defendants.

B) Did the Trial Court Err in Refusing to Grant the Plaintiffs Leave to File an Amended Complaint?

After Williams and Sunburst filed their motions for summary judgment, the Plaintiffs filed their motion for leave to file an amendment complaint. In doing so, the Plaintiffs sought leave to add the additional theories of invasion of privacy and breach of fiduciary duty to their fraud and conspiracy claims. This motion for leave was filed the day after oral arguments on the motions for summary judgment were heard by the trial court and twenty-four days before trial or the case was scheduled to begin.

A ruling of a trial judge denying leave to file an amended complaint may only be overturned if the judge abused his discretion in making it. *Parker v. Game and Fish Comm'n*, 555 So. 2d 725, 730 (Miss. 1989). The last discovery item entered in the record is the June 8, 1992 deposition of Richard Hall. The order setting this case for trial on June 26, 1994 was entered on October 13, 1993.

Nonetheless, the Plaintiffs did not file their motion for leave to file an amended complaint until June 3, 1994, the day after the trial court heard oral arguments on the motions for summary judgment and twenty-four days before trial was set to begin. We think that in view of the relatively late date at

which the Plaintiffs sought to file an amended complaint, the trial judge was well within his discretion in denying their attempt to do so. Accordingly, we affirm his ruling.

**THE JUDGMENT OF THE CIRCUIT COURT OF DESOTO COUNTY IS AFFIRMED.
COSTS ARE ASSESSED TO THE APPELLANTS.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, PAYNE, AND
SOUTHWICK, JJ., CONCUR. MCMILLIN, J., CONCURS IN RESULT ONLY.**