STATE OF MICHIGAN

COURT OF APPEALS

NORMAN FORGE and NMF, INC.,

Plaintiffs/Counter Defendants/Appellants,

v

LEONARD SMITH and DIANE SMITH,

Defendant/Counter-Plaintiffs/Appellees,

and

THOMAS FABER,

Defendant-Appellee,

and

HARRY KIEF, JOSEPH ASCIONE and JERRY ASCIONE,

Defendants.

UNPUBLISHED

No. 177588
LC No. 91-116241 CH

Before: Taylor, P.J., and Murphy and E.J. Grant,* JJ.

Murphy, J. (dissenting).

I respectfully dissent. I disagree with the majority's conclusion that a judgment notwithstanding the verdict was in order because plaintiffs failed to overcome defendants' statute of frauds defense. In light of my decision to reverse the trial court's order granting defendants' JNOV, I would not address the merits of plaintiffs' claim that the trial court erred in dismissing their claim for innocent misrepresentation because the claim, if viable, involves the same damages.

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* Circuit judge, sitting on the Court of Appeals by assignment.

At the outset, I take issue with that portion of the majority's opinion that expresses ambivalence regarding the standard of review for a JNOV motion. Although *Rasmussen v Louisville Ladder*, 211 Mich App 541, 545; 536 NW2d 221 (1995) does set forth an abuse of discretion standard for a JNOV motion, the cases preceding *Rasmussen* (stating the same standard), ultimately lead to the case of *Wilson v General Motors Corp*, 183 Mich App 21, 36; 454 NW2d 405 (1990).[1] There, it is clear that the appellant was seeking review of its motion for JNOV *and a new trial*, and that the abuse of discretion standard of review pertained *only* to the new trial motion. *Wilson, supra*, at 36. Therefore, in reviewing the JNOV motion at hand, I employed the standard of review as succinctly stated by the Michigan Supreme Court:

> II. STANDARD OF REVIEW FOR JUDGMENT
>
> NOTWITHSTANDING THE VERDICT
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> The standard of review for judgments notwithstanding the verdict requires review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should a motion for judgment notwithstanding the verdict be granted. [*Orzel v Scott Drug Co*, 449 Mich 550, 557-558 (1995) (citations omitted).]

Here, in viewing the evidence in the light most favorable to plaintiffs, I do not believe that plaintiffs' claim was barred by the statute of frauds because plaintiffs presented sufficient evidence to create a question of fact regarding this defense and the jury was, therefore, free to conclude that the defense did not apply. *West Central Packing, Inc v A F Murch Co*, 109 Mich App 493, 499; 311 NW2d 404 (1981). First, a question of fact existed as to whether the combination of several writings (the original lease agreement, building contract, applications for building permits, related site plans, and zoning board documents) were sufficient to meet the writing requirement necessary to satisfy the statute of frauds. Within this question lies the subissue of whether an agency relationship existed between Leonard Smith and the other landlords, Diane Smith and Thomas Faber. The issue of the existence and scope of an agency relationship is one for the jury. *Hertz Corp v Volvo Truck Corp*. 210 Mich App 243, 246; 533 NW2d 15 (1995).

In my opinion, sufficient evidence was presented by plaintiffs to allow the jury to conclude that Leonard Smith was acting as an agent on behalf of Diane Smith and Faber. Specifically, paragraphs 30 and 32 of the lease agreement, as cited by the majority, made reference to the building contract and construction plans, and the lease agreement was signed by all of the landlords. The building contract and construction plans, in turn, made reference to lot 21, as did the decision from the City of Detroit Zoning Board and the Board of Appeals, which granted Leonard Smith's application to build plaintiffs' restaurant. Therefore, because the lease agreement specifically allowed Leonard Smith to act for Diane Smith and Faber on the issue of site plains that included lot 21, and because Leonard Smith solely approved the plans by submitting them to the zoning board, I believe that plaintiffs presented sufficient evidence to create a question of fact as to whether Leonard Smith was authorized to act as these parties' agent. *Hertz, supra* at 246.

Having found that sufficient evidence was presented to allow the jury to find that an agency relationship existed, the jury was, therefore, free to conclude that the combination of the writings submitted by plaintiffs was sufficient to satisfy the writing requirement of the statute of frauds. See *West Central Packing, supra* at 499; *Goslin v Goslin,* 369 Mich 372, 375-376; 120 NW2d 242 (1963). Accordingly, in my opinion, when viewing the evidence in a light most favorable to plaintiffs, their claim was not barred for lack of a signed writing.

The majority found it unnecessary to reach the issue of whether the trial court erred in finding that the construction plans, the only written evidence concerning plaintiffs' use of lot 21 for parking, were not certain and definite enough to satisfy the statute of frauds, given its conclusion that a jury question did not exist regarding plaintiffs' claim that a combination of writings took the case out of the statute. However, in light of my differing view, I would address the trial court's finding, and hold that the court erred.

A review of the proposed construction plans indicates that parking spaces were anticipated on lot 21. Further, the zoning order allowing the construction of plaintiffs' restaurant states that "the construction, additions, alterations or use [of the proposed restaurant] shall be in accordance with the plot plan submitted on the date of the hearing." Therefore, the zoning board granted the application to construct the proposed restaurant with the knowledge that parking on lot 21 would be available, and conditioned its approval of the construction upon compliance with the plans. Accordingly, the exact number of spaces is not at issue, only that parking was anticipated on lot 21 for plaintiffs' patrons.

A writing does not fall prey to the statute of frauds for lack of definiteness if the writing establishes the intent of the parties. See *Goslin, supra* at 376. Accordingly, where evidence was presented that plaintiffs intended to use lot 21 as a parking lot for their patrons, and where evidence was presented that the city granted Leonard Smith's application to construct plaintiffs' restaurant with the knowledge that lot 21 would be used as such, I would conclude that sufficient evidence was produced at trial to create a question of fact as to the definiteness of the alleged easement. *Id.* Therefore, the jury was free to conclude that the plaintiffs' claim was not barred by the statute of frauds. See *West Central Packing, supra* at 499.

Next, I agree with the majority's conclusion that, because the lease agreement could not be performed within one year (the use of lot 21 for parking was for the twenty-five-year lease), the doctrine of partial performance did not apply. *Dumas v Auto Club Insurance Association,* 437 Mich 521, 540-541; 473 NW2d 652 (1991). However, I disagree with the trial court's finding that plaintiffs' partial performance of striping and installing parking berms on lot 21 was insufficient to take the case out of the statute of frauds because such performance was merely part of the existing lease agreement. If such were true, then in effect, the trial court found that the lease agreement expressly granted plaintiffs easement rights in lot 21. In other words, if the lease agreement required plaintiffs to stripe and utilize lot 21 for parking, then an express easement was granted in the written, signed lease and the statute of frauds is not at issue.

I also agree with the majority that the trial court erroneously dismissed plaintiffs' claim for innocent misrepresentation on the basis that Michigan does not recognize such a claim. In *US Fidelity and Guaranty v Black*, 412 Mich 99, 118 n 10; 313 NW2d 77 (1981), our Supreme Court clearly stated that the doctrine of innocent misrepresentation may be used as either a cause of action to recover damages or as an affirmative defense. However, in light of my belief that the trial court erred in granting defendant's motion for JNOV, I would not address plaintiffs' innocent representation claim further because the claim, if viable, involves the same damages.

In summary, I would reverse the trial court's decision to grant defendant a JNOV, where plaintiffs presented sufficient evidence to allow the jury to conclude that plaintiffs' claim was not barred by the statute of frauds, and would find that the trial court's decision regarding plaintiffs' claim for innocent misrepresentation is moot because the claim, if viable, involves the same damages.

/s/ William B. Murphy

[1] *Rasmussen, supra* at 545, relies upon *Winiemko v Valenti*, 203 Mich App 411, 415; 513 NW2d 181 (1994), which relies upon *Schutte v Celotex Corp*, 196 Mich App 135, 138; 492 NW2d 773 (1992), which relies upon *Howard v Canteen Corp*, 192 Mich App 427, 431 n 2; 481 NW2d 718 (1992), which relies upon *Michigan Microtech v Federated Publications, Inc*, 187 Mich App 178, 186-187; 466 NW2d 717 (1991), which relies upon *Wilson, supra* at 36; however, the *Michigan Microtech* court did not state that *Wilson* applied the abuse of discretion standard only to a motion for a new trial.