

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

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GERALD EDWARDS,

Plaintiff-Appellee,

v

CAPE TO CAIRO, L.L.C.,

Defendant-Appellant.

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UNPUBLISHED

March 18, 2010

No. 280023

Washtenaw Circuit Court

LC No. 06-000782-AV

Before: ZAHRA, P.J., and WHITBECK and M. J. KELLY, JJ

PER CURIAM.

Plaintiff filed this action against defendant, a tour operator, to obtain a refund of deposits made for a planned trip to Africa in September 2001. Following a bench trial in the district court, the court found that defendant violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, and awarded plaintiff damages of \$15,497 and attorney fees of \$12,046, for a total judgment of \$27,543. Defendant appealed to the circuit court, which affirmed the district court's decision. This Court granted defendant's delayed application for leave to appeal. We affirm.

**I. BASIC FACTS AND PROCEEDINGS**

In the summer of 2001, plaintiff planned a trip to Africa for himself and several church members. Plaintiff testified that, as was his custom and for convenience, he paid the deposits for the trip through his company, Engineered Plastic Products, Inc. ("EPP"), and he later reimbursed EPP for the charges. He also used his administrative assistant at EPP to handle many of the arrangements. The trip was to include both leisure activities and charitable mission work, but did not have any purpose related to EPP, which was an automotive parts supplier with no ties to Africa. The group was scheduled to depart for Africa on September 17, 2001, but after the tragic terrorist attacks on September 11, 2001, it was decided to cancel the trip. The hotel, lodge, and airlines all agreed to provide full refunds, but defendant declined to refund the full amounts to plaintiff. Plaintiff filed this action to obtain full refunds of his deposits, alleging that defendant misrepresented that the vendors were not willing to provide refunds and then improperly retained portions of the amounts refunded by the vendors. The district court found that defendant falsely informed plaintiff that refunds were not available and engaged in other deceptive practices to avoid refunding plaintiff's deposits.

## II. STANDING

Defendant first argues that plaintiff did not have standing to bring this action because the charges for the trip were paid by EPP, and therefore EPP, not plaintiff, was the real party in interest. Whether a party has standing is a question of law, which is reviewed de novo. *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc.*, 479 Mich 280, 291; 737 NW2d 447 (2007). However, a trial court's findings of fact at a bench trial are reviewed under the clearly erroneous standard. MCR 2.613(C); *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* at 329-330.

MCR 2.201(B) provides, in relevant part:

**(B) Real Party in Interest.** An action must be prosecuted in the name of the real party in interest, subject to the following provisions:

(1) A personal representative, guardian, conservator, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a person authorized by statute may sue in his or her own name without joining the party for whose benefit the action is brought.

In *City of Kalamazoo v Richland Twp*, 221 Mich App 531, 534; 562 NW2d 237 (1997), this Court explained:

MCR 2.201(B) requires that, generally, an action must be prosecuted in the name of the real party in interest. A real party in interest is the one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). This standing doctrine recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy. *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). In addition, the doctrine protects a defendant from multiple lawsuits for the same cause of action. *Kearns v Michigan Iron & Coke Co*, 340 Mich 577, 581; 66 NW2d 230 (1954). A defendant is not harmed provided the final judgment is a full, final, and conclusive adjudication of the rights in controversy that may be pleaded to bar any further suit instituted by any other party. *Id.*; *Cody Park Ass'n v Royal Oak School Dist*, 116 Mich App 103, 110; 321 NW2d 855 (1982).

The "real party in interest" rule is concerned only with the standing of the plaintiff then before the court to bring suit. *Hofmann*, 211 Mich App at 95. Thus, contrary to defendant's contention, this Court is not concerned with whether EPP is a proper party; rather, only whether plaintiff is a proper party.

Here, plaintiff was a real party in interest with respect to his claim under the MCPA. MCL 445.911(2) provides that a "person who suffers a loss as a result of a violation of this act may bring an action to recover actual damages or \$250.00, which ever is greater, together with

reasonable attorneys' fees." The district court's written decision addressed whether plaintiff lacked standing "because most of the bills were paid for with business checks issued by [EPP] and credit cards issued to [EPP]." The court initially found that the issue was a "red herring" and that "relationship between [plaintiff] and [EPP] and the taxing authorities is irrelevant to the disposition of the issues in this case." The court later issued a written opinion expanding its findings to indicate that "[t]he checks issued to [defendant] to pay for the trip were issued by [EPP], of which [plaintiff] is the CEO, but according to his testimony the trip was paid by [EPP], and the company was to be reimbursed." The district court clearly found that plaintiff used EPP's funds to finance the trip. However, the court also recognized that plaintiff testified that he intended to reimburse EPP. Although the court did not expressly conclude that plaintiff had reimbursed EPP, the court nonetheless accepted that plaintiff considered himself indebted to EPP and that he would have "to justify this particular trip between his maker and the Internal Revenue [Service]." In other words, the court accepted plaintiff's testimony and concluded that plaintiff suffered a "loss" as a result of a violation of the MCPA. Indeed, defendant's owner, Barbara Levedahl, admitted that two refund checks were issued in plaintiff's name, reflecting her understanding that plaintiff was the responsible party. The court's conclusion is supported by plaintiff's testimony and we are not left with a definite and firm conviction that a mistake has been made.

Defendant questions whether plaintiff ever actually reimbursed EPP for the deposits charged to EPP's accounts, because, despite plaintiff's testimony that he reimbursed EPP, he never produced any cancelled checks or other records showing repayment. Plaintiff testified that he believed the reimbursement checks were written in 2001, and he did not know if the cancelled checks were still available. Defendant now argues that the district court should not have considered plaintiff's testimony because the records had been destroyed. However, plaintiff explained at trial that he does not receive cancelled checks from his bank, and defendant never moved to strike plaintiff's testimony at trial on the basis that any alleged records were destroyed, nor did defendant ask the court to presume that any such evidence would not be favorable to plaintiff. See *Hamann v Ridge Tool Co*, 213 Mich App 252, 255-258; 539 NW2d 753 (1995) (where a party deliberately or negligently destroys evidence or fails to produce it, a court may presume that the evidence would operate against the party who destroyed or lost it). By failing to present this argument in the district court, defendant has forfeited appellate review. *LME v ARS*, 261 Mich App 273, 284; 680 NW2d 902 (2004).

Further, plaintiff possessed constitutional standing to assert his claim. *Michigan Citizens for Water Conservation*, 479 Mich at 302-303. Plaintiff had a sufficient interest in the outcome of litigation to ensure vigorous advocacy and had a legal or equitable right, title, or interest in the subject matter of the controversy, i.e. his deposits. In addition, plaintiff alleged (a) an economic loss (injury-in-fact), (b) there existed a connection between his alleged loss and right to his deposits, and (c) the MCPA provided express authority to the district court award relief on the merits.

For these reasons, the district court did not err in finding that plaintiff had standing to bring this action.

### III. THE MCPA

Defendant argues that the MCPA does not apply to this case because the trip was not intended “primarily for personal, family, or household purposes.” We disagree.

The applicability of the MCPA is to be decided on a case-by-case basis. *Nelson v Ho*, 222 Mich App 74, 84; 564 NW2d 482 (1997). Here, the district court found that defendant violated MCL 445.903(1), which provides that “[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful.”

MCL 445.902(g) [formerly subsection (d)] defines “trade or commerce,” in relevant part, as

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. . . . [Emphasis added.]

The intent behind the MCPA is to protect consumers when purchasing goods that are primarily for personal, family, or household purposes. *Zine v Chrysler Corp*, 236 Mich App 261, 271; 600 NW2d 384 (1999). Thus, the MCPA does not apply to transactions intended primarily for business or commercial, rather than personal, purposes. *Id.* at 273; *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 83-86; 592 NW2d 112 (1999); see *Slobin v Henry Ford Health Care*, 469 Mich 211, 216-218; 666 NW2d 632 (2003).

Initially, we disagree with defendant’s argument that the MCPA did not apply to this case because the deposits were paid for through EPP, and defendant used his administrative assistant at EPP to make many of the arrangements, thereby indicating that the trip was primarily for business purposes. As previously indicated, plaintiff testified that this was done merely for convenience, not for any purpose related to EPP, which is an automotive parts supplier with no ties to Africa. Further, the evidence showed that the trip was planned for members of plaintiff’s family and church, not employees of EPP. Although there was also evidence that plaintiff had an interest in some diamond mines in Africa and may have intended to schedule some business meetings in connection with those interests, the evidence showed that this was, at most, only a small purpose of the trip.

We also disagree with defendant’s argument that the charitable purposes associated with the trip removed it from the scope of the MCPA. Plaintiff testified that the trip was intended to include both leisure activities and charitable mission work. The charitable work was intended to further the mission of his family’s charitable foundation, the Edwards Foundation, to bring relief to children in Africa. We do not believe that the mission aspect of the trip disqualifies it from being considered for “personal, family, or household purposes,” particularly considering that plaintiff, his family, and the other church members were not clergy members or professional charitable workers, and that the charitable work was not intended to further any business or commercial interests. Furthermore, apart from the charitable work, the trip was intended to include several leisure activities that plaintiff arranged through defendant, including safari and fishing excursions.

We reject defendant's argument that it was entitled to summary disposition on this issue because plaintiff's affidavit submitted in opposition to its motion failed to disclose the primary purpose of the trip. Plaintiff averred that he planned the trip for himself and his friends, and was paying for it personally. The allegations were sufficient to allege that the trip was intended primarily for personal reasons to withstand summary disposition.

Defendant also argues that the district court erred in relying on plaintiff's posttrial affidavit in which he averred that he had planned the trip for himself and his friends, and that 60 percent of the trip was intended for leisure and recreational purposes. The court considered the affidavit only in connection with plaintiff's post-trial request for attorney fees under the MCPA. Even if the court erred in considering the affidavit, the error was harmless because the court had already found that plaintiff had prevailed on his MCPA claim and, contrary to what defendant argues, the facts averred in the affidavit did not contradict plaintiff's trial testimony. Rather, the trial testimony also indicated that the trip was primarily for personal, not business, reasons.

In sum, the evidence supports the district court's determination that the trip was intended "primarily for personal, family, or household purposes," thereby bringing it within the ambit of the MCPA.

#### IV. DAMAGES

Defendant also challenges the district court's awards of damages. We review the trial court's findings of fact with respect to damages under the clearly erroneous standard. MCR 2.613(C); *Carrier Creek Drain Drainage Dist*, 269 Mich App at 329.

##### A. CURRENCY FLUCTUATIONS

Plaintiff paid defendant \$14,952.50 as a deposit for the safari lodge, which amount defendant paid to the lodge. The lodge later fully refunded the deposit, but due to changes in the exchange rate between the American dollar and the South African rand, the amount refunded by the lodge was only \$11,244.76. The trial court held that defendant was liable for the difference of \$3,707.74.

As its sole basis for challenging this award on appeal, defendant contends that it should not have been held liable for the difference in the exchange rate because plaintiff conceded at trial that it was not responsible for the currency loss. We disagree. Viewed in context, plaintiff only stated that defendant was not responsible for the currency fluctuations and changes in the exchange rate. Plaintiff did not concede that defendant was not liable for any difference. While we agree that defendant was not responsible for the changes in the exchange rate due to economic conditions, that does not mean that it did not assume the risk of currency fluctuations, an issue defendant does not address. Moreover, plaintiff testified at trial that he was quoted prices based on the American dollar, not the South African rand. This supports the trial court's determination that plaintiff was entitled to a refund for the full amount of his deposit in American dollars. Accordingly, we find no error.

## B. NGALA LODGE CANCELLATION

Defendant next argues that it was entitled to retain a \$1,560 cancellation fee that was charged when plaintiff reduced the number of reservations at the Ngala Lodge well before September 11, 2001. We disagree.

The evidence at trial indicated that the lodge charged a cancellation fee when plaintiff reduced the number of room reservations in June or July 2001, but did not require that the fee be paid right away and agreed that plaintiff would not be charged the fee if it was able to rebook the rooms by plaintiff's arrival date, September 17, 2001. Nevertheless, defendant charged the cancellation fee to plaintiff in advance, at a higher rate than that imposed by the lodge, and led plaintiff to believe that the higher fee had been imposed by the lodge, not defendant. As it turned out, plaintiff did not take the trip and was granted a full refund by the vendors in Africa. Because the cancellation fee was never ultimately charged by the lodge, the trial court did not err in finding that plaintiff was entitled to a return of the cancellation fee he had previously paid.

## C. AIRLINE CANCELLATION FEE

Defendant also challenges the trial court's determination that plaintiff was entitled to a return of its cancellation fees for cancelled airline tickets. Although the airlines issued full refunds for all cancelled tickets after September 11, defendant imposed an additional fee of \$75 for each cancelled airline ticket, resulting in total fees of \$3,750 for cancelled airline tickets. Although defendant argues that it disclosed its cancellation policy when plaintiff ordered the tickets, defendant's notice failed to explain that it would be imposing fees separate from any penalties imposed by the airlines. The trial court did not disagree that defendant may have a right to be compensated for its work in arranging the trip, but concluded that it could not retain refunds owed to plaintiff to account for its fees. Defendant was obligated to explain its fees when it entered into any contract with plaintiff for arranging the trip, and its failure to clearly explain its schedule of fees, including in the documents provided to plaintiff when the tickets were ordered, meant that defendant was not entitled to retain the \$3,750 it withheld for the cancelled airline tickets.

We disagree with defendant's argument that the MCPA was not applicable to plaintiff's claim for the airline ticket cancellation fees, or that the claim is preempted by federal law.

MCL 445.904(1)(a) provides that "[t]his act does not apply to . . . [a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Defendant argues that this issue is governed by 49 USC 41712(a) of the Airlines Deregulation Act of 1978 (ADA), which also preempts plaintiff's claim.

49 USC 41712(a) provides:

On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, or ticket agent, and if the Secretary considers it is in the public interest, the Secretary *may* investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the

sale of air transportation. If the Secretary, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method. [Emphasis added.]

Federal law takes precedence over state laws by express preemption, conflict preemption, or field preemption. Congress's intent is the cornerstone of any preemption analysis. *X v Peterson*, 240 Mich App 287, 289; 611 NW2d 566 (2000).

49 USC 41712(a) provides for only permissive jurisdiction by the Secretary of Transportation. The statute specifically provides that the secretary "may" assume jurisdiction over matters related to airlines or ticket agents. Nothing in 49 USC 41712(a) requires the secretary's involvement or suggests that any state claim based on deceptive business practices involving ticket agents are preempted.<sup>1</sup> We therefore reject this claim of error.

Affirmed.

/s/ Brian K. Zahra  
/s/ William C. Whitbeck  
/s/ Michael J. Kelly

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<sup>1</sup> Defendant's reliance on *Nali v Northwest Airlines, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 2003 (Docket No. 240421), is misplaced because that case, in addition to being unpublished, is distinguishable. *Nali* involved the application of 49 USC 41713(b), which, unlike 49 USC 41712(a), provides for mandatory preemption of state law.