

IN THE SUPREME COURT OF MISSISSIPPI

**PETER SCHIFF and
NEW WAVE LIMITED**

Appellants

versus

Clerk's Docket # 2009-CA-00798

SCTE

**MAO, INC and
MARVIN A. ORNSTEIN**

Appellees

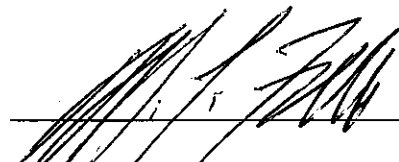
An Appeal from the Circuit Court of Jackson County, Mississippi

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Peter Schiff, an Appellant
New Wave Limited, an Appellant
Mao, Inc., an Appellee
Marvin A. Ornstein, an Appellee
Hon. Kathy King Jackson, the Circuit Court Trial Judge in this case.

So certified,



MICHAEL L. FONDREN,
Attorney for Appellants

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STATEMENT OF ISSUES

Whether there are genuine, material issues of fact which should be presented to the fact finder as to whether Peter Schiff, as an individual, was the victim of the tort of fraud by Mao, Inc. and Marvin A. Ornstein?

STATEMENT OF THE CASE

The Appellants, Peter Schiff (hereinafter "Mr. Schiff") and New Wave Limited (hereinafter "New Wave"), filed its Complaint in the Circuit Court of Jackson County, Mississippi against Mao, Inc. (hereinafter "Mao") and Marvin A. Ornstein (hereinafter "Mr. Ornstein") on August 11, 2005. The Complaint alleges that Mr. Schiff and New Wave were victims of the tort of fraud and to breach of contract. Mao and Mr. Ornstein denied these allegations in separate answers. After a period of discovery, Mao and Mr. Ornstein joined together and filed a Motion to Dismiss and a Motion for Summary Judgment.

On April 17, 2009, the Circuit Court of Jackson County, Mississippi granted the Summary Judgment Motion solely on the issue of whether the Mr. Schiff and New Wave were proper parties to this action. On April 28, 2009, the Trial court issued its Final Judgment granting dismissal with prejudice. Mr. Schiff and New Wave filed their Notice of Appeal to this Honorable Court on May 13, 2009.

FACTS

Mr. Schiff met Mr. Ornstein in the late 1980s. Mr. Ornstein represented to Mr. Schiff that he was well connected in the financial world and might be able to safeguard his personal assets. (Rec. at p.5).

Mr. Ornstein informed Mr. Schiff that he had owned casinos in Haiti that had made millions of dollars and was also a former New York bank president. He told Mr. Schiff that he had several sites eligible to build casinos, i.e. Biloxi, Mississippi, Missouri, and the Bahamas. (Rec. at p.5). Mr. Schiff was interested in the Missouri site. However, the actual truth was that

the site had not even had a tenant who had attempted to file an application for casino gambling. Sometime in 1994, Mr. Ornstein requested that Mr. Schiff invest \$300,000.00 of Mr. Schiff's personal assets into an "ironclad" investment in the casino site in Missouri. Mr. Ornstein represented that the investment , "...couldn't miss." (Rec. at p.154). Mr. Ornstein even stated in writing that, "If something went wrong, I would be picking up the tab." (Rec. at p.10).

Mr. Schiff was led to believe by Mr. Ornstein that the property in which Mr. Ornstein allegedly had a leasehold interest in was immediately eligible for casino gambling. Mr. Schiff was led to believe that there was definitely was going to be a gambling operation on the property and that he could receive a percentage of the proceeds from that gambling operation. (Rec. at p. 57). However, the truth of the matter was that the deal was not "ironclad" and that the alleged "gambling site" was not a "gambling site" at all. Rather, to the contrary, Mr. Ornstein, Mao, nor anyone else, had ever even filed for an application to operate the subject property as a gambling site. (Rec. at p.234). At the time Mr. Ornstein accepted Mr. Schiff's money, there was never even an agreement for any casino to use the subject property as a gambling site, as had been promised. The truth finally came out that the property was never approved as a gambling site. (Rec. at p. 234).

Mr. Schiff (not knowing the truth and reasonably relying upon Mr. Ornstein, a former New York FDIC bank examiner, former bank director and executive vice-president, and a former owner of casinos) decided to invest \$300,000.00 of his own personal money into Mr. Ornstein's "ironclad" venture which provided that if there was any loss Mr. Ornstein would "pick up the tab". It is clear Mr. Ornstein had no intent to pay back Mr. Schiff.

(Fondren) "Q. Well, do you feel like you owe him the money today?

(Ornstein) A. Do I owe him the money?

Q. \$300,000.00.

A. I never legally owed him the money, Morally, - -

Q. Morally, you feel like you owe him the money?

A. Morally, I felt I had an obligation to him if Biloxi came through.

Q. So if you made a lot of money, morally you would have pay him back;

but if you didn't, morally, you didn't owe it to him?

A. I would have never pay him what our financial arrangement was, no."

Ornstein Depo. (Rec. at p.258).

Even though Mr. Ornstein made promises and assurances directly to Mr. Schiff, clearly,

by his own testimony, he never intended to pay Mr. Schiff back under their financial

arrangement.

Mr. Ornstein suggested to Mr. Schiff that he set up an offshore corporation. (Rec. at p.6).

At this time, the fraudulent misrepresentations had already been spoken and written to Mr. Schiff,

as an individual. (Rec. at p.10) The fraud began way before New Wave was incorporated. Upon

Mr. Ornstein's suggestion, Mr. Schiff had the New Wave Limited Corporation incorporated.

Mr. Ornstein then had his attorney draft an agreement. A copy of the agreement is in the

Record at Pages 12 through 18. Mr. Schiff signed the agreement and loaned Mr. Ornstein

\$300,000.00 pursuant to Mr. Ornstein's representations.

The Agreement provides that Mao (then owned by Mr. Ornstein) will sublease certain real

property to a gaming company or develop a site in Missouri to be used for gaming purposes. (Rec. at p.12). Further, New Wave (of which Mr. Schiff was the sole owner and officer) was to receive a percentage of the proceeds after expenses for loaning \$300,000.00 to Mao. (Rec. at p. 12). The contract states that Mao represents that the real property which is the subject of the agreement "...complies with the Missouri Gaming Commission's requirement as a gaming site and that it knows of no information terms or conditions that might prohibit this property from being usable as a gaming site." (Rec. at p.15). Clearly, Mao and Mr. Ornstein knew that no application for gambling was on file with the Missouri Gaming Commission, and this fact "might prohibit this property from being usable as a gaming site." (Rec. at p. 15). The truth is, Mr. Ornstein, Mao nor anyone ever even attempted to file an application for gambling on the subject site.

The agreement also gave New Wave collateral in certain Bahamian property called "the Cat Island Property", and a lien on the stock of Bethel-Morris Enterprises, which was the company that owned the Cat Island Property. (Rec. at p.15). However, the Cat Island Property was sold for about one million dollars without even advising Mr. Schiff or New Wave. (Rec. at p.270). The stocks of Bethel-Morris Enterprises were never held by Mr. Ornstein's law firm as required by the Agreement. (Rec. at p. 15). Mr. Schiff repeatedly made demands on Mr. Ornstein, but Mr. Ornstein repeatedly told him verbally, and in writing, that Mr. Schiff did not need to file a lawsuit because he would pay him his money back.

All along Mr. Ornstein knew that the collateral was not properly encumbered by the agreement, yet he represented to Mr. Schiff that the collateral would be there to protect Mr. Schiff's money. As a banker, Mr. Ornstein knew how to properly lien property for collateral

with a mortgage or deed of trust. (Rec. at p. 82). Mr. Ornstein knew all along that the Cat Island property was not collateral for Mr. Schiff's money because there was no lien recorded upon it. Sadly, the facts end with no money whatsoever being repaid to Mr. Schiff. Rather, the money was spent without a paper trail. Though, Mr. Ornstein did admit that he kept \$100,000.00 of it for himself as a refund. (Rec. at p. 256).

SUMMARY OF THE ARGUMENT

MARVIN A. ORNSTEIN COMMITTED THE TORT OF FRAUD AGAINST PETER SCHIFF, AS AN INDIVIDUAL, AS SUCH PETER SCHIFF, AS AN INDIVIDUAL, IS THE PROPER PARTY TO PURSUE THE FRAUD CLAIM.

With all due respect to the Trial Court, the Trial Court's decision ignores Mr. Schiff's common law fraud claim. The common law fraud claim is not even mentioned in its Order Granting Motion For Summary Judgment. The Trial Court erred when it failed to consider the fact that the fraud was committed against Mr. Schiff, personally. The fraud began when Mr. Ornstein represented to Mr. Schiff that he had an "ironclad" investment that would be "protected" by the Cat Island, Bahamas property. All elements of common law fraud that a Defendant must commit to be fraud, were committed by Mr. Ornstein before New Wave Limited was formed. The final element (damages) was simply the conveyance of Mr. Schiff's \$300,000.00 to Mr.

Ornstein.

The trial court relied upon *Durham v. University of Mississippi*, 2006-CA-01388-COA

(2006 Ct. App. MS) in applying the rule of *Bruno* to this case. In *Bruno v. Southeastern*

Services, Inc. 385 So.2d 620, 622 (Miss. 1980), Mississippi adopted the rule that

“an action to redress injuries to a corporation, whether in contract or in tort, cannot be maintained by a stockholder in his own name, but must be brought by the corporation because the action belongs to the corporation and not the individual stockholder whose rights are merely derivative. The rule applies even though the complaining stockholder owns all or substantially all of the stock in the corporation.” *Id.*

However, the rule of *Bruno* does not apply in this case. The tort of common law fraud was committed against Mr. Schiff personally. Every representation and act needed by a defendant to establish fraud had been committed by Mr. Ornstein against Mr. Schiff personally before New Wave was ever formed. New Wave was formed on November 11, 1994. (Rec. at p. 3). The fraudulent misrepresentations began prior to this date. (*See Schiff Affidavit*, Rec. at pp. 5-9, *also see* the Exhibits attached to the *Schiff Affidavit*). Mr. Ornstein committed the fraud in his writing on November 3, 1994, wherein he represented to Mr. Schiff that there would be no surprises, that he would be protected by a secured interest in the Cat Island property, and that if something went wrong, he would “pick up the tab.” (Rec. at 10). This letter even states that Mr. Schiff and Mr. Ornstein had discussed these items before the letter was written. The misrepresentations were given to Mr. Schiff, an individual, before New Wave was a corporation. Therefore, there is no legally logical way that the rule of *Bruno* would require that New Wave pursue this action. To the contrary, the proper party must be Mr. Schiff. The creation of New Wave was merely an action of reasonable reliance upon Mr. Schiff.

Further, the idea to incorporate New Wave was a concept of Mr. Ornstein. All of Mr.

Ornstein's statements were made in an effort to obtain Mr. Schiff's personal money. Mr. Schiff

is the personal victim to the fraud and should be entitled to recover his damages from Mr.

Ornstein.

STANDARD OF REVIEW

The standard of review for a Summary Judgment motion under Rule 56 of the Mississippi Rules of Civil Procedure is whether there is a genuine issue of material fact. *See Comments to* MRCP 56. If there are genuine issues of material fact, then the matter should be heard by the trier of fact, and not dismissed pursuant to a Summary Judgment.

In the present case, the issue is whether there were genuine issues of material fact presented to the Trial Court as to whether Peter Schiff, as an individual, was a victim of common law fraud by Mr. Ornstein.

ARGUMENT

PURSUANT TO THE ELEMENTS OF COMMON LAW FRAUD, THERE ARE GENUINE MATERIAL ISSUES OF FACT AS TO WHETHER PETER SCHIFF WAS A VICTIM, AS AN INDIVIDUAL, TO THE TORT OF FRAUD.

Again, with all due respect to the Trial Court, the Trial Court ignored Mr. Schiff's common law fraud claim. The elements of fraudulent conduct, which are committed by a tortfeasor in a fraud case (in the case, Mr. Ornstein), occurred before New Wave was incorporated.

The common law elements of fraud are as follows:

- 1) a representation,
- 2) its falsity,
- 3) its materiality,

- 4) the speaker's knowledge of its falsity or ignorance of its truth,
- 5) his intent that it should be acted upon by the hearer and in the manner reasonably contemplated,
- 6) the hearer's ignorance of its falsity,
- 7) the hearer's reliance on its truth,
- 8) the hearer's right to rely on its truth,
- 9) all resulting in, the hearer's consequent and proximate injury.

Chaitman v. Gulf Pub. Co., Inc., 502 So.2d 644 (Miss. 1987).

Furthermore, fraud may be perpetuated by remaining silent or not disclosing facts that should have been disclosed when the speaker finds that certain material representations are false. In *Mooneyham v. Progressive Gulf Ins. Co.*, 910 So.2d 123 (Miss. App. 2005), the Court points out that a party to a business transaction, "is under a duty to disclose to the other party, before the transaction is consummated, information which will correct previous representations to the other party which are untrue or misleading." This disclosure is required where the misrepresentation of the facts is at the outset and there was at the outset a duty of disclosure to correct the affirmative falsehood. *Mooneyham*, 910 So.2d at 1227. See also, *Guastella v. Wardell*, 198 So.2d 227 (Miss. 1967).

In the present case, the fraud began against Mr. Schiff personally and individually before New Wave was ever incorporated. It was Mr. Ornstein's concept to set up New Wave. The fraud began when Mr. Ornstein represented to Mr. Schiff, an individual, that he could get him involved in a lucrative "casino deal" for \$300,000.00 of Mr. Schiff's personal money. Further, Mr. Ornstein failed to disclose the fact that the casino which Mr. Ornstein described as "...one of the

largest gaming companies in the world..." never executed the agreement to "lease" the subject property before November 8, 1994 as he promised. (Rec. at p. 10). As a matter of fact, no gaming company ever executed an agreement to lease the subject property or even filed for an application with the Missouri Gaming Commission. Nevertheless, Mr. Ornstein having full knowledge of this fact took Mr. Schiff's \$300,000.00 subsequent to the date that he promised a lease would be executed by a gaming company. The receipt for the check is dated January 5, 1995. (Rec. at p. 368). Without question, Mr. Ornstein knew that no casino had executed an agreement to lease the subject property at the time that he received and kept Mr. Schiff's \$300,000.00. When you examine the facts in detail, this action is primarily about fraud against an individual!

The facts as applied to the common law elements of fraud in this case represent genuine issues of material facts that the fraud was committed against Mr. Schiff, as an individual. Each element of common law fraud is discussed below:

1) A Representation,

On November 3, 1994, before the existence of New Wave, Mr. Ornstein wrote to Mr. Schiff and made the following representations:

"Pursuant to our conversation, I propose the following:

I will sell to you or your company 3% (three percent) of money generated via an agreement to be executed before November 8, 1994, with one of the largest gaming companies in the world. We project that agreement will generate \$6 Million to MAO, Inc., before federal taxes. MAO, Inc.'s financial arrangement is 5% (five percent) of gross income; therefore, there cannot be surprises with the exception of the gross itself" (Rec. at p. 10). (emphasis added).

There was an agreement to be executed before November 8, 1994, with one of the largest gaming companies in the world. There were no "six (6) million dollar" projections. There were plenty of surprises, especially the truth. The truth being that no one had even applied

2) Its Falsity,

"In the event the project is aborted or fails, you would be protected by receiving 20% (twenty percent) of the corporate stock of the company holding title to 540 acres on Cat Island in the Bahamas." (Rec. at p. 10).

"We should make a substantial amount of money on this deal. If something went wrong, I would be picking up the tab. (Rec. at p. 10). (emphasis added).

Mr. Ornstein promised Mr. Schiff that his investment would be safe and that the investment would not lose and that it was a sure thing. (Rec. at p. 6). He also promised one of the largest gaming companies would execute an agreement to lease the subject property on November 8, 1994. This never occurred. However, Mr. Ornstein received Mr. Schiff's money after November 8, 1994, but never disclosed that the gaming company had not executed the agreement to lease the subject property. Certainly, he had a duty to disclose the most material fact in the agreement. Without a gaming company and without a gaming application approved for the subject property, there is no money to be made.

Mr. Ornstein represented to Mr. Schiff that the property had been approved for gambling and that he had a tenant to run a casino or gambling related entity on the project. (Rec. at p. 7) He indicated that this is an "ironclad" deal. (Rec. at p. 154).

statements to induce fraud.

Further, he had no idea what the "projections" may be. These were all classic property as collateral some type of mortgage had to be recorded. (Rec. at p. 291).

was no casino or gambling entity in place. He knew this was a risk. He also knew that to secure gambling applications had been filed with the State of Missouri. He, therefore, knew that there

Most importantly, Mr. Ornstein himself testified under oath that he knew no

4) The Speakers Knowledge of Its Falsity or Ignorance of Its Truth,

Notably, all of this occurred before the existence of New Wave.

persuade Mr. Schiff that this is an "ironclad" deal that cannot go wrong. All of this was false.

Also, the promises of collateral and the projections of profit are material to consideration to Mr. Ornstein. Without a tenant, the deal does not work.

approved with the State of Missouri, there would be no reason to give the \$300,000.00 in

All of the statements are material. Without a gambling application being filed and

3) Its Materiality,

Schiff was taking any risk whatsoever.

representation, and guarantees, were false. At no time did Mr. Ornstein even imply that Mr.

The application for gambling had not been filed by any entity. (Rec. at p. 234). Clearly, the

The property had not been finally approved for gambling, for the use of any entity.

apparently did not spend his own money. The lease (if there was one) lapsed. (Rec. at p. 7).

not be "picking up the tab". Rather, at least \$100,000.00 was kept by Mr. Ornstein and he

There was no protection by a Cat Island Bahamas property. Mr. Ornstein would

to Missouri for a gambling application. (Rec. at p. 234).

5) **His Intent That it Should be Acted Upon by the Hearer and in the Manner Reasonably Contemplated,**

Mr. Ornstein clearly made the statements both verbally and in writing with the purpose of having Mr. Schiff give him \$300,000.00 of Mr. Schiff's personal money. The fraud was directed to Peter Schiff as an individual.

6) **The Hearer's Ignorance of Its Falsity,**

Mr. Schiff had no evidence that the statements were false. This has not been disputed.

7) **The Hearer's Reliance on Its Truth,**

Mr. Schiff read Mr. Ornstein's letter and listened to Mr. Ornstein's representations. As a result, Mr. Schiff relied upon them by incorporating New Wave and giving Mr. Ornstein \$300,000.00 of his personal money.

8) **The Hearer's Right to Rely on Its Truth,**

Mr. Schiff acted reasonably when he relied upon Mr. Ornstein's statements. He had represented to Mr. Schiff that he had owned casinos in Haiti that had made millions of dollars and was a former New York bank president. Mr. Ornstein was a well educated man with a background of working with the FDIC, large banks, and casinos. (Rec. at p. 215-224).

9) **All Resulting in the Hearer's Consequent and Proximate Injury,**

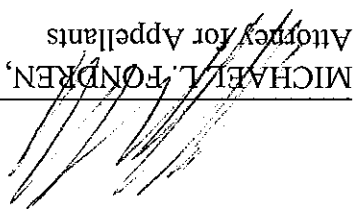
Mr. Schiff has lost \$300,000.00, and lost income from the \$300,000.00. He has also incurred attorney's fees and costs to pursue this action. He could not collect on the alleged "collateral" because it was serendipitously sold for about a million dollars by Mr. Ornstein. (Rec. at p. 279).

CONCLUSION

With all due respect to the Trial Court, the Trial Court focused on the breach of contract claim and ignored the fraud claim. Clearly, there are material issues of fact to each of the fraud elements under Mississippi Common Law Fraud. It is Peter Schiff, as an individual, that was the victim of fraud.

WHEREFORE, PREMISES CONSIDERED, Mr. Schiff and New Wave request that this Honorable Court reverse the Trial Court's Summary Judgment ruling and remand this case to the Trial Court for a jury trial.

This the 22nd day of September, 2009.



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CERTIFICATE OF SERVICE

I, MICHAEL L. FONDREN, do hereby certify that I have this day served, via

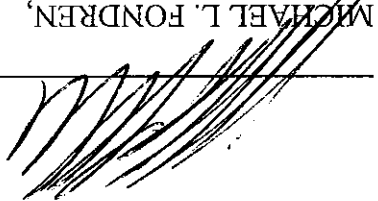
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States Mail, postage prepaid, a true and correct copy of the foregoing to:

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This the 22nd day of September, 2009.


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