

FILED

APR 27 2016

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

LOIS A. DUNSTON
CIRCUIT CLERK

BRADLEY L. SWEENEY,

Plaintiff,

vs.

CITY OF DECATUR,

Defendant.

No. 2016-L-18

MEMORANDUM SUPPORTING PLAINTIFF'S AMENDED COMPLAINT

BRADLEY L. SWEENEY, Plaintiff, by BOLEN ROBINSON & ELLIS, LLP, submits this Memorandum of Law in support of his Amended Complaint filed herein on April 22, 2016; and in further response to the following questions or concerns mentioned by the Court at the April 12 hearing on Defendants' Motion to Dismiss:

1. Does the *Sardiga v. Northern Trust Co.*,¹ decision apply to Sweeney's Complaint where Sardiga did not "refuse" or "report" wrongdoing as required by the Act?
2. Whether an "unclean hands" defense applies to any claim made by Plaintiff Sweeney where he did not voluntarily participate in Gleason's misconduct?

A. *Hubert v. Consolidated Medical Lab*, does not apply to the case at bar, when Plaintiff Sweeney did not personally participate in the questioned activity, and where he objected, but was overruled by the City Manager who controls the police department according to the City Code.

¹ *Sardiga v. Northern Trust Co.*, 409 Ill.App. 3d 56 (1st Dist. 2011) involved a complaint brought under Section 20 of the Whistleblower Act, not Section 15 as alleged in the Sweeney Complaint

B. The *Fellhauer v. City of Geneva*, 142 Ill.2d 495 (1991) decision has no application to the case at bar, where the parties and facts of the alleged retaliatory discharge are not even remotely similar to *Fellhauer*.

C. *Fellhauer* does inform us about pleading public policy for common law retaliatory discharge claims.

3. Could an “unclean hands” defense apply to any requested remedy other than job reinstatement?
4. Is the “unclean hands” argument an affirmative matter which could defeat Sweeney’s claim at the pleading stage, where there are fact questions as to whether Sweeney was guilty of some misconduct or bad faith toward the City? *See Zahl v. Krupa*, 365 Ill.App. 3d 653 (2d Dist. 2006).

I. The *Sardiga v. Northern Trust Co.* decision does not apply to Sweeney.

Plaintiff Sweeney’s Amended Complaint now clearly identifies his claim as one brought under Section 15 of the Illinois Whistleblower Act, 740 ILCS 174/15. Sweeney’s claim is that he “disclosed” what he reasonably believed was a violation of specific Illinois misconduct laws to Decatur City Manager Gleason, who was Sweeney’s sole and immediate government supervisor. *Brame v. City of Northern Chicago*, 2011 Ill.App. 2d 100760 (2011) confirms that Section 15 of the Act is satisfied if the plaintiff “discloses suspected unlawful activity to his employer who also happens to be a government or law-enforcement agency.” *Id.* at 3.

The *Sardiga* case dealt exclusively with a claim under Section 20 of the Act where “refusing to participate in an activity that would result in a violation of State or federal law . . .” *Supra.* Sardiga did not report or disclose alleged misconduct, but he complained to his private employer about what he believed to be illegal.

In the case at bar, Plaintiff Sweeney's Count II claim under Section 15 of the Illinois Whistleblower Act is based on his disclosure of conduct he suspected was unlawful. His Complaint states a factual and legal basis for relief, unlike Sardiga who neither disclosed to government or law enforcement, and who did not "refuse to participate" in the alleged unlawful conduct.

II. An "unclean hands" defense is not applicable to Plaintiff Sweeney who did not voluntarily participate in suspected unlawful activity by Gleason.

Sweeney disclosed his opposition to Gleason's misconduct, which amounted to reporting the suspected misconduct to a government authority. Gleason was then also a member of the Illinois Law Enforcement Training and Standards Board. Sweeney objected to Gleason's use of police department resources, and he did not furnish his car or his services as the driver. Sweeney also ultimately refused to ever again allow Gleason to order police department resources for his own use and benefit.

A. The *Hubert* decision cited by Defendants' Combined Motion to Dismiss is inapposite here.² The *Hubert* case involved a plaintiff employee who personally participated in the fraudulent/improper conduct of preparing false tissue samples, and where the plaintiff reported that she had herself committed voluntary misconduct in preparing the false tissue samples. Unlike *Hubert*, Sweeney immediately reported and disclosed City Manager Gleason's improper conduct. And, Gleason was the perpetrator and beneficiary, not Sweeney.

Sweeney's "disclosure" of Gleason's conduct for purposes of his Count II statutory claim satisfies Section 15 of the Whistleblower Act. Neither the common law nor the Act requires a plaintiff to both refuse to participate and to report/disclose suspected unlawful activity.

² *Hubert v. Consolidated Med. Labs*, 306 Ill.App.3d 1118 (1999).

Claiming that Sweeney “participated” in misconduct, the City and Gleason have variously argued that the *Hubert* “unclean hands” decision bars Sweeney’s claim because Sweeney did not arrest Gleason; he did not prevent Gleason from having access to the police car and driver; and he did not file a written interdepartmental report of misconduct by Gleason. Paragraph 13 of the Amended Complaint contains allegations that Sweeney did not voluntarily participate in Gleason’s use of the police car and driver; that Gleason overruled Sweeney’s stated opposition to Gleason’s personal use of police department resources; and that City Manager Gleason has testified that he believes he had authority to overrule the police chief and established department rules and regulations.³ These allegations must be taken as true at this pleading stage of the case.

Obviously, under the circumstances alleged here, Plaintiff Sweeney was subject to the direction and control of City Manager Gleason. According to Gleason’s Affidavit at paragraph 9, he did not consider his use of the police car and driver on May 7, 2015, to be a violation of any law or regulation. In summary on this point, Sweeney’s alleged conduct was not voluntary participation; and as alleged, his conduct did not mislead Gleason or the City in any way such that he could be guilty of “unclean hands,” or where he could be estopped from pursuing his claims in this case to trial.

B. *Fellhauer* does not apply to the facts in *Sweeney v. City of Decatur*. The *Fellhauer* case involved a complaint for retaliatory discharge by an employee against the city mayor who terminated him. *Fellhauer* predates the Illinois Whistleblower Act, and therefore, it is not a

³ Gleason’s testimony about his assumed authority under the Decatur City Code indicates he claims discretion as City Manager to overrule or contradict police department rules and regulations such as the rule prohibiting taking a police car outside city limits for personal use. Gleason dep. at 146-147.

defense to Sweeney's claim under that Act. Moreover, the *Fellhauer* decision does not apply to the facts and circumstances of this case for purposes of Sweeney's Count I common law claim.

Fellhauer brought a common law retaliatory discharge claim against the Geneva mayor who discharged him for protesting the delay of a public contract. *Fellhauer v. City of Geneva*, 142 Ill.2d 495, 499-501 (1991). The Supreme Court found that Fellhauer's complaint did not properly specify a law or public policy that would be violated by the complained-of conduct. Ultimately, the Court upheld dismissal of Fellhauer's complaint for retaliatory discharge because the employee's interest in a livelihood was outweighed by the mayor's absolute discretion to terminate, and where the Illinois Municipal Code required mandatory city council review of all employment terminations by a mayor. These limited circumstances are markedly different from the unreviewed and unreviewable termination by City Manager Gleason.

The circumstances in the case at bar are dramatically different than in *Fellhauer*. Sweeney has specifically identified the laws and public policies implicated by his termination; and there are three other factual distinctions which make the *Fellhauer* decision inapplicable here. First, unlike *Fellhauer*, Sweeney's complaint alleges specific misconduct by another public employee which could constitute official misconduct. Second, unlike *Fellhauer*, Sweeney alleges that he reported the misconduct and objected to it. Third, here there is no mandatory review of Sweeney's termination, contrary to the mandatory review in *Fellhauer*. To date there has not been any investigation or review by the Decatur City Council of Gleason's now-admitted personal use of City resources or of Gleason's discharge of Sweeney. In summary, unless his Amended Complaint is allowed to move forward, Brad Sweeney's interest in earning a livelihood is not properly balanced or protected where the City Manager has unlimited (and unreviewed) discretion to

discharge the police chief, and where the City Manager claims to have authority to overrule established police department rules and regulations for his personal benefit.

C. Fellhauer does inform us about pleading clearly mandated public policy for common law retaliatory discharge claims. *Fellhauer* does stand for the proposition that a plaintiff claiming retaliatory discharge must specifically allege a constitutional or statutory basis, and must allege facts which show that a discharge could violate the public policy mandated by the constitutional or statutory provision. *Id.* at 505. Plaintiff Fellhauer did not allege a constitutional or statutory basis for his claim of retaliatory discharge, i.e. he alleged only that he was discharged for refusing to delay contract negotiations and for refusing to solicit contributions from city vendors. *Id.* at 505.

Going beyond Plaintiff Fellhauer's failure to allege a required constitutional or statutory provision for a clearly mandated public policy, the Supreme Court held that the Illinois official misconduct statute removed the need to recognize a common law retaliation claim in Fellhauer's circumstances. The Court held in *Fellhauer's* circumstances that the official misconduct provision would be a sufficient deterrent to a wrongful termination, where the Illinois Municipal Code required review of the mayor's decision to discharge Fellhauer.

Eighteen years after the *Fellhauer* decision, the Illinois Supreme Court decided *Turner v. Memorial Medical Center*, 233 Ill.2d 494 (2009). In *Turner*, the Court recognized a balancing of interests between society's interest in adhering to public policy, the employer's interest in operating efficiently, and an employee's interest in earning a livelihood. *Id.* at 500. The Court found that Turner's complaint failed to set forth a clearly mandated public policy because it referred only to non-Illinois commission standards and the Medical Patient Rights Act. *Id.* at 501.

Ultimately, the Court found that Turner had failed to plead any specific Illinois public policy based on the limited statements in the complaint.

Unlike *Turner* and *Fellhauer*, here Sweeney has specified not only the specific constitutional and statutory references in paragraph 10 of his Amended Complaint, but he also has described the specific public policy violation which results from his discharge at paragraph 30 of his Amended Complaint. The Illinois Whistleblower Act itself supports the clearly mandated Illinois public policy violated by his termination where he has alleged in detail a discharge related to his reporting of suspected illegal conduct by City Manager Gleason.

When weighing and balancing Sweeney's right to earn a livelihood, the public's interest in reporting criminal conduct by public officials, and the public's interest in the freedom of a public employee to speak or not speak in support or opposition to additional taxes against the governmental employer's interest in operating efficiently, sustaining Sweeney's complaint for retaliatory discharge is necessary to achieve a proper balance. Here, the City of Decatur has not even alleged that Sweeney's discharge was necessary to avoid interference with City Government. To the contrary, the City has formally admitted that Sweeney was not fired for anything related to job performance, but only because of a personal dispute with City Manager Gleason. *See* Ex. 6 attached to Sweeney's Amended Complaint.

III. An "unclean hands" defense only applies to equitable claims; and in asserting this claimed affirmative defense, Defendant admits the legal sufficiency of Plaintiff's claims. *Zahl v. Krupa*, 365 Ill. App. 3d 653 (2006) citing *Long v. Kemper Life Insurance Co.*, 196 Ill.App. 3d 216, 218-19 (1990). A copy of the *Zahl* decision is attached.

"Unclean hands" as affirmative defense only applies, if at all, to equitable remedies, and it does not affect legal rights such as money damages or statutory claims. *Zahl*, at 658, citing *American National Bank & Trust Co. of Chicago v. Levy*, 83 Ill.App. 3d 933, 936 (1980).

IV. Defendant's previous 2-619 motion to dismiss with attached affidavit cannot be the basis for dismissal of Sweeney's Complaint.

In order for an affirmative matter under Section 2-619(a)(9) to avoid or defeat a claim, it must completely refute crucial conclusions of law, or amount to undisputed facts which render it impossible for the plaintiff to ever plead a cause of action. *Zahl* at 659.

As in the *Zahl* case, here Defendant can do nothing more than offer statements designed by it to refute facts well-pleaded in the Amended Complaint which must be taken as true for purposes of Defendant's prior motions to dismiss. *Id.* at 659. In other words, at this pleading stage of the case, the affidavits submitted by Defendant have only created additional questions of fact for a jury.

V. Conclusion.

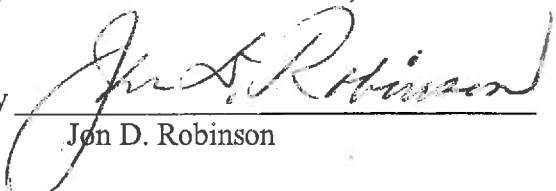
For the reasons stated above, the *Sardiga* decision is not applicable to Sweeney's Complaint, and Defendant's previous motions to dismiss based on a claimed "unclean hands" affirmative defense must fail. Neither the *Fellhauer* nor the *Hubert* decisions are on point or applicable to the facts alleged in Sweeney's complaint. Defendant City of Decatur should be ordered to answer the complaint.

Respectfully submitted,

BRADLEY L. SWEENEY, Plaintiff

By BOLEN ROBINSON & ELLIS, LLP

By

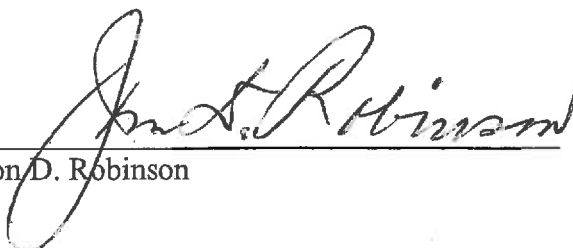

Jon D. Robinson

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I mailed a true and exact copy of the above and foregoing document by depositing same in the United States Mail at 5:00 p.m. properly addressed to the following this 27th day of April, 2016:

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and I further state that a courtesy copy was handed to the Clerk for delivery to the Honorable A. G. Webber IV this 27th day of April, 2016.


Jon D. Robinson

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Zahl v. Krupa

Appellate Court of Illinois, Second District

May 31, 2006, Filed

No. 2-05-0919

Reporter

365 Ill. App. 3d 653; 850 N.E.2d 304; 2006 Ill. App. LEXIS 487; 302 Ill. Dec. 867

JACQUELINE ZAHL, GENE KRUPA, and LYNN KRUPA, Plaintiffs-Appellants, v. RONALD A. KRUPA, Individually, Defendant (Jones and Brown Company, Inc., and John G. Creighton, Thomas Kulakowski, Ronald A. Krupa, John Creighton, Larry Wright, Ross Boehmer, Terry Mooney, Patricia M. Dell'Aquila, Marysue Brown, Ron Krol, and Steven Brown, as Directors and Officers of Jones and Brown Company, Inc., Defendants-Appellees).

Subsequent History: [***1] Released for Publication July 14, 2006.

Appeal after remand at Zahl v. Krupa, 2010 Ill. App. LEXIS 325 (Ill. App. Ct. 2d Dist., Apr. 13, 2010)

Prior History: Appeal from the Circuit Court of Du Page County. No. 04-L-1334. Honorable John T. Elsner, Judge, Presiding.

Disposition: Reversed and remanded.

Core Terms

plaintiffs', invest, allegations, apparent authority, board of directors, trial court, letterhead, doctrine of unclean hands, investment fund, signature, Lumber, defeat, parties, funds, investment opportunity, friends and family, unclean hands, individually, pleaded, bind

Case Summary

Appellant investors sued appellees, the corporation and its directors and officers, in the Circuit Court of Du Page County (Illinois), for breach of contract, fraud, negligent hiring, negligent supervision, and negligent retention. The corporation and its directors and officers moved to dismiss under 735 Ill. Comp. Stat. Ann. 5/2-615 (2004) and 735 Ill. Comp. Stat. Ann. 5/2-619 (2004). The court dismissed the lawsuit. The investors appealed.

The investors claimed that the president of the corporation represented to them that he was authorized to take their money and invest it in his name in an investment fund at the corporation for the corporation's principals. They also claimed that he told them that the investment would be guaranteed by the corporation. They further claimed that they had successfully invested through the president in the fund in the past. Finally, they claimed that the president informed them that he had lost their money by losing it in the stock market. Later, he allegedly told them that he had lost their money by gambling. On appeal, the

court found that the trial court erred in dismissing the investors' claims. First, the doctrine of unclean hands did not bar the investors' claims. Further, the trial court should not have granted dismissal based on the language of the agreements because they did not unequivocally reflect an intent to bind the president individually. Finally, the investors pleaded facts that, if true, would have proved that the president acted with the apparent authority of the corporation, its officers, and directors in taking their money pursuant to the investment agreements.

The judgment of the circuit court dismissing the investors' claims against the corporation and its officers and directors was reversed. Further, the cause was remanded for further proceedings.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

HN1 735 Ill. Comp. Stat. Ann. 5/2-619.1 (2004) of the Illinois Code of Civil Procedure permits combined motions.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2 735 Ill. Comp. Stat. Ann. 5/2-615 (2004) and 735 Ill. Comp. Stat. Ann. 5/2-619 (2004) allow for dismissal under different legal theories. A 735 Ill. Comp. Stat. Ann. 5/2-615 motion attacks the legal sufficiency of the plaintiff's claims, while a 735 Ill. Comp. Stat. Ann. 5/2-619 motion admits the legal sufficiency of the claims but raises defects, defenses, or other affirmative matter, appearing on the face of the complaint or established by external submissions, that defeat the action.

Civil Procedure > ... > Equity > Maxims > Clean Hands Principle

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Contracts Law > Remedies > Equitable Relief > Unclean Hands

HN3 Unclean hands is an affirmative defense.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Appeals > Standards of Review > General Overview

HN4 The question presented on review of a motion to dismiss pursuant to 735 Ill. Comp. Stat. Ann. 5/2-615 (2004) is whether the complaint contains sufficient facts that, if established, would entitle the plaintiff to relief.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Standards of Review > General Overview

HN5 Where a claim has been dismissed pursuant to 735 Ill. Comp. Stat. Ann. 5/2-619 (2004), the question for review is whether there is a genuine issue of material fact and whether the defendant is entitled to judgment as a matter of law.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN6 When reviewing a trial court's disposition of a motion to dismiss filed under either 735 Ill. Comp. Stat. Ann. 5/2-615 (2004) or 735 Ill. Comp. Stat. Ann. 5/2-619 (2004), a reviewing court accepts all well-pleaded facts as true and makes all reasonable inferences therefrom. A dismissal under either 735 Ill. Comp. Stat. Ann. 5/2-615 or 735 Ill. Comp. Stat. Ann. 5/2-619 is reviewed de novo.

Civil Procedure > ... > Equity > Maxims > Clean Hands Principle

Contracts Law > Remedies > Equitable Relief > Unclean Hands

HN7 The doctrine of unclean hands applies if a party seeking equitable relief is guilty of misconduct, fraud, or bad faith toward the party against whom relief is sought and if that misconduct is connected with the transaction at issue in the litigation.

Civil Procedure > ... > Equity > Maxims > Clean Hands Principle

Contracts Law > Remedies > Equitable Relief > Unclean Hands

HN8 The unclean hands doctrine bars only equitable remedies and does not affect legal rights.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN9 735 Ill. Comp. Stat. Ann. 5/2-619(a)(9) (2004) of the Illinois Code of Civil Procedure provides for dismissal where a claim asserted against a defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN10 "Affirmative matter," for purposes of avoiding the effect or of defeating a claim, is something in the nature of a defense that negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. It must, however, be something more than evidence offered to refute a well-pleaded fact in the complaint, for, as in the case of a motion under 735 Ill. Comp. Stat. Ann. 5/2-615 (2004), such

well-pleaded facts must be taken as true for the purposes of a motion to dismiss under 735 Ill. Comp. Stat. Ann. 5/2-619(a)(9) (2004).

Business & Corporate Law > ... > Corporate Governance > Directors & Officers > General Overview

Business & Corporate Law > ... > Directors & Officers > Scope of Authority > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Contracts Law > Formation of Contracts > Execution

HN11 Where language in a document conflicts with the apparent representation by a corporate officer's signature, an issue of fact is created.

Business & Corporate Law > Agency Relationships > Fiduciaries > Definitions

HN12 An agency is a fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on the principal's behalf.

Business & Corporate Law > ... > Authority to Act > Actual Authority > Express Authority

Business & Corporate Law > ... > Actual Authority > Implied Authority > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

HN13 An agent's authority may be either actual or apparent, and actual authority may be either express or implied.

Business & Corporate Law > ... > Authority to Act > Actual Authority > Express Authority

HN14 An agent has express authority when the principal explicitly grants the agent the authority to perform a particular act.

Business & Corporate Law > ... > Actual Authority > Implied Authority > General Overview

HN15 Implied authority is actual authority proved by circumstantial evidence or authority that is inherent in an agent's position.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > Elements

HN16 Apparent authority arises when a principal holds an agent out as possessing the authority to act on its behalf, and a reasonably prudent person, exercising diligence and discretion, would naturally assume the agent to have this authority in light of the principal's conduct.

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

HN17 Only the words and conduct of an alleged principal, not those of an alleged agent, establish the agent's authority, whether actual or apparent.

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Business & Corporate Law > ... > Authority to Act > Business Transactions > Management

Business & Corporate Law > ... > Duties & Liabilities > Disclosure Requirements > Disclosed Principal

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

HN18 Where a corporation is an alleged principal, it must be remembered that a corporation is a legal entity that acts only through persons--e.g., its officers and directors.

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

HN19 The existence and scope of an agency relationship are usually questions of fact to be decided by the trier of fact, unless the parties' relationship is so clear as to be undisputed.

Business & Corporate Law > ... > Authority to Act > Business Transactions > Management

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

HN20 A reasonable person would assume that a corporate officer has the authority to bind a corporation financially because decisions relating to a corporation's financial obligations are typically reserved for a corporation's officers and directors.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

HN21 The question of whether apparent authority exists is generally one of fact.

Civil Procedure > Appeals > Standards of Review > General Overview

HN22 An appellate court may affirm the judgment of a trial court on any basis in the record.

Counsel: For Gene Krupa, Lynn, Krupa, Jacqueline Zahl, Appellants: Michael S. Loeffler, J. Aaron Jensen, Meckler, Bulger & Tilson LLP, Attorneys at Law, Chicago, IL.

For Ross Boehmer, Marysue Brown, Steve Brown, John G. Creighton, Patricia M. Dell'Aquila, Directors & Officers of Jones & Brown Company Inc., Jones & Brown Company Inc., Ron Krol, Thomas Kulakowski, Terry Mooney, Larry Wright, Appellees: Kevin P. Brown, Maria E. Mazza, Rieck & Crotty, P.C., Attorneys at Law, Chicago, IL.

Judges: JUSTICE O'MALLEY delivered the opinion of the court. BOWMAN and CALLUM, JJ., concur.

Opinion by: O'MALLEY

Opinion

[**307] [*655] JUSTICE O'MALLEY delivered the opinion of the court:

Plaintiffs, Jacqueline Zahl, Gene Krupa, and Lynn Krupa, appeal the judgment of the circuit court of Du Page County dismissing their claims against defendants, Jones & Brown Co., Inc., and its directors and officers, including its president, Ronald A. Krupa (Krupa). Plaintiffs' complaint alleges that they were swindled by Krupa, who presented an investment opportunity to them but then failed to return their money at the end of the contractual investment period. We reverse and remand.

The following are the material allegations of plaintiffs' complaint:

(A) Krupa was at all relevant times president of Jones & Brown and a member of its board of directors;

(B) Jones & Brown outfitted Krupa with an office, phone, and company letterhead to perform his duties;

(C) Krupa, acting "in his capacity [***2] as [Jones & Brown's] President" and as the "agent or apparent agent" of Jones & Brown and its board of directors, represented to plaintiffs that "he was authorized to take [plaintiffs' money] and invest it in his name in the investment fund at [Jones & Brown]" called the "Scudder Fund," which was "open to high ranking executives of [Jones & Brown], such as himself, for such investing for himself and for others, including his friends and family, in his name, and was backed by the full faith and financial strength of [Jones & Brown] and its insurers";

(D) Krupa, acting "in his capacity as [Jones & Brown's] President" and as the "agent or apparent agent" of Jones & Brown and its board of directors, represented to plaintiffs "on multiple occasions" that they "could avail [themselves] of [Jones & Brown's] investment fund" and "that he had invested money from other friends and family of his in like fashion, that other directors and officers of [Jones & Brown] made like investments of their friends' and families' money in [Jones & Brown's] investment fund, that making such investment of directors' and officers' own money as well as that of their friends and family was [***3] a perk available only to [Jones & Brown's] directors and officers, and that [Jones & Brown] encouraged its directors and officers to invest their friends' and families' money in the fund";

(E) Krupa, acting "in his capacity as [Jones & Brown's] President" and as the "agent or apparent agent" of Jones & Brown and its board of directors, "had previously made such representations to [plaintiffs], had entered into prior contracts with [them] for investment of [their] money in the investment fund at [Jones & Brown], and had repaid to [them] such investments with interest"; and

[*656] (F) Plaintiffs, based on their prior experiences, "continued to rely on the representations [Krupa] made to [them] ***, due to his long-standing employment with [Jones & Brown] of more than 20 years and [their] knowledge that he was president of [Jones & Brown] and enjoyed a variety of perks due to his position and regarding his ability to invest [their] money in [Jones & Brown's] investment fund, his guarantee on behalf of himself and [Jones & Brown] that [their] investment would be repaid in full with interest, and his capacity as President of [Jones & Brown] in making such [***4] representations."

[**308] Plaintiffs attached to their complaint two agreements handwritten on Jones & Brown letterhead. The first agreement, dated December 28, 2002, reads:

"This letter shall act as the basis of the following agreement between Jacqueline Zahl and Ron Krupa.

Effective 1-1-03, I[,], Ron Krupa (President of Jones and Brown)[,], agrees [*sic*] to invest \$ 160,000 of Jacqueline Zahl's money into a [*sic*] investment fund at Jones and Brown. This is a Scudder Fund only available to members of Jones & Brown's board of directors. The investment will be for a period of seven months yielding a guarantee [*sic*] net rate of return in the amount of 11.1%.

Thus, Jacqueline's investment [of] \$ 160,000 cash effective 1-1-03 at 11.1% thru 7-31-03 equals a full investment return of \$ 177,760 less processing fees.

Jones and Brown fully guarantees this investment."

The note is signed by Krupa and plaintiff Jacqueline Zahn.

The second note is dated May 31, 2003, and provides:

"I[,], Ron Krupa[,], President of Jones and Brown[,], agrees [*sic*] to invest \$ 100,000 of Gene and Lynn Krupa's money at a rate of 11.1% for a period of 10 months. Thru [***5] a Scudder investment fund available only to Jones and Brown[']s Board of Directors.

The net return available 4-01-04 will be \$ 111,100 less processing fees. This money is guaranteed by Jones and Brown."

The note is signed by Krupa and plaintiffs Gene Krupa and Lynn Krupa.

Plaintiffs alleged that, when the contractual investment period was over, they asked Krupa to return their money with the contractual interest. Krupa told them that there was no Scudder investment fund at Jones

& Brown¹ and that he had lost all of their money through investing in the stock market. Krupa later told plaintiffs that he lost their money through gambling.

[**6] [*657] Plaintiffs brought causes of action against defendants for breach of contract (premised on actual and/or apparent authority), fraud (premised on actual and/or apparent authority), negligent hiring, negligent supervision, and negligent retention.²

Defendants moved to dismiss the claims under section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2004)). Defendants argued that plaintiffs' claims were barred by the doctrine of unclean hands because, according to the written agreements attached to plaintiffs' complaint, the Scudder fund was available only to members of Jones & Brown's board of directors. Defendants reasoned that plaintiffs cannot claim wrongdoing with respect to agreements that Jones & Brown's policies did not allow them to make in the first place. Defendants argued in the alternative that plaintiffs failed to plead facts showing [**7] that Krupa acted as the actual or apparent agent of defendants in depriving plaintiffs of their money. The trial court accepted both arguments. The court found that plaintiffs' claims were defeated by the doctrine of [**309] unclean hands because the written contracts signed by plaintiffs and Krupa recite that the Scudder fund was available only to members of Jones & Brown's board of directors, a criterion that plaintiffs admittedly did not meet. The court further found that plaintiffs' allegations of actual or apparent authority were inadequately pleaded, resting entirely on the allegation that Jones & Brown and its board of directors "provided Mr. Krupa with an office, a telephone, and letterhead." The court also noted that the written agreements contain no indication that Krupa was acting on behalf of defendants when he signed them. The court dismissed plaintiffs' claims against defendants, and plaintiffs filed this timely appeal.

Although styled as a motion brought under section 2-619, defendants' motion actually combines features of a section 2-619 motion and a motion under section 2-615 of the Code (735 ILCS 5/2-615 (West 2004)). *HN1* Section 2-619.1 [**8] of the Code (735 ILCS 5/2-619.1 (West 2004)) permits such combined motions. *HN2* Sections 2-615 and 2-619 allow for dismissal under different legal theories. *Van Duyn v. Smith*, 173 Ill. App. 3d 523, 528, 527 N.E.2d 1005, 123 Ill. Dec. 367 (1988). A section 2-615 motion attacks the legal sufficiency of the plaintiff's claims, while a section 2-619 motion admits the legal sufficiency of the claims but raises defects, defenses, or other affirmative matter, appearing on the face of [**658] the complaint or established by external submissions, that defeat the action. *Northern Trust Co. v. County of Lake*, 353 Ill. App. 3d 268, 278, 818 N.E.2d 389, 288 Ill. Dec. 701 (2004). In arguing that plaintiffs failed to establish that Krupa acted with actual or apparent authority, defendants attack the legal sufficiency of plaintiffs' claims. See *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720, 726-27, 688 N.E.2d 732, 228 Ill. Dec. 34 (1997) (setting forth elements of cause of action based on apparent agency). In asserting that plaintiffs have unclean hands, however, defendants admit the legal sufficiency of plaintiffs' claims but raise an affirmative defense. See *Long v. Kemper Life Insurance Co.*, 196 Ill. App. 3d 216, 218-19, 553 N.E.2d 439, 142 Ill. Dec. 925 (1990) [**9] (*HN3* unclean hands is an affirmative defense).

¹ Whether the Scudder fund ever existed is not indicated in the pleadings. As we must take all well-pleaded facts as true for our purposes here (*Northern Trust Co. v. County of Lake*, 353 Ill. App. 3d 268, 278, 818 N.E.2d 389, 288 Ill. Dec. 701 (2004)), we assume as true plaintiffs' allegation that they believed the Scudder fund existed at the time they agreed to invest.

² The complaint also contains claims against Krupa individually. These claims are not the subject of this appeal.

HN4 The question presented on review of a motion to dismiss pursuant to section 2-615 is whether the complaint contains sufficient facts that, if established, would entitle the plaintiff to relief. Illinois Graphics Co. v. Nickum, 159 Ill. 2d 469, 488, 639 N.E.2d 1282, 203 Ill. Dec. 463 (1994). **HN5** Where a claim has been dismissed pursuant to section 2-619, however, the question is whether there is a genuine issue of material fact and whether the defendant is entitled to judgment as a matter of law. Illinois Graphics Co., 159 Ill. 2d at 494. **HN6** When reviewing a trial court's disposition of a motion to dismiss filed under either section 2-615 or section 2-619, the reviewing court accepts all well-pleaded facts as true and makes all reasonable inferences therefrom. Northern Trust Co., 353 Ill. App. 3d at 278. A dismissal under either section 2-615 or section 2-619 is reviewed *de novo*. Chicago Motor Club v. Robinson, 316 Ill. App. 3d 1163, 1171, 739 N.E.2d 839, 250 Ill. Dec. 892 (2000).

Plaintiffs' first argument is that the trial court erred in finding that their claims are defeated by the doctrine of unclean [***10] hands. We agree. **HN7** The doctrine of unclean hands applies if a party seeking equitable relief is guilty of misconduct, fraud, or bad faith toward the party against whom relief is sought and if that misconduct is connected with the transaction at issue in the litigation. Long, 196 Ill. App. 3d at 219. [**310] Though the parties do not recognize it, **HN8** the unclean hands doctrine bars only equitable remedies and does not affect legal rights. American National Bank & Trust Co. of Chicago v. Levy, 83 Ill. App. 3d 933, 936, 404 N.E.2d 946, 39 Ill. Dec. 355 (1980); 30A C.J.S. Equity § 111, at 324 (1992) (doctrine of unclean hands "does not deny legal rights"). Plaintiffs seek not equitable relief but the legal remedy of money damages, *i.e.*, their initial investment together with the contractual rate of interest. See John O. Schofield, Inc. v. Nikkel, 314 Ill. App. 3d 771, 786-87, 731 N.E.2d 915, 247 Ill. Dec. 142 (2000) (distinguishing between money damages and equitable remedy of specific performance).

However, even if the doctrine were applicable here, we would still find that dismissal based on that doctrine was improper. In seeking [*659] dismissal on the basis of the unclean hands [***11] doctrine, defendants relied specifically on **HN9** subsection (a)(9) of section 2-619 of the Code (735 ILCS 5/2-619(a)(9) (West 2004)), which provides for dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." Our review requires us to examine whether defendants have adduced an "affirmative matter" that defeats plaintiffs' claim.

HN10 " 'Affirmative matter,' for purposes of avoiding the effect or of defeating the claim, is something in the nature of a defense that negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. [Citation.] It must, however, be something more than evidence offered to refute a well-pleaded fact in the complaint, for, as in the case of a motion under section 2-615 [citation], such well-pleaded facts must be taken as true for the purposes of a motion to dismiss under section 2-619(a)(9) [citation]." Heller Equity Capital Corp. v. Clem Environmental Corp., 232 Ill. App. 3d 173, 178, 596 N.E.2d 1275, 173 Ill. Dec. 396 (1992). [***12]

The trial court held, and defendants now argue, that plaintiffs' bad faith in attempting to invest in the Scudder fund is established by the statements in the written agreements that the fund was open only to members of Jones & Brown's board of directors. We disagree. These statements admit of two different

interpretations, both of them plausible. On defendants' reading, the statements are entirely exclusive, limiting the Scudder fund strictly to the monies of Jones & Brown's directors. On another reading, however, the statements identify Jones & Brown's directors as the company's sole conduits for investing in the Scudder fund but place no limits on whose money the directors may invest. The latter reading is entirely consistent with plaintiffs' allegations that Krupa told them that the Scudder fund was available not just to Jones & Brown's officers and directors but to their friends and families as well, and that, based on Krupa's representations, they previously gave him funds for investing in the Scudder fund and received what Krupa promised them. Therefore, we cannot say that the written agreements defeat plaintiffs' claims. We hold that the trial court erred in dismissing [***13] plaintiffs' claims as barred by the doctrine of unclean hands.

We turn to the other grounds for dismissal relied on by the trial court and now argued by defendants. Plaintiffs dispute the trial court's finding that Krupa signed the investment agreements solely in his individual capacity and that he therefore bound himself alone. Defendants respond by observing that Krupa's signature was [**311] not accompanied [**660] by a designation of himself as a corporate officer. For support, defendants cite 84 Lumber Co. v. Denni Construction Co., 212 Ill. App. 3d 441, 571 N.E.2d 231, 156 Ill. Dec. 644 (1991). In 84 Lumber, the officers of a construction company signed an application for credit from a lumber supplier. Although the name of the construction company was indicated in the section entitled "company name," both officers signed their names in their individual capacities on the "applicant" lines. Additionally, one of the officers signed his name on the signature line for "principal." The contract specified that the "'applicant agrees that he will be personally responsible.'" 84 Lumber Co., 212 Ill. App. 3d at 443. The appellate court held that parol evidence was not admissible to show the [***14] intent of the parties because the officers unambiguously assumed personal liability under the contract:

"Here, [the officers] signed, not in their corporate capacity, but individually. An officer who signs his name, without more, is individually liable on the contract. [Citation.]" 84 Lumber Co., 212 Ill. App. 3d at 443.

84 Lumber is distinguishable. The agreements in the present case do not unequivocally reflect an intent to bind Krupa individually. Although, like the signatures in 84 Lumber, Krupa's signature is not accompanied by a designation of himself as a corporate officer, the manner of signature is not dispositive. **HN11** "Where language in the document conflicts with the apparent representation by the officer's signature, an issue of fact is created." Sullivan v. Cox, 78 F.3d 322, 326 (7th Cir. 1996), citing Knightsbridge Realty Partners, Ltd-75 v. Pace, 101 Ill. App. 3d 49, 53, 427 N.E.2d 815, 56 Ill. Dec. 483 (1981). The agreements recite that the investments are guaranteed by Jones & Brown, which contradicts what is implied in the manner of Krupa's signature. We conclude, therefore, that there is an issue of fact regarding whether the [***15] parties intended to bind Krupa individually. The trial court, therefore, should not have granted dismissal based on the language of the agreements.

Next, we address plaintiffs' allegations that Krupa acted with either the actual or the apparent authority of defendants in signing the agreements on behalf of Jones & Brown. We must determine whether the complaint alleges facts that, if proven, would entitle plaintiffs to relief from defendants under a theory of

agency. *Illinois Graphics Co.*, 159 Ill. 2d at 488. **HN12** An agency is a fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on the principal's behalf. *Kaporovskiy v. Grecian Delight Foods, Inc.*, 338 Ill. App. 3d 206, 210, 787 N.E.2d 268, 272 Ill. Dec. 453 (2003). **HN13** An agent's authority may be either actual or apparent, and actual authority may be either express or implied. *Kaporovskiy*, 338 Ill. App. 3d at 210. **HN14** An agent has express authority when the principal explicitly [*661] grants the agent the authority to perform a particular act. *Amcore Bank, N.A. v. Hahnman-Albrecht, Inc.*, 326 Ill. App. 3d 126, 135, 759 N.E.2d 174, 259 Ill. Dec. 694 (2001). [***16] **HN15** Implied authority is actual authority proved by circumstantial evidence or authority that is inherent in an agent's position. *Amcore Bank*, 326 Ill. App. 3d at 137. **HN16** Apparent authority, by contrast, arises when the principal holds an agent out as possessing the authority to act on its behalf, and a reasonably prudent person, exercising diligence and discretion, would naturally assume the [**312] agent to have this authority in light of the principal's conduct. *Letsos v. Century 21-New West Realty*, 285 Ill. App. 3d 1056, 1065, 675 N.E.2d 217, 221 Ill. Dec. 310 (1996). **HN17** Only the words and conduct of the alleged principal, not those of the alleged agent, establish the agent's authority, whether actual or apparent. *Kaporovskiy*, 338 Ill. App. 3d at 210. **HN18** Where, as here, a corporation is the alleged principal, it must be remembered that a corporation is a legal entity that acts only through persons—e.g., its officers and directors. See *American Family Mutual Insurance Co. v. Enright*, 334 Ill. App. 3d 1026, 1036, 781 N.E.2d 394, 269 Ill. Dec. 597 (2002); *First Chicago v. Industrial Comm'n*, 294 Ill. App. 3d 685, 691, 691 N.E.2d 134, 229 Ill. Dec. 198 (1998). As [***17] Krupa is an officer of Jones & Brown, plaintiffs were entitled to consider his words and conduct as those of Jones & Brown itself where it was reasonable to do so. See *First Chicago*, 294 Ill. App. 3d at 691 (officer had authority to bind corporation in signing appeal bond). **HN19** The existence and scope of an agency relationship are usually questions of fact to be decided by the trier of fact, unless the parties' relationship is so clear as to be undisputed. *Pyskaty v. Oyama*, 266 Ill. App. 3d 801, 826, 641 N.E.2d 552, 204 Ill. Dec. 328 (1994).

Plaintiffs argue that Krupa had authority to accept funds on behalf of defendants for investment in the Scudder fund because (1) Krupa was president of Jones & Brown, had enjoyed that position for 20 years, and was given an office, telephone, and company letterhead for the execution of his duties; (2) Krupa told plaintiffs that Jones & Brown not only allowed but encouraged friends and family of Jones & Brown's officers and directors to invest in the Scudder fund; (3) Krupa had previously taken plaintiffs' money for investing in the Scudder fund with a guaranteed rate of return, and Krupa returned the money with the interest promised; [***18] and (4) the investment agreements at issue were written on company letterhead. Notably, plaintiffs do not argue that defendants gave Krupa express authority to accept money on their behalf for investment in the Scudder fund but, rather, contend that Krupa's authority was implied in his position as president of Jones & Brown and was also apparent from plaintiffs' prior course of dealing with defendants and from their providing Krupa with various accouterments of office.

For authority, plaintiffs rely principally on *Denten v. Merrill Lynch*, [*662] *Pierce, Fenner & Smith, Inc.*, 887 F. Supp. 176 (N.D. Ill. 1995), a case applying Illinois's law of agency. The plaintiff in *Denten* sued Merrill Lynch for the misconduct of one its brokers, Webster. The plaintiff alleged in her complaint that Webster had been a broker and employee of Merrill Lynch for 20 years when the plaintiff decided to have him handle her investment account. The plaintiff chose Webster based on her father's positive experiences with him during his long-standing relationship with Merrill Lynch. The plaintiff alleged that, after she became Webster's client, he regularly contacted her regarding investment strategy. [***19] He phoned

her from his office in Merrill Lynch's building, had meetings with her in that office, and sent her letters that were printed on Merrill Lynch's letterhead and enclosed in envelopes bearing Merrill Lynch's name and address. The plaintiff further alleged that one of the investment opportunities Webster presented to her involved a radio station. Webster persuaded the plaintiff to give him funds to invest for her in the radio station, but Webster used the money to purchase his own share in the station. The plaintiff alleged that Merrill Lynch was liable for Webster's misconduct on a theory of apparent agency. Denten, 387 F. Supp. at 177-78. The trial court found that the plaintiff had pleaded facts establishing that Webster acted with the apparent authority of Merrill Lynch in taking her money for investment in the radio station:

"First, according to the allegations, Merrill Lynch employed Webster as an Executive Vice President. For twenty years, Merrill Lynch furnished Webster with a large office, telephone number and Merrill Lynch letterhead. These allegations support the fact that Merrill Lynch created the impression that Webster had authority from Merrill [***20] Lynch to act as he did.

Additionally, the allegations support plaintiff's reasonable belief that Webster had the authority from Merrill Lynch. Plaintiff alleged that part of her decision to become a client with Merrill Lynch was the relationship her family enjoyed with the company through Webster who was their personal representative, advisor and financial consultant. Plaintiff also alleges that Webster reminded plaintiff of Merrill Lynch's reputation and his twenty years of experience with Merrill Lynch to persuade her to become a client of Merrill Lynch." Denten, 887 F. Supp. at 179.

While Denten, being a federal case, is not binding on this court (Tri-G, Inc. v. Burke, Bosselman & Weaver, 353 Ill. App. 3d 197, 213, 817 N.E.2d 1230, 288 Ill. Dec. 580 (2004)), we find its reasoning persuasive. The actions alleged of defendants are similar to the actions alleged of Merrill Lynch in Denten to prove apparent authority. The plaintiff in that case alleged that Merrill Lynch held out Webster as its agent by employing him for 20 years and by outfitting him with an office, phone, and company letterhead. [*663] Here, plaintiffs have similarly pleaded that Jones & Brown [***21] employed Krupa for at least 20 years and supplied him with an office, phone, and company letterhead. The plaintiff in Denten alleged that her decision to use Merrill Lynch and, particularly, Webster for investment advice was based on her father's relationship of many years with Merrill Lynch. Plaintiffs pleaded analogous facts here, alleging that their decision to invest in the Scudder fund was based on their past successes in investing in the fund through Krupa. Moreover, *HN20* "a reasonable person would assume that a corporate officer has the authority to bind the corporation financially because decisions relating to a corporation's financial obligations are typically reserved for corporation officers and directors" (First Chicago, 294 Ill. App. 3d at 691). Based on Denten and the principles of First Chicago, we hold that plaintiffs have pleaded facts that, if true, would prove that Krupa acted with the apparent authority of defendants in taking plaintiffs' money pursuant to the investment agreements.

Defendants argue that Denten is inapposite because Jones & Brown "is not engaged in the business of selling investment opportunities to third parties as [***22] was the defendant in Denten." Rather, defendants assert, they are in the construction business. Plaintiffs' complaint contains no allegations about Jones & Brown's actual business, but such allegations were not necessary to establish apparent authority. The question is not whether Jones & Brown's course of business includes the selling of investment

opportunities but whether plaintiffs reasonably believed that Jones & Brown permitted outside parties to invest in a Scudder fund available to its directors. Plaintiffs allege that they did so reasonably believe. Whether plaintiffs can prove their allegations if defendants prove that Jones & Brown is in a business totally [**314] unrelated to investment opportunities remains to be seen.

Defendants also argue that plaintiffs failed to exercise due prudence and should have avoided the agreements Krupa proposed because of certain suspicious aspects, namely: (1) the investment agreements were handwritten by Krupa and signed by him in his individual capacity; (2) Krupa told plaintiffs that the funds were to be invested in his name rather than in plaintiffs' names; and (3) Krupa told plaintiffs that the funds were to be given to him, in cash, and [***23] not to Jones & Brown. As for the issue of Krupa's signature, we reiterate that the agreements contained sufficient indicia that Krupa signed them in his capacity as president of Jones & Brown. As for the method by which Krupa was to receive and invest the funds, we cannot say as a matter of law that these aspects were so patently suspicious that plaintiffs could not reasonably proceed with the proposed deal. Rather, these aspects are but a few of the circumstances that bear upon [*664] *HN21* whether apparent authority existed here, and such a question is generally one of fact. *Pyskaty*, 266 Ill. App. 3d at 826.

We note that, though defendants moved for dismissal of all claims against them, the trial court focused its analysis on the contract and fraud counts and did not specifically address plaintiffs' claims for negligent hiring, negligent supervision, and negligent retention. Presumably, the trial court considered such analysis superfluous in light of its acceptance of the defense of unclean hands, which was relevant to all counts--contract, fraud, and negligence alike. However, we have found that the pleadings and supporting documents do not establish the defense of unclean [***24] hands. While *HN22* we may affirm the judgment of the trial court on any basis in the record (*Tri-G*, 353 Ill. App. at 214), defendants present no alternative basis for affirming the dismissal of the negligence claims but instead rely entirely on the defense of unclean hands. Accordingly, we reverse the dismissal of all claims against defendants.

For the foregoing reasons, we reverse the judgment of the circuit court dismissing plaintiffs' claims against defendants, and we remand the cause.

Reversed and remanded.

BOWMAN and CALLUM, JJ., concur.