

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

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THOMAS GALECKA,

Plaintiff-Appellant,

v

SAVAGE ARMS, INC. and SAVAGE ARMS  
COMPANY,

Defendants-Appellees.

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UNPUBLISHED

June 26, 2014

No. 313350

Clinton Circuit Court

LC No. 12-011022-CZ

Before: WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's<sup>1</sup> motion for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim). We affirm in part and reverse in part.

According to the allegations in plaintiff's complaint, defendant manufactured and sold firearm models 10ML and 10ML-II (collectively, "10ML") between 2001 and 2010. By about 2005, it became apparent that the 10ML had a manufacturing defect, design defect, or both, that occasionally resulted in the barrel of the firearm unexpectedly exploding without cause. Given these safety concerns, plaintiff sent his 10ML firearm ("the firearm") to defendant for a safety inspection. Defendant returned the firearm to plaintiff after performing the safety inspection and informed him that the firearm was safe for use without needing any repairs or modifications. However, plaintiff examined the barrel of the firearm and concluded that defendant had replaced the barrel when the firearm was in its possession. Plaintiff subsequently contacted defendant about the apparent barrel replacement, but defendant denied replacing the barrel. Plaintiff filed this action, claiming that defendant's secret barrel replacement violated several provisions of MCL 445.903(1) of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), arguing in relevant part that plaintiff did not allege a "loss" as required by MCL 445.911 and that the allegations did not fall within the scope and purpose of the MCPA. At the conclusion of the

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<sup>1</sup> For ease of discussion, we will refer to both defendants as the singular "defendant."

motion hearing, the trial court granted defendant's motion on two alternative grounds. First, the trial court held that plaintiff did not suffer a loss as required by the MCPA. Second, the trial court held that the inspection and servicing of the firearm was not a covered "transaction" under the MCPA because there was no deception in plaintiff acquiring the firearm.

On appeal, plaintiff argues that the trial court improperly granted defendant's motion for summary disposition. We review de novo a trial court's decision on a motion for summary disposition. *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 206; 828 NW2d 459 (2012) (citation and quotation marks omitted). The motion should be granted if the plaintiff has not stated a claim upon which relief can be granted and no factual development could possibly justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

#### I. "LOSS" UNDER THE MCPA

The trial court granted defendant's motion for summary disposition because it concluded that plaintiff had not suffered any loss, which therefore prohibited him from prevailing on *any* claims under the MCPA. This conclusion is incorrect.

The MCPA "prohibits the use of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." *Zine v Chrysler Corp*, 236 Mich App 261, 270-271; 600 NW2d 384 (1999). MCL 445.911 of the MCPA provides, in relevant part, as follows:

(1) Whether or not he seeks damages or has an adequate remedy at law, a person may bring an action to do either or both of the following:

(a) Obtain a declaratory judgment that a method, act, or practice is unlawful under [MCL 445.903].

(b) Enjoin in accordance with the principles of equity a person who is engaging or is about to engage in a method, act, or practice which is unlawful under [MCL 445.903].

(2) Except in a class action, a person who suffers loss as a result of a violation of [the MCPA] may bring an action to recover actual damages or \$250.00, whichever is greater, together with reasonable attorneys' fees.

The plain language of the statute establishes that only section (2) of MCL 445.911, involving an action for damages, requires a plaintiff to have suffered a "loss" caused by a violation of the MCPA. Section (1) contains no such requirement. Therefore, under the plain language of the statute, a plaintiff may obtain declaratory judgment and/or enjoin any unlawful practices without having suffered any loss, and the trial court erred in dismissing plaintiff's claims for relief under MCL 445.911(1) on this basis.

With respect to MCL 445.911(2), plaintiff argues that he suffered a loss through the reduction in value of the firearm and his unfulfilled expectations as a result of defendant secretly replacing the barrel. We disagree.

To recover damages for a “loss” under MCL 445.911(2), a plaintiff must satisfy “the common-law requirement of injury.” *Mayhall v AH Pond Co, Inc*, 129 Mich App 178, 183; 341 NW2d 268 (1983). Such an injury does not have to directly affect the “plaintiff’s pocketbook.” *Id.* Instead, the injury may consist of the plaintiff’s “unfulfilled expectations.” *Id.* at 183, 185-186. When the plaintiff proves frustration of his or her expectations, “the plaintiff may recover the difference between the actual value of the property when the contract was made and the value that it would have possessed if the representations had been true.” *Id.* at 185.

The trial court did not err in concluding that plaintiff did not suffer a “loss” for the purposes of MCL 445.911(2). First, plaintiff’s complaint does not allege any facts to show that he suffered any actual damages. Notably, plaintiff has not alleged that his firearm is in “worse” shape than when he initially sent it to defendant. All that his allegations establish is that defendant replaced the barrel with a new one and thereafter denied making the replacement. Simply put, plaintiff has not alleged or shown that the firearm before the safety inspection was more valuable than the firearm after the safety inspection, or is otherwise less desirable for another reason, such as being less accurate than the gun with the original barrel. Because the firearm did not have a reduced value or intrinsic worth, no “traditional” injury or loss occurred either to the property, or to plaintiff’s expectations concerning it, so as to support an award of damages under MCL 445.911(2). Moreover, plaintiff’s cursory statement in his complaint that he “has suffered a loss” is insufficient to establish a “loss” under MCL 445.911(2). See *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003) (“Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action.”).

Plaintiff argues that the “loss” or “injury” here is his personal belief that the firearm is unsafe for use after it was secretly modified by defendant. However, the case that plaintiff relies on, *Mayhall*, provides that in order to successfully establish a claim of unfulfilled expectations, a plaintiff must show that he did not receive “what he expected to receive.” *Mayhall*, 129 Mich App at 185, citing *Warren v Cole*, 15 Mich 265 (1867). Here, plaintiff’s complaint does not show that he had any expectation regarding what would happen to the firearm or that any expectation he may have had was not met. He initiated contact with defendant and relayed his safety concerns. Defendant agreed to inspect the firearm to ensure that it was indeed safe, and plaintiff sent the firearm to defendant. Thus, when plaintiff sent the firearm to defendant, the only reasonable expectation that he could have had at that time was that he would receive a “safe” version in return. Plaintiff has not alleged that the firearm-as-modified is actually unsafe or is even potentially unsafe.

Nor do we find merit in plaintiff’s argument that defendant’s refusal to admit that his barrel was replaced suggests that the firearm “was defective or unsafe.” While we agree that such a “secret replacement” could indicate that the firearm was unsafe *before* the inspection, any change by the manufacturer would indicate that any danger has been corrected. Thus, under plaintiff’s theory, the barrel replacement actually improved the value or worth of the firearm by rendering a potential user more likely to believe that any possible danger had been addressed.

Consequently, plaintiff cannot establish that he suffered the necessary “loss” to recover on a claim for damages under MCL 445.911(2).

## II. UNLAWFUL ACTS UNDER MCL 445.903

Plaintiff next argues that the trial court erred in determining that the alleged facts of this case did not fall under the purview of the MCPA. We agree.

As noted earlier, a plaintiff may seek declaratory judgment and/or injunctive relief under MCL 445.911 if there has been unlawful conduct under MCL 445.903. MCL 445.903(1) lists numerous instances of unlawful conduct. In his complaint, plaintiff asserted that defendant had violated MCL 445.903(1)(a), (c), (e), (n), (s), (y), (bb), and (cc).

Without analyzing any of these specific subsections, the trial court concluded that plaintiff could not succeed in his claim under the MCPA because he did not rely on any of defendant’s misrepresentations. While we agree that plaintiff did not rely on any misrepresentations in proceeding with the transaction, i.e., sending the firearm to defendant for inspection, we note that reliance is not a necessary element when proving unlawful conduct under the subsections plaintiff cited in his complaint.

Because the trial court did not specifically address the particular subsections involved with this case, we offer no opinion on whether plaintiff’s facts as stated in his complaint describe unlawful conduct under those subsections. Instead, we merely hold that the trial court erred in granting summary disposition on its blanket ruling that *all* claims under the MCPA require reliance on a misrepresentation.

## III. CONCLUSION

We conclude that the trial court erred when it granted defendant’s motion for summary disposition on all of plaintiff’s claims. Because plaintiff did not need to have suffered a loss in order to maintain an action for declaratory judgment or injunction, summary disposition was not warranted on plaintiff’s claims related to MCL 445.911(1). But, because suffering a loss is necessary to recover damages under MCL 445.911(2), the trial court properly granted defendant’s motion for summary disposition with respect to those claims. Further, the trial court erred in dismissing all of plaintiff’s claims based on its erroneous belief that all unlawful conduct under the MCPA required reliance on a misrepresentation.

Affirmed in part and reversed in part. Neither party have prevailed in full, no costs are taxable pursuant to MCR 7.219.

/s/ William C. Whitbeck  
/s/ Kurtis T. Wilder  
/s/ Amy Ronayne Krause