

STATE OF MICHIGAN
COURT OF APPEALS

JAMES BRODERICK and
LAURA BRODERICK,

UNPUBLISHED
February 2, 1999

Plaintiffs-Appellants,

v

No. 204760
Wayne Circuit Court
LC No. 96-601260 NZ

ARNOLD HOME, INC., and LYNN ACKER,

Defendants-Appellees,

and

HARPER ASSOCIATES,

Defendant.

Before: Sawyer, P.J., and Bandstra and R. B. Burns*, JJ.

PER CURIAM.

Plaintiffs appeal from the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants, Arnold Home, Inc., and Lynn Acker (hereinafter referred to collectively as “defendants”). We affirm.

Plaintiff, James Broderick (“James”), became employed at Arnold Home as an assistant controller following an interview with Acker, Arnold Home’s controller, in which Acker allegedly represented that the two previous assistant controllers, Lynette Conners and Joseph Daniels, had resigned for personal reasons unrelated to any dissatisfaction with their employment. Acker had told James that Conners left to get married and that Daniels was between jobs and had another job. After accepting the position and resigning from a position at Oakwood Hospital, James learned that Acker’s representations were not true. James was subsequently discharged from Arnold Home. Plaintiffs filed suit, alleging fraud, innocent misrepresentation and loss of consortium. In addition to damages resulting from loss of consortium, plaintiffs alleged loss of income and emotional damages. Defendants

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

successfully moved for summary disposition, arguing that plaintiffs had failed to adduce sufficient evidence to support their claims.

Plaintiffs' first argument on appeal is that the trial court erred in granting summary disposition in favor of defendants with respect to plaintiffs' innocent misrepresentation claim. We disagree.

Although the trial court apparently granted summary disposition pursuant to MCR 2.116(C)(10), dismissal of the innocent misrepresentation claim (as well as the remaining claims) was proper under both MCR 2.116(C)(8) and (C)(10). See *Smith v Kowalski*, 223 Mich App 610, 612 n 2; 567 NW2d 463 (1997). This Court reviews a decision on a motion for summary disposition under the former provision de novo. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Id.* Such a motion should be granted when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a recovery. *Id.* This Court should accept as true all factual allegations supporting the claim, as well as any reasonable inferences or conclusions that can be drawn from those allegations. *Id.* "However, mere conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *Id.*

A motion under MCR 2.116(C)(10) is also reviewed de novo. *Baker v Arbor Drugs*, 215 Mich App 198, 202; 544 NW2d 727 (1996). Such a motion tests the factual basis underlying plaintiff's allegations. *Id.* This Court must view the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the nonmoving party. *Id.* This Court must then decide "whether a genuine issue regarding any material fact exists to warrant a trial." *Id.*

Plaintiffs' innocent misrepresentation claim was properly dismissed because plaintiffs failed to allege facts or adduce evidence to establish that Acker made a false representation *in connection with the making of a contract*. *M&D, Inc v McConkey*, 231 Mich App 22, 27-28; 585 NW2d 33 (1998). Acker allegedly misrepresented to James during his interview the reasons why Conners and Daniels resigned. These misrepresentations were not made in connection with the making of a contract. James' employment was at will, and James admitted at deposition that he did not have an employment contract with Arnold Home. Moreover, plaintiffs have failed to allege facts or adduce evidence regarding the elements that must be satisfied in order to establish the existence of a contract. Plaintiffs have presented no facts regarding express words or visible acts of the parties which would indicate mutual assent to be bound by a contract. *Rood v General Dynamics Corp*, 444 Mich 107, 118-119; 507 NW2d 591 (1993). Plaintiffs' innocent misrepresentation claim was thus properly dismissed.

Plaintiffs' next argument on appeal is that the trial court erred in dismissing their actual fraud, constructive fraud, and silent fraud¹ claims. We disagree. Plaintiffs' actual fraud claim was properly dismissed because plaintiffs have failed to allege facts or adduce evidence that Acker made a *material* representation. *M&D, Inc., supra* at 27. The reasons for Conners' and Daniels' resignations have no bearing on the terms and conditions of James' employment at Arnold Home. Although the personality or management style of one's supervisor may be relevant to the terms and conditions of employment, James did not ask any specific, fact-based questions about Acker's personality or management style, and Acker made no such representations. Even if Conners and Daniels were dissatisfied with Acker's

supervision, such facts would not be material to whether James would find Acker to be a satisfactory supervisor, since one employee may find a supervisor to be satisfactory while another may not.

Summary disposition of plaintiffs' actual fraud claim was also proper because plaintiffs have not alleged or adduced evidence that they suffered recoverable damages. *M & D, supra* at 27. "In a fraud and misrepresentation action, the tortfeasor is liable for injuries resulting from his wrongful act, whether foreseeable or not, provided that the damages are the legal and natural consequences of the wrongful act and might reasonably have been anticipated." *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997). Here, plaintiffs have presented no facts to establish such damages. There is no indication that James' total compensation at Arnold Home was less than his total compensation at his prior job. James was never deceived about the amount of money that he would be paid. In addition, the wage loss allegedly suffered by James when he was discharged from Arnold Home is not recoverable. Such damages were not the legal and natural consequence of Acker's misrepresentation because there is no indication that the misrepresentation bore a causal relationship to James' discharge. Plaintiffs have presented no facts to support their conclusory allegations regarding emotional damages and loss of consortium. Accordingly, plaintiffs' fraud claim was thus properly dismissed.

Plaintiffs' constructive fraud claim was properly dismissed because plaintiffs failed to present facts to establish the breach of a legal or equitable duty that tends to deceive others, regardless of the moral guilt of the person committing the fraud. *Sumpter v Kosinski*, 165 Mich App 784, 804; 419 NW2d 463 (1988). In addition, since plaintiffs fail to address whether such a duty existed in their brief on appeal, we deem this issue abandoned as insufficiently briefed. *Dresden v Detroit Macomb Hospital*, 218 Mich App 292, 300; 553 NW2d 387 (1996). A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Joerger v Gordon Food, Inc.*, 224 Mich App 167, 178; 568 NW2d 365 (1997).

Plaintiffs' silent fraud claim was also properly dismissed. Silent fraud, or fraudulent concealment, involves the suppression of a material fact which a party is duty-bound to disclose. *M&D, supra* at 28-29. "A claim of silent fraud requires a plaintiff allege that the defendant intended to induce him to rely on its nondisclosure and that defendant had an affirmative duty to disclose." *Clement-Rowe v Michigan Health Care Corp.*, 212 Mich App 503, 508; 538 NW2d 20 (1995). Here, Acker did not fail to disclose a material fact which she was duty-bound to disclose. Plaintiffs have offered no reason to believe that Acker had an affirmative duty to disclose any facts regarding Connors' and Daniels' resignations or Acker's management style. Moreover, as discussed, *supra*, the reasons for Connors' and Daniels' departures were not material to James' employment, and plaintiffs did not suffer any recoverable damages.

We need not address plaintiffs' argument that summary disposition was improper because Acker's credibility remained in question, since plaintiffs failed to include that issue in their statement of questions presented. *Fletcher v Fletcher*, 229 Mich App 19, 26; 581 NW2d 11 (1998). In any event, the argument is without merit.

Plaintiffs' next argument on appeal is that the trial court erred in concluding that an at-will employee may not sue for interview fraud. Our review of the record indicates that the trial court

did not decide this issue. This issue is thus unpreserved for appellate review. *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996). Moreover, the issue is moot, *Michigan National Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997), since we have already concluded that summary disposition was proper because plaintiffs failed to satisfy each element of their various claims.

Plaintiffs' final argument on appeal is that the trial court abused its discretion when it declined to require production of the entire "BBK report," the report of an outside consulting firm regarding Arnold Home's business. We disagree. The trial court did not deny recovery of any relevant information or of any information that was reasonably calculated to lead to the discovery of admissible evidence. MCR 2.302(B)(1); *Harrison v Olde Financial Corp*, 225 Mich App 601, 614; 572 NW2d 679 (1997). Since plaintiffs were claiming fraud, the only relevant portions of the report would be those portions that related to whether Acker made any misrepresentations or that related to Acker's relationship with Conners and Daniels (since the alleged misrepresentations concerned Conners and Daniels). The court specifically indicated, after an in-camera review of the report, that the report contained no such information. Also, general information regarding Acker's job performance, which was not related to the misrepresentation or to Conners or Daniels, was not relevant to plaintiffs' claims. Plaintiffs were not suing Acker for being a bad supervisor, but rather, for fraud. However, information in the report concerning *James'* job performance was relevant since it related to the reason for James' discharge and thus undermined plaintiffs' damages claim. Hence, plaintiffs' complaint that it was unfair to produce information regarding James' job performance, but not Acker's, is without merit. The trial court therefore did not abuse its discretion in denying plaintiffs' motion to produce the entire BBK report.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Robert B. Burns

¹ Plaintiffs did not specifically allege silent fraud in their complaint, but did allege that defendants made representations and/or omissions upon which James relied. To the extent that plaintiffs have claimed silent fraud, such a claim was properly dismissed, as discussed, *infra*.