

STATE OF MICHIGAN
COURT OF APPEALS

KEITH ALBER, LINDSAY COCHRANE, LYLE
CURTIS, LLOYD GRAU, DAVID KLINK, T. H.
PARKER, J. C. SANDERS, WILLIAM SAYLOR,
GUY SHARP, LEON SWANK, and RONALD
WINTERSTEEN,

Plaintiffs-Appellants,

v

CONSUMERS POWER COMPANY,

Defendant-Appellee.

UNPUBLISHED
May 18, 1999

No. 206752
Jackson Circuit Court
LC No. 96-074715 CK

JON R. MARCUS, Trustee on behalf of STRAY
VOLTAGE CLAIMANTS,

Plaintiff-Appellant,

v

CONSUMERS POWER COMPANY,

Defendant-Appellee.

No. 209735
Washtenaw Circuit Court
LC No. 95-005790 CK

Before: Jansen, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition. We affirm.

This case arises out of the effects of stray voltage on livestock farms. Electrical current flowing through defendant's distribution system flowed to the farms' ground lines and then to feeders, waterers,

and milking machines. The animals who made contact with the energized metallic equipment received low grade electrical shocks and would suffer a variety of adverse effects. In December of 1992 and February, March, and April of 1993, plaintiffs, and over one hundred other farmers, entered into an agreement releasing defendant from all claims arising out of any stray voltage resulting from the operation and maintenance of defendant's electric distribution system, in exchange for \$7,500. Defendant subsequently went out to several farms, detected stray voltage, and separated the neutrals at the farms. Approximately 122 farmers received an additional \$22,500 from defendant, although this additional amount was not required by the release agreements. At some point, defendant stopped paying farmers an additional \$22,500. Renewed negotiations were unsuccessfully conducted on behalf of farmers who did not receive the additional payment.

Plaintiffs thereafter commenced this action, seeking a declaratory judgment and damages for breach of contract, based upon a letter written by defendant's attorney, James W. Dempsey, to plaintiffs' attorney, David A. Woelkers, dated September 13, 1995. Plaintiffs claimed that the letter constituted an agreement to settle outstanding claims and pay an additional sum of \$22,500 to those farmers listed in the letter.

As a result of several court rulings, plaintiffs filed a second amended complaint alleging breach of contract, fraud and misrepresentation, negligence, exemplary damages, violation of the Michigan Consumer Protection Act, and several additional counts pertaining to plaintiff Lindsay Cochrane only. The trial court ultimately granted defendant summary disposition of each count.

Notwithstanding Dempsey's apparent authority to enter into a settlement agreement on behalf of defendant, *Nelson v Consumers Power Co*, 198 Mich App 82, 89-90; 497 NW2d 205 (1993), we agree with the trial court that the September 13, 1995, letter¹ does not evidence an independent contract or agreement to pay plaintiffs an additional amount of \$22,500. *Koenig v South Haven*, 221 Mich App 711, 722; 562 NW2d 509 (1997); *Kamalnath v Mercy Memorial Hospital Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). The letter is simply not sufficient to constitute a contract. See *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991) (a promise to pay is not binding if not made without consideration).

Next, the trial court granted defendant summary disposition of plaintiff Cochrane's claims on the basis that his tender of the \$7,500 consideration received in exchange for the previous release was not timely. We agree and conclude that tender was required, at the latest, upon the filing of the original complaint alleging claims in contravention of the previous release. *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 174-176; 458 NW2d 56 (1990); *Randall v Port Huron, St C & M C R Co*, 215 Mich 413, 424; 184 NW 435 (1921); *Burns v Reading Estate*, 188 Mich 591; 155 NW 479 (1915).

Plaintiffs' third claim is that the trial court erred in granting defendant's motion for summary disposition of their breach of contract claim. We find no error. We agree with the trial court that the releases signed by the plaintiffs are clear and unambiguous and represent the complete agreement between the parties. *Rinke v Automotive Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997); *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990).

The trial court correctly held that the inclusion of an integration clause² in each release precluded the admission of any parol evidence in support of plaintiffs' allegations of a prior or contemporaneous agreement to pay an additional \$22,500. *Romska v Oppen*, ___ Mich App ___; ___ NW2d ___ (Docket No. 195410, issued 3/19/99), slip op, p 2; *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 502; 579 NW2d 411 (1998).

Next, we find no error in the trial court's dismissal of plaintiffs' fraud and misrepresentation claim. Plaintiffs failed to establish a prima facie case of fraud and misrepresentation. *Kassab v Michigan Basic Property Ins Assoc*, 441 Mich 433, 442; 491 NW2d 545 (1992); *Phinney v Perlmutter*, 222 Mich App 513, 535; 564 NW2d 532 (1997). Further, the trial court correctly determined that the alleged representations, if made, constituted only future promises, upon which an action for fraud and misrepresentation will not lie. *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998); *Kamalnath, supra* at 554.

Next, the trial court did not err in granting defendant summary disposition of plaintiffs' claim alleging violation of the Michigan Consumers Protection Act, MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.* We agree with the trial court that defendant was not subject to the act, pursuant to MCL 445.904(2)(c); MSA 19.418(4)(2)(c). Alternatively, this Court has recently held in a stray voltage case that the act did not apply to the defendant because the plaintiff's cause of action under MCL 445.903(1); MSA 19.418(3)(1) was inapplicable where the plaintiff purchased electricity from the defendant primarily for the purpose of operating its business rather than primarily for personal, family, or household purposes as required under the statutory subsection. *Jackson Co Hog Producers v Consumers Power Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 197916, issued 2/12/99), slip op, pp 5-6.

Next, we find plaintiffs' contention that the trial court erred in granting defendant's motion for summary disposition of plaintiffs' negligence claim to be without merit. Plaintiffs failed to establish an actionable claim for negligence. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993); *Baker v Arbor Drugs*, 215 Mich App 198, 203; 544 NW2d 727 (1996). The claim of untimely inspection was not supported by evidence of injury or damages, and a claim of breach of duty to pay a settlement agreement is governed by contract principles, not tort. See *Zelenka v Wayne Co Corp Counsel*, 143 Mich App 567, 571; 372 NW2d 356 (1985).

Finally, we reject plaintiffs' claim that the trial court erred in dismissing their claim for exemplary damages. Again, plaintiffs failed to support their claim with sufficient documentary evidence to establish a genuine issue of material fact. *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401, 415; 419-420; 295 NW2d 50 (1980); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995); *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 485; 502 NW2d 742 (1993).

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Stephen J. Markman

¹ This letter states in relevant part: “Past commitments that have been properly made will be honored. Enclosed is a listing of those claims which are due an additional sum of money.” No other terms are set forth in the letter.

² The integration clause states: “The undersigned further declare and represent that no promise, inducement or agreement not herein expressed has been made to the undersigned, that this Release contains the entire agreement between the parties hereto, and that the terms of this Release are contractual and not a mere recital.”