STATE OF MICHIGAN

COURT OF APPEALS

EARLETTA F. MAPLES and ROBERT MAPLES,

Plaintiffs-Appellants,

v

DOW CHEMICAL CORP.,

Defendant-Appellee,

and

DOW CORNING CORP. and DOW CORNING WRIGHT CORP.,

Defendants,

UNPUBLISHED
September 14, 1999

No. 207043
Wayne Circuit Court
LC No. 93 329419 NP

Before: Sawyer, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

This is an appeal from an order in Michigan's consolidated silicone implant litigation granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in the instant case and dismissing with prejudice all claims brought against defendant in the consolidated action. Plaintiffs appeal as of right and we affirm.

In 1943, defendant and the Corning company created a new corporation, Dow Corning, devoted to promoting commercial uses of silicone. Defendant and Corning were each 50% shareholders in Dow Corning. Eventually, Dow Corning became a major manufacturer of silicone breast implants and supplier of silicone for use in breast implants. A number of women now allege that they were made ill as a result of the presence of the silicone breast implants in their bodies. In this case, plaintiffs assert that the "essence of the question of the safety of breast implants is whether silicone is inert in the body or whether it is capable of stimulating a physiologic response by the immune system such as to produce a variety of symptoms." Accordingly, they contend that defendant is liable for their injuries because it "played a central and critical role in creating and maintaining the illusion of [silicone]

inertness (and, hence, safety)." In response, defendant contends that it cannot be held liable because "the undisputed facts establish that Dow Chemical never designed breast implants, never manufactured breast implants, never sold breast implants, never undertook to test breast implants or the suitability of silicone for use in breast implants, and never undertook to advise on the safety of breast implants or the suitability of silicone for use in breast implants." Because of the poor quality of plaintiffs' brief on appeal, which in large part (1) fails to coherently articulate a specific factual scenario that would entitle plaintiffs to relief if established at trial and (2) fails to identify specific documentary evidence that would support any such factual scenario, it is difficult for us to fully address the substance of many of plaintiffs' claims. It is well-settled that a party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. E.g. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997).

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Id.* When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court must consider pleadings, affidavits, admissions, depositions, and any other documentary evidence then filed in the action or submitted by the parties in a light most favorable to the nonmoving party. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). Summary disposition may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

On appeal, plaintiffs first argue that the trial court erred in granting defendant's motion for summary disposition on their concert of action claim. We disagree. The trial court correctly concluded that plaintiffs did not plead a concert of action claim against defendant. This is so because ¶ 141 of the second amended master complaint, which specifically set forth the legal theories alleged against defendant in particular, did not indicate that defendant was included in Count VII (concert of action). Accordingly, plaintiff is not entitled to relief on this issue. Cf. *Williams v Nevel's-Jarret Assoc's, Inc*, 171 Mich App 119, 121; 429 NW2d 808 (1988).

Plaintiffs next argue that the trial court erred in granting defendant's motion for summary disposition on their negligent misrepresentation claim. We disagree. In Count VI of their second amended master complaint, plaintiffs alleged that all of the named defendants were liable for their negligent misrepresentations made directly to plaintiffs. On appeal, however, plaintiffs seem to argue that defendant aided and abetted Dow Corning in its alleged negligent misrepresentations to plaintiffs, and that defendant was liable to plaintiff based on its negligent misrepresentations to Dow Corning.

With respect to their aiding and abetting theory of negligent misrepresentation, plaintiffs are not entitled to relief because no such theory was alleged in their second amended master complaint. See *Williams, supra* at 121.

With respect to their theory that defendant was liable to plaintiff based on its alleged negligent misrepresentations to Dow Corning, plaintiffs rely on Restatement Torts, 2d, § 311. In so doing,

however, plaintiffs have provided no legal support for their implied proposition that Michigan courts recognize the sort of negligent misrepresentation described in § 311. In Michigan, the tort action of negligent misrepresentation has been adopted in the specific context of a title abstractor being sued for economic damages by a third-party buyer who foreseeably relied on the abstract. See *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974). This Court has subsequently considered the theory in a physical injury case, but rejected its application on other grounds.[1] See *Boumelhem v Bic Corp*, 211 Mich App 175, 184-185; 535 NW2d 574 (1995); *Clark v Grover*, 132 Mich App 476, 484; 347 NW2d 748 (1984). In order for there to be liability under a negligent misrepresentation theory in Michigan there must first be a misrepresentation of fact. *Boumelhem*, *supra* at 184. A misrepresentation of fact may be shown by silence in cases where the defendant had a duty to disclose the information, such as a duty to warn of a latent defect. *Id.* at 184-185. Second, there must exist a duty of care between the actor and the original recipient of the misrepresentation, arising either by contract or otherwise. See *Clark*, *supra* at 484, citing *Polgar*, *supra* at 18-19. Third, as noted above, the third-party plaintiffs' reliance must have been foreseeable. See *Polgar*, *supra*. Finally, the third party plaintiff must have actually relied on the actor's misrepresentation. See *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 468; 487 NW2d 807 (1992).

Here, plaintiffs have failed to sufficiently argue (1) what the specific misrepresentation of fact to Dow Corning was, (2) why Dow Chemical owed a duty of care to Dow Corning with respect to the misrepresentation, (3) why reliance on the misrepresentation by plaintiffs would have been foreseeable, or (4) how the plaintiffs' actually relied on the misrepresentation. Further, plaintiffs have failed to identify any specific documentary evidence that would support a negligent misrepresentation theory. For the reasons stated, we deem this issue to have been abandoned. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984) (explaining that when a party gives an issue only cursory treatment or fails to provide any legal authority for its position, the issue will be deemed abandoned.); *Meagher v Wayne State University*, 222 Mich App 700, 718; 565 NW2d 401 (1997) ("A mere statement of position is insufficient to bring an issue before this Court.").

Next, plaintiffs contend that the trial court erred in granting defendant's motion for summary disposition on their "negligent undertaking" claim. We disagree. In their second amended master complaint, plaintiffs alleged that defendant undertook to test silicone gels and that it failed to follow up on its tests or to inform the manufacturers of silicone gel implants, presumably Dow Corning, when it discovered that silicone gel was not biologically or chemically inert and that it could cause medical problems if used in implants. Apparently, these allegations form the basis of plaintiffs' argument on appeal that defendant should be held liable pursuant to Restatement Torts, 2d, § 324A, which provides as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect[2] his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

This rule, often referred to as the "good Samaritan" rule, see, e.g., *Lemar v United States*, 580 F Supp 37, 39 (WD Tenn, 1984), is recognized in Michigan. See *Smith v Allendale Mutual Ins Co*, 410 Mich 685; 303 NW2d 702 (1981).

In Michigan, in order to create a jury question on the issue whether defendant engaged in an undertaking sufficient to create liability under § 324A, the evidence must show that the defendant intended to undertake the service as a benefit to the recipient of the service. See *Smith, supra* at 715-719; see also *Blackwell v Citizens Ins Co*, 457 Mich 662, 674; 579 NW2d 889 (1998) (explaining that the proper focus is on the "purpose" of the undertaking); *Staffney v Michigan Millers Mutual Ins Co*, 140 Mich App 85, 90; 362 NW2d 897 (explaining that an incidental benefit to another is insufficient to show an undertaking to render services). Moreover, the scope of an actor's duty under § 324A is limited by the scope of its undertaking. See *Callesen v Grand Trunk Western Railroad Co*, 175 Mich App 252, 266-268; 437 NW2d 372 (1989) (holding that the American Association of Railroads (AAR), which undertook to research railroad crossings and publish test data along with general recommendations, could not be held liable for failing to make certain specific recommendations because the plaintiff could not show that such conduct was within the scope of its undertaking); cf *In re TMJ Product Liability Litigation*, 113 F3d 1484, 1493 (CA 8, 1997) (explaining in the context of a silicone implant case that the scope of an actor's undertaking defines and limits his duty under § 324A).

Here, plaintiffs' fail to argue the precise nature of defendant's undertaking (apart from their broad allegation that defendant agreed to render certain silicone testing/advising services) or when such undertaking occurred. In this regard there is no documentary evidence that would support a finding that defendant ever intentionally undertook to test silicone on behalf of Dow Corning for purposes of human implantation, or that it ever intentionally undertook to advise Dow Corning regarding the propriety of silicone for purposes of human implantation. Because plaintiffs cannot prove that defendant ever undertook to make specific recommendations regarding the propriety of silicone for use in human implants, they cannot show that defendant's alleged failure to adequately warn Dow Corning about the dangers of silicone was within the scope of defendant's undertaking. Accordingly, plaintiffs are not entitled to relief on this issue. *Smith, supra*; *Callesen, supra*.

Finally, plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition on their fraud claim. We disagree. As with their other issues, plaintiffs have failed to establish the legal or factual basis for their various fraud claims. Although plaintiffs allege that defendant is liable under two distinct theories (fraudulent misrepresentation and fraudulent concealment), their argument fails to clearly distinguish between the two theories. Moreover, the factual basis of their fraud claim is lacking.

Plaintiffs first suggest that defendant should bear some of the responsibility for Dow Corning's failure to adequately warn consumers about the risks associated with breast implants,[3] because defendant "assumed the quasi-fiduciary duty of testing such products for human safety." Plaintiffs cite to no documentary evidence in support of the factual aspect of this assertion and provide no legal authority for the proposition that the provision of testing services creates a "quasi-fiduciary" relationship.

Plaintiffs then suggest that defendant, having acquired information from Dow Corning and its foreign subsidiary (LePetit) that implants could spontaneously rupture after implementation, should have disclosed its knowledge "to the medical community which it knew was using the medical devices containing silicone fluid." Again, there is no citation to any documentary evidence offered in support of the factual aspect of this assertion and plaintiffs provide inadequate legal support of their position.

Plaintiffs next suggest that defendant's superior knowledge concerning the adverse effects of liquid silicone *created* a duty to disclose its superior knowledge to the plaintiffs, their physicians, and the scientific community. This claim comes without any explanation of the extent or content of defendant's so-called superior knowledge. Further, the only legal support offered for this particular claim is *Burton v RJ Reynolds Tobacco Co*, 916 F Supp 1102, 1105 (D Kan, 1996), a memorandum opinion in which a federal district court held that a smoker could maintain a fraudulent concealment claim against the cigarette manufacturer for failing to disclose known dangers associated with its product. *Burton*, *supra*, does not stand for the proposition that a duty to disclose may be *based upon* the possession of superior knowledge. The defendant's duty in *Burton*, *supra*, although not discussed, presumably arose from its status as a *manufacturer* in a products liability action.

Plaintiffs also state that a duty to speak arises when a party has disclosed only partial or half-truths. Although this may be true in certain circumstances, plaintiffs' argument fails to explain which half or part of which "truth" defendant disclosed, or which half or part of that same "truth" defendant left undisclosed.

To prevail on a fraud theory, a plaintiff must be able to show either an affirmative fraudulent misrepresentation, see *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 208; 544 NW2d 727 (1996), or silence in the face of an affirmative duty to speak, see *M & D, Inc v McConkey*, 231 Mich App 22, 28-29; 585 NW2d 33 (1998), quoting 226 Mich App 801, 807; 573 NW2d 281 (1997). In this case, plaintiffs do not even suggest that defendant is liable for an affirmative fraudulent misrepresentation, and their argument regarding defendant's affirmative duty to speak is wholly inadequate. Accordingly, plaintiffs are not entitled to relief on this issue. See *Goolsby*, *supra* at 655 n 1; *Meagher*, *supra* at 718; *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1994).

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael J. Talbot

[1] In this case, neither of the parties address the propriety of a negligent misrepresentation claim in a suit seeking damages for physical injuries.

[2] Use of the word "protect" here was a typographical error by the authors of the restatement. It should read "perform." See *Smith v Allendale Mutual Ins Co*, 410 Mich 685, 705 n 4; 303 NW2d 702 (1981).

[3] Plaintiffs contend that Dow Corning was required to make such warnings under the Food Drug and Cosmetic Act, 21 USC 355.