STATE OF MICHIGAN

COURT OF APPEALS

JESUS REYES, Individually and as Next Friend of LOURDES REYES, a Developmentally Disabled Person, and JESUS ANTONIO REYES, a Minor,

Plaintiffs-Appellees,

v

KAY-JAN, INC., d/b/a OAKLAND INDIVIDUALIZED SERVICES, a/ka CHRISTIAN HILLS GROUP HOME, and ROBERT ZILLI,

Defendants-Appellants,

and

MACOMB-OAKLAND GUARDIANSHIP, INC., and STANLEY SMART,

Defendants.

UNPUBLISHED
April 5, 2002

No. 226079
Oakland Circuit Court
LC No. 98-009100-NO

JESUS REYES, Individually and as Next Friend of LOURDES REYES, a Developmentally Disabled Person, and JESUS ANTONIO REYES, a Minor,

Plaintiffs-Appellants,

v

KAY-JAN, INC., d/b/a OAKLAND INDIVIDUALIZED SERVICES, a/k/a CHRISTIAN HILLS GROUP HOME, and ROBERT ZILLI,

Defendants-Appellees,

and

No. 230854
Oakland Circuit Court
LC No. 98-009100-NO

MACOMB-OAKLAND GUARDIANSHIP, INC.,
and STANLEY SMART,

Defendants.

Before: Hood, P.J., and Gage and Murray, JJ.

PER CURIAM.

In Docket No. 226079, defendants appeal, by leave granted, from the trial court's order granting in part and denying in part their motion for partial summary disposition.[1] In Docket No. 230854, plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition of their negligence claims. In docket no. 226079, we reverse the trial court's order to the extent that it denied defendants' motion for summary disposition of the damage claims involving plaintiffs Jesus Reyes and the minor child Jesus Antonio Reyes. In docket no. 230854, we reverse the trial court's order granting defendants' motion for summary disposition of the negligence claims.

Lourdes Reyes is a developmentally disabled person with an age equivalency of a person under two years old. Due to her developmental disability, Lourdes has difficulty communicating and is unable to consent to sexual interaction. Macomb-Oakland Guardianship, Inc. (MOG), and Stanley Smart, the Executive Director of MOG, were appointed the plenary guardians for Lourdes for the period of July 20, 1992, and July 20, 1997.[2] On September 23, 1993, Lourdes was placed in Christian Hills Group Home (Christian Hills), and was put under the care and supervision of the employees of Christian Hills. Defendant Robert Zilli is the owner and administrator of defendant Kay-Jan, Inc., which operates as Christian Hills.

In the fall of 1995, Lourdes attended classes at Pontiac Central High School. Defendants allege that some time after November 4, 1995, Lourdes became pregnant. Defendants became aware of the pregnancy in January or February 1996. On March 8, 1996, the Oakland County Probate Court concluded that Lourdes' pregnancy was a result of rape and entered an order authorizing MOG to consent to an abortion to end Lourdes' pregnancy. On March 13, 1996, the medical director of the Macomb-Oakland Regional Center examined Lourdes and concluded that she was in an advanced stage of pregnancy and that abortion was not a legally or physically

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[1] Defendants alleged that the gravamen of plaintiffs' complaint requested damages that were prohibited as a result of the evolution of the law in the area of wrongful pregnancy, wrongful conception, and wrongful birth cases. Specifically, defendants alleged that the minor child and Jesus Reyes, the minor child's grandfather, could not recover damages for the costs of rearing the child. The trial court denied the motion by concluding that plaintiffs had not raised a cause of action under the various wrongful birth categories, but alleged negligence, gross negligence, and breach of contract. However, the trial court granted defendants' motion with respect to the minor child's loss of consortium claim. Additionally, the trial court granted defendants' motion for summary disposition of the intentional infliction of emotional distress claim.

[2] MOG and Smart are not parties to this appeal.

viable option for her. Lourdes gave birth to a healthy baby boy on July 21, 1996. Plaintiff Jesus Reyes has custody of and cares for the minor child. The father of the child has never been ascertained despite a police investigation.

Plaintiffs filed a complaint against defendants, alleging a duty to supervise and monitor Lourdes and act in her best interests, but that that duty was breached by allowing Lourdes to be sexually assaulted, impregnated, and bear a child. Plaintiffs also alleged that defendants failed to report to her family or the proper authorities that Lourdes had been sexually assaulted and impregnated. However, the complaint also contained the following general averments that were not correlated to any specific claim or damage category:

> 36. As a proximate result of the negligence, gross negligence and breach of duties cited herein, Plaintiff LOURDES REYES will forever be deprived of developing a trusting relationship with her care-providers, and of enjoying the company of her son and the ability to share love, affection, nurturing and bonding with her son and she has experienced the depression and sense of loss that has occurred because of the Defendants' course of conduct, negligence and gross negligence.
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> 37. As a proximate result of the negligence, gross negligence and breach of duties cited herein, minor Plaintiff JESUS ANTONIO REYES will forever be deprived of having a biological mother with whom he can share love, affection, nurturing and bonding.
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> 38. As a proximate result of the negligence, gross negligence and breach of duties cited herein, Plaintiff JESUS REYES has incurred and will continue to incur substantial expenses for the support, care, health, education, and welfare of the minor JESUS ANTONIO REYES at least until the minor JESUS ANTONIO REYES attains the age of eighteen years.

Prior to a settlement conference, plaintiffs' counsel sent a letter to defendants indicating additional damages that were requested. Specifically, plaintiffs sought the costs of child rearing and "grandparents/plaintiffs may be awarded damages for the impairment of their lifestyles." Additionally, plaintiffs asserted that the minor child could receive damages "for the cost of child rearing, deprivation of his mother, being bi-racial, not having a family unit that will encourage his development, well-being and the psychological impact that this awareness will have upon him once he reaches an appropriate age."

Shortly after the receipt of this letter, defendant filed a motion for partial summary disposition, alleging that the damages plaintiffs' requested were not recoverable based on the evolution of wrongful birth, life, conception, and pregnancy cases. However, in order to ascertain the exact nature of the damage claims raised by plaintiffs, defendants were required to "glean" the information from the general averments and the letter submitted to defendants in anticipation of a settlement conference. Defendants did not file a motion to request a more definite statement. In response to the motion, plaintiffs did not move to amend their complaint. Rather, plaintiffs asserted that all damages were recoverable because the case law cited by defendants were based on medical malpractice or wrongful pregnancy claims. Furthermore, plaintiffs alleged that the minor child's damage claim was based on loss of consortium, although it was not categorized or delineated as such in plaintiffs' complaint. The trial court denied

defendants' motion for partial summary disposition of damages, except with regard to the minor child's loss of consortium claim, without examining defendants' gravamen argument, by stating:

> Conversely, Plaintiffs' allegations, predominately encompass Defendants' negligence, gross negligence and breach of contract. None of the allegations contained in Plaintiffs' Complaint state or otherwise infer that Plaintiffs are attempting to bring a cause of action for wrongful birth, wrongful life, wrongful pregnancy or wrongful conception and, therefore, Defendants' motion is fundamentally flawed. The limitations in recovery pronounced by the Michigan courts as to the costs or raising a child lie within the context of wrongful birth and wrongful pregnancy, neither of which apply in this matter.[3]

We granted defendants' application for leave to appeal with respect to the trial court's opinion and order addressing damages. Defendants filed a subsequent motion for summary disposition challenging plaintiffs' ability to demonstrate duty, breach, and causation. In response to this motion, plaintiffs alleged that summary disposition was inappropriate where factual issues were presented and the doctrine of res ipsa loquitur applied. The trial court granted defendants' motion for summary disposition by concluding that plaintiffs could not establish the elements of res ipsa loquitur, but failed to address plaintiffs' factual dispute argument.

Defendants first allege that the trial court erred in denying their motion for partial summary disposition of the minor child's claim for damages.[4] We agree. An appellate court reviews the grant or denial of a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). While the minor child's claim for damages included the costs of child rearing, this type of damage is not recoverable under Michigan law. *Rinard v Biczak*, 177 Mich App 287, 292; 441 NW2d 441 (1989). The recovery of the costs of raising a normal, healthy child is not an element of damages. *Id*. The rationale being that the benefit and value of life is far outweighed by the costs involved. *Id*. at 292-293. Plaintiffs contend that the *Rinard* decision is distinguishable because it involved a wrongful pregnancy claim, not a negligence action. Plaintiffs' attempt to distinguish *Rinard* on this basis is without merit. To reach the conclusion that child rearing damages were not appropriate, this Court relied on the rationale of the benefit of life from a wrongful death decision. This Court then noted that the fact that the complaint alleged wrongful pregnancy rather than wrongful death was of no consequence because "allowing the costs of raising a child as an *element of damages* logically requires the conclusion that the nonexistence of that child would be a benefit." *Id*. at 293 (emphasis added).

[3] While the trial court concluded that there were no allegations in the complaint that were based on wrongful birth or wrongful life, review of the complaint reveals that plaintiffs alleged that Smart failed to request an earlier hearing date on an emergency basis regarding his petition for authority to obtain an abortive procedure. Additionally, plaintiffs alleged that after the Oakland County Probate Court order authorized the medical proceedings necessary to abort Lourdes Reyes' pregnancy, Smart alleged did not seek immediate "treatment or medical services."

[4] To address the issue of damages, defendants correctly note that we must read the complaint as a whole to determine the gravamen of the complaint. *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490; 458 NW2d 671 (1990). However, the settlement letter and the parties' pleadings further clarify the nature of the damages requested.

Thus, the type of action alleged is not dispositive. Rather, the key inquiry is whether child rearing costs are requested as an element of damages. Consequently, the trial court erred in denying defendants' motion for partial summary disposition to the extent it involved the minor child's damage claim for child rearing.

In response to this issue, plaintiffs argue that the damages requested involve loss of consortium damages. Michigan law recognizes a child's claim for loss of consortium. *Berger v Weber*, 411 Mich 1, 17; 303 NW2d 424 (1981). Specifically, "a child may recover for loss of a parent's society and companionship caused by tortious injury to the parent." *Id*. This action arises when negligently caused injuries to the parent results in the loss of parental consortium. See *Hebert v Cole*, 115 Mich App 452, 455; 321 NW2d 388 (1982). In the present case, any alleged negligence by defendants did not result in the loss of parental consortium. Lourdes' developmental disability was not an "injury" resulting from defendant's actions. Plaintiffs do not dispute that, under any circumstances, Lourdes was not capable of caring for a child. Accordingly, the damages characterized as loss of consortium are not recoverable. *Hebert, supra*.

Defendants next allege that the trial court erred in denying plaintiff Jesus Reyes' claim for damages with respect to child rearing and impairment of his lifestyle. We agree.[5] In *Rinard, supra*, we held that parents could not recover the costs of raising a child and that this rationale was equally applicable to grandparents:

> We do not dispute the fact that child rearing is a costly enterprise. We simply believe that the benefits of raising a normal, healthy child must be conclusively presumed to be greater than the costs of raising that child. As a matter of public policy, parents should not be able to recover the costs of raising a normal, healthy child as an element of damages. We would limit the parents' recovery for a physician's failure to diagnose pregnancy to the costs of pregnancy and birth, and related damages for pain and suffering, medical complications caused by the pregnancy, mental distress, lost wages, and loss of consortium. These damages should not be offset with what the factfinder speculates to be the benefits of a child. The benefits rule should not be used to measure damages in this type of case.
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> We turn to the question of whether the child's grandparents, who are also the adoptive parents in this case, can bring this cause of action. They should not be able to recover child-rearing costs as an element of damages for the same

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[5] Defendants also allege that the trial court erred in allowing a claim for damages to plaintiffs Jesus Reyes and the minor child based on the pregnancy of Lourdes Reyes. Based on our review of the complaint and the proposed settlement letter, we cannot conclude that plaintiffs' request encompassed these damages on behalf of these individuals. (The parties do not dispute that damages involving Lourdes Reyes are not at issue.) However, assuming that plaintiffs did request such damages, we agree that the cause of action for Lourdes Reyes' pregnancy and any attending damages cannot be asserted individually by plaintiffs Jesus Reyes and the minor child. See *Health Central v Insurance Commissioner*, 152 Mich App 336, 348; 393 NW2d 625 (1986) ("a wrong to one gives no right of action to another whom it incidentally injures.").

> reasons that the child's parents should not be able to recover those costs. [*Rinard, supra* at 294 (citations omitted).]

Furthermore, this Court noted that, aside from the esteemed value of human life, courts should not allow parents to maximize recovery by disparaging the value or degree of affection for the child. *Rinald, supra* at 293; see also *Rouse v Wesley*, 196 Mich App 624, 631; 494 NW2d 7 (1992). Therefore, plaintiff Jesus Reyes' damage claim for impairment of lifestyle is also not recoverable. Accordingly, the trial court erred in denying defendants' motion for summary disposition with respect to plaintiff Jesus Reyes' damage request for costs of child rearing and lifestyle impairment.

Plaintiffs allege that the trial court erred in granting summary disposition of their negligence claims as to Lourdes. We agree. Our review of this issue is de novo. *Maiden, supra*. The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in opposition to a motion shall be considered only to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6); *Maiden, supra*. An affidavit consisting of mere conclusory allegations that are devoid of detail are insufficient to demonstrate that there is no genuine issue of material fact for trial. See *Quinto, supra* at 371-372.

To establish a prima facie case of negligence, a plaintiff must prove: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "The threshold issue of duty of care in negligence actions must be decided by the trial court as a matter of law." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992). Generally, there is no duty to aid or protect another. *Hammack v Lutheran Social Services*, 211 Mich App 1, 4; 535 NW2d 215 (1995). However, a duty may arise based on a contractual relationship, see *Antoon v Community Emergency Medical Service, Inc*, 190 Mich App 592, 595; 476 NW2d 479 (1991), or when a special relationship exists between the plaintiff and the defendant. *Hammack, supra*. Once the existence of a special relationship is acknowledged, the performance of that duty presents a question for the trier of fact to evaluate. *Id*. at 5.

Defendants do not dispute the special relationship of caregiver to Lourdes Reyes. Rather, defendants' argument with respect to the negligence claim is essentially two-fold: (1) defendants allege that they had no duty to protect Lourdes on the way to or at school; and (2) all the evidence indicates that Lourdes was sexually assaulted while she was at school. Assuming, without deciding, that defendants did not owe a duty to Lourdes during her transport to school and attendance at school, nonetheless, a genuine issue of material fact is presented regarding a breach of duty of care by defendants.

In support of entitlement to summary disposition, defendants submitted the affidavit of defendant administrator Zilli. In the affidavit, defendant Zilli asserted that the only male who had physical contact with Lourdes Reyes between the relevant time period for conception was a

fellow group home occupant, who was ruled out as the father by police. However, mere conclusory allegations contained within an affidavit are insufficient to meet the party's burden. *Quinto, supra*. Defendant Zilli's affidavit fails to contain a foundation to establish that he had personal knowledge that Lourdes was never in contact with a male while at the group home. Furthermore, it appears that defendant Zilli did not reside in this group home with Lourdes. Thus, any information regarding Lourdes' contact with males would have been ascertained by defendant Zilli through company records or his employees.[6] However, even if defendant Zilli had delineated that this information was obtained from his employees in his affidavit, the affidavit would have contradicted his deposition testimony.[7] Specifically, during his deposition, defendant Zilli acknowledged that he learned that there were instances where individuals or visitors were impermissibly allowed into the group home. Additionally, plaintiffs submitted the properly verified affidavit of group home employee Nancy Gibson that presented genuine issues of material fact. In her affidavit, Gibson attested to the fact that visitors were present in the group home, but were not reported. Gibson further attested that, when short of staff, Lourdes was removed from the group home by manager Janet Robinson.[8] Accordingly, the question of whether defendants breached any duty owed to Lourdes while in their care presents an issue for the trier of fact. *Hammack, supra*.[9] Accordingly, the trial court erred in granting summary disposition of plaintiffs' negligence claims.[10]

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[6] Affidavits from the supervising employees would not have permitted summary disposition in defendants' favor. Summary disposition is rarely appropriate in cases involving questions of credibility, intent, or state of mind. *Arbelius v Poletti*, 188 Mich App 14, 18; 469 NW2d 436 (1991). Defendant Zilli testified that he learned of an instance where an employee brought a visitor into the home and terminated that employee. Thus, the credibility of the employees' assertion that individuals or visitors were not improperly allowed into the group home presents a question for the trier of fact.

[7] A party examined at length in deposition may not circumvent the procedural rules governing summary disposition that screen out sham factual issues by submitting an affidavit contradicting his prior testimony. *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972).

[8] We note that defendants allege that the minor child is biracial and that the father is an African-American. Defendants further allege that plaintiffs have to demonstrate that Lourdes had contact with an African-American male after November 4, 1995, because of the dates of her reproductive cycle. As previously stated, the moving party must support entitlement to summary disposition with documentary evidence. *Quinto, supra*. Although there are assumptions that the minor child is biracial, there is no actual evidence in the record to support the assertion that the father of the minor child must be an African-American male. Furthermore, the allegation that the conception must have occurred after November 4, 1995, may be contrary to the ultrasound results of February 8, 1996, wherein the results concluded that conception could have occurred fourteen to fifteen weeks earlier. Utilizing a fifteen week period, the conception date would have occurred prior to November 4, 1995. Lastly, there is some indication that record keeping by defendants' employees was not appropriately monitored and recorded at relevant time periods. Accordingly, in the absence of admissible documentary evidence to establish these allegations raised by defendants, the blanket assertion is insufficient to warrant summary disposition.

[9] We note that defendants also challenge Gibson's affidavit. Specifically, defendants contend that Gibson's observations of Lourdes contact with an African-American employee in November 1995 is inaccurate because the employee was terminated in September 1995. However, it is entirely feasible that the former employee was present at the group home for an unrecorded visit.

(continued…)

However, we do note that the doctrine of res ipsa loquitur is unavailable to plaintiffs. Plaintiffs have demonstrated that there is sufficient evidence that Lourdes' pregnancy could have occurred while she was under defendants' care and supervision to allow the issue to be resolved by the trier of fact, and the special relationship duty allows this issue to proceed to the trier of fact. *Hammack, supra*. However, to avail themselves of the res ipsa loquitur doctrine, plaintiffs must demonstrate that the event was "caused by an agency or instrumentality within the exclusive control of the defendants." *Jones v Porretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987). Plaintiffs must also demonstrate that the true explanation for the event is more readily accessible to defendants. *Id*. at 151. Plaintiffs have failed to meet this burden. Accordingly, while plaintiffs may proceed with their negligence claims regarding breach of duty to Lourdes, the doctrine of res ipsa loquitur is inapplicable.

Affirmed in part, reversed in part. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ Christopher M. Murray

(…continued)

There is no indication that Gibson was deposed to clarify or contradict any assertions in her affidavit. Furthermore, defendants' challenge to her affidavit based on contradictions in a written police statement are without merit. There is no indication that the written statement to police was a sworn statement. Furthermore, the attested statements in Gibson's affidavit do not conflict with any prior inconsistent sworn testimony. Therefore, the challenge to the affidavit is without merit.

[10] Because of our conclusion that summary disposition was improper with respect to the negligence claims, we need not address plaintiffs' assertion that summary disposition was prematurely granted prior to the close of discovery and without an opportunity to file additional evidence when the decision on the motion had been pending for over a year.