

STATE OF MICHIGAN
COURT OF APPEALS

MARIE JOHNSON, Personal Representative of
the Estate of MARGARET WHITE, Deceased,

Plaintiff-Appellant,

V

VILLA ELIZABETH—BUTTERWORTH, INC.,

Defendant-Appellee.

UNPUBLISHED
September 24, 2002

No. 228425
Kent Circuit Court
LC No. 99-010623-CK

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff, as personal representative of the estate of Margaret White, appeals from the trial court's grant of defendant's motion for summary disposition. We affirm.

I. Facts and Proceedings

In August 1995, plaintiff sought the services of defendant for care of her mother, Margaret White. She eventually signed an admission agreement provided by defendant, and her mother was admitted to defendant's care. White's health began to deteriorate and in April 1997, she was taken to the emergency room at St. Mary's Health Center, where she was provisionally diagnosed with presumptive sepsis, urinary tract infection, presumptive pneumonia, and dehydration. White was later admitted to St. Mary's Assisted Living Center. She died on June 13, 1997.

Plaintiff filed suit against defendant in October 1999 alleging breach of contract, exemplary damages, fraudulent misrepresentation, and innocent misrepresentation. The essence of plaintiff's suit was that defendant had failed to provide care in accordance with the admission agreement, which included providing "routine nursing services" and "nursing care and treatment." In its first motion for summary disposition, defendant claimed that plaintiff's suit was actually one for medical malpractice and because plaintiff had not filed the required affidavit of merit, the suit should be dismissed. Additionally, defendant argued that even if plaintiff's claims were in fact based in contract, plaintiff had failed to provide a writing that satisfied the statute of frauds since only plaintiff had signed the admission agreement. The trial court found that plaintiff had not pleaded a contract cause of action and granted plaintiff leave to amend her complaint.

Plaintiff's amended complaint asserted the same claims as the original complaint, but phrased the claims differently. Defendant again moved for summary disposition, arguing that the issue was still one of the standard of care provided to White and, alternately, that the document did not satisfy the statute of frauds. The trial court granted defendant's motion based on its conclusion that plaintiff's suit was a medical malpractice suit "thinly disguised" as a breach of contract action. Having reached this conclusion, the court did not address defendant's statute of frauds argument. This appeal followed.

II. Standard of Review

We review a trial court's grant or denial of a motion for summary disposition de novo. *Mack v City of Detroit*, ___ Mich ___; 649 NW2d 47; 51 (2002). The trial court based its decision on MCR 2.116(C)(8) and (C)(10). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the claims based on the pleadings alone, *id.*, while a motion based on MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's claims. *Steward v Panek*, ___ Mich App ___; ___ NW2d ___ (Docket No. 222847, decided 6/4/02), slip op at 5-6.

Whether a document satisfies the statute of frauds is an issue of law subject to de novo review. *In re Stotzke Estate*, 216 Mich App 247, 252; 548 NW2d 695 (1996).

III. Analysis

Plaintiff first asserts that the trial court erroneously decided that her breach of contract claim was actually one for medical malpractice. Assuming without deciding that plaintiff's claim was based in contract, we nevertheless affirm the dismissal of plaintiff's breach of contract claim because she has not presented a writing that satisfies the statute of frauds.¹

The statute of frauds provides, in part:

(1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

* * *

¹ Although the trial court did not reach this issue, we may address it because it is an issue of law and all of the facts necessary for its resolution have been presented to this Court. *Steward v Panek*, ___ Mich App ___; ___ NW2d ___ (Docket No. 222847, decided 6/4/02), slip op at 3.

(g) An agreement, promise, contract, or warranty of cure relating to medical care or treatment. This subdivision does not affect the right to sue for malpractice or negligence. [MCL 566.132.]

Assuming, without deciding, that plaintiff correctly asserts the admission agreement was a contract for the medical care of White, MCL 566.132 would apply to plaintiff's claim. Under the language of subsection (1)(g) of the statute, "the party to be charged with the agreement" is defendant. However, it is undisputed that defendant's representatives did not sign the admission agreement at issue. Accordingly, the agreement is void, and plaintiff's breach of contract claim is barred. MCL 566.132.

Plaintiff next asserts that the trial court erred by granting defendant's motion regarding her fraudulent misrepresentation claim. We disagree. In order to prove fraudulent misrepresentation, plaintiff must show that

(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*M&D, Inc v McConkey*, 231 Mich App 22, 27-28; 585 NW2d 33 (1998).]

The representation upon which a claim for fraudulent misrepresentation is based must concern a past or existing fact, *Forge v Smith*, 458 Mich 198, 212 n 41; 580 NW2d 876 (1998); citing *Kamalnath v Mercy Hospital*, 194 Mich App 543, 554; 487 NW2d 499 (1992). We agree with the trial court that the misrepresentations alleged by plaintiff concern future conduct; specifically, the future care White was to receive once she was admitted. Therefore, plaintiff's claim fails.

Plaintiff also argues that the trial court improperly granted summary disposition on her innocent misrepresentation claim. Without analyzing the elements of the claim, the trial court dismissed this count of plaintiff's amended complaint because, like her breach of contract action, it had concluded that plaintiff's claim was actually for medical malpractice. Innocent misrepresentation is a "species" of fraudulent misrepresentation, but requires proof that the misrepresentations were made in connection with making a contract and that the plaintiff and the defendant were in privity of contract. *M&D, supra* at 27-28.

Here, plaintiff's innocent misrepresentation claim is based on the admission agreement, which, as we previously stated, is void because it does not satisfy the statute of frauds. MCL 566.132. Because the agreement is void, it cannot support plaintiff's innocent misrepresentation claim. See *Cassidy v Kraft-Phenix Cheese Corp*, 285 Mich 426, 435-437; 280 NW 814 (1938).

Plaintiff finally asserts that the trial court erred in granting defendant summary disposition on plaintiff's exemplary damages claim. We disagree. Exemplary damages fall

within the larger category of actual damages, *Ray v City of Detroit, Dep't of Street Railways*, 67 Mich App 702, 704; 242 NW2d 494 (1976), and are not a separate cause of action. Because plaintiff's substantive claims fail, she cannot recover any damages.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra