STATE OF MICHIGAN

COURT OF APPEALS

RAJAN EADARA, Personal Representative of the Estate of JYOTHI K. EADARA, PH.D., Deceased, Plaintiff-Appellee, v HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL, LEONARD LUTTER, PH.D., and RAJIV JOSEPH, PH.D., M.D., Defendants-Appellants.	UNPUBLISHED February 10, 2004 No. 238137 Wayne Circuit Court LC No. 97-737726-NO
RAJAN EADARA, Personal Representative of the Estate of JYOTHI K. EADARA, PH.D., Deceased, Plaintiff-Appellee, v HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL, LEONARD LUTTER, PH.D., and RAJIV JOSEPH, PH.D., M.D., Defendants-Appellants.	No. 238979 Wayne Circuit Court LC No. 97-737726-NO

Before: O'Connell, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, plaintiff was awarded judgment in the amount of $315,971.74[1] on his claims for conversion of intellectual property and breach of contract with regard to his

[1] The trial court denied defendant's motion for judgment notwithstanding the verdict (JNOV), (continued…)

deceased wife, Jyothi Eadara.[2] In Docket No. 238137, defendants appeal as of right, challenging the judgment in favor of plaintiff. In Docket No. 238979, defendants appeal by delayed leave granted from the trial court's order awarding plaintiff mediation sanctions. We affirm in part and reverse in part the judgment in plaintiff's favor, and reverse the award of mediation sanctions.

I. Docket No. 238137

A. Claims against Dr. Lutter

Defendants contend that the trial court erred in denying their motion for summary disposition as to plaintiff's conversion claim against Dr. Lutter. We agree. Defendants argued that they were entitled to summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), because discovery was complete and plaintiff had yet to identify any evidence supporting the conversion claim. Plaintiff's responsive brief failed to address this issue. At the hearing on defendants' motion, plaintiff's only response to this argument was that if the trial court allowed the fraud and misrepresentation claim to proceed to trial, an interlocutory appeal concerning dismissal of the conversion claim would not be filed. We view this statement as a concession that there was no evidence to support the conversion claim. Even if it was not, the fact remains that plaintiff failed to establish factual support for the claim. Accordingly, the trial court should have granted defendants' motion. See *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 709; 644 NW2d 779 (2002) (wherein this Court reversed a trial court's denial of a summary disposition motion and a trial judgment for the plaintiffs on the ground that the plaintiffs failed to establish evidentiary support for elements of their claim.)

Furthermore, we agree that the trial court also erred in denying defendants' post-trial motion for JNOV as to the claims against Dr. Lutter. We review de novo a trial court's decision regarding a motion for JNOV. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). A motion for JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997). Although Michigan law has not yet clearly set forth all the elements of a claim for conversion of intellectual property, this Court held in *Sarver v Detroit Edison*, 225 Mich App 580, 586-587; 571 NW2d 759 (1997), that an intellectual concept is entitled to protection only if it is developed into some useful form and is novel or unique. Here, plaintiff has not cited any evidence showing that Dr. Eadara's contributions to Dr. Lutter's grant proposals were novel or unique. Plaintiff has not identified any idea, concept, methodology, hypothesis, or theory that originated with Dr. Eadara, which Dr. Lutter incorporated into the October 1996 grant proposals. The mere fact that Dr. Lutter relied on Dr. Eadara's work does not lead to the inference that her work was original.

Plaintiff's claim that Dr. Lutter appropriated Dr. Eadara's name and reputation is more in the nature of a publicity or invasion of privacy claim than a conversion claim. Cf. 3 Restatement

(…continued)

but granted the motion for remittitur with regard to the damage award for the breach of contract claim against Dr. Joseph from $43,000 to $1.00.

[2] The action was originally brought by Jyothi Eadara, who died before trial. Rajan Eadara, as Personal Representative for his deceased wife's estate, was subsequently substituted as plaintiff.

Torts, 2d, § 652A, p 376; *Lewis v LeGrow*, 258 Mich App 175, 193; 670 NW2d 173 (2003) (the common-law right of privacy protects against four types of invasion of privacy, including appropriation, for the defendant's advantage, of the plaintiff's name or likeness). In *Parks v LaFace Records*, 329 F3d 437 (CA 6, 2003), the Sixth Circuit held that "a plaintiff must prove in a right of publicity action . . . that she has a pecuniary interest in her identity, and that her identity has been commercially exploited by a defendant." *Id.*, 460. Here, plaintiff has not shown that Dr. Lutter exploited Dr. Eadara's identity for financial gain. The evidence failed to show that Dr. Eadara's name on the grant proposal was a factor in the granting agencies' decision to fund Dr. Lutter's research. On the contrary, there was evidence that Dr. Lutter had been denied grants when Dr. Eadara was listed as a co-investigator. The trial court therefore erred in denying defendants' motion for JNOV as to the conversion claim.

Because we reverse the judgment against Dr. Lutter, we need not consider defendants' issues regarding remittitur or the trial court's reversal of its earlier directed verdict order.

B. Claims against Dr. Joseph

Defendants also argue that the trial court erred in denying their motions for JNOV as to the breach of contract claim against Dr. Joseph. We disagree.

Defendants contend that there was no valid contract between Dr. Eadara and Dr. Joseph because there was no evidence of mutual assent and no evidence of consideration. As this Court stated in *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1998):

> A valid contract requires mutual assent on all essential terms. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 54 3, 548-549; 487 NW2d 499 (1992). Mere discussions and negotiation cannot be a substitute for the formal requirements of a contract. *Id.* at 549. Before a contract can be completed, there must be an offer and acceptance. *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). An offer is defined as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement Contracts, 2d, § 24; see also *Cheydleur v Hills*, 415 F Supp 451, 453 (ED Mich, 1976). Acceptance must be unambiguous and in strict conformance with the offer. *Pakideh, supra* at 640.

Defendants rely on the following testimony to argue that plaintiff failed to establish a mutual understanding between Dr. Eadara and Dr. Joseph:

> *Q*. Now your arrangement with Dr. Joseph was never solidified in writing, was it?
>
> *A*. Well, you have several letters and each grant applications [sic] Dr. Joseph asked me to give a written letter that I will continue to work on the grant that was submitted for publication. So that was a commitment for both of us.
>
> *Q*. So my question is in terms of how much time you spent in the neuroscience lab in terms of what your role would be in the neuroscience lab in terms of

salary support from these funding sources that was never reduced to writing, is that correct?

A. Well, Dr. Joseph himself indicated in the grants that he himself requested salary support for me in those grants and sometimes he even asked me to give a written report.

And in one of those letters I gave him a hundred percent effort before funding to work on a grant. It's in all of those documents. He even discussed it with an American Heart Society whatever salary for me.

Q. I understand that in terms of each individual grant proposal. My question is when you went into this arrangement you did not have anything in writing saying that you would be a co-investigator, co-author or whatever your role would be relative to what was going on in the neuroscience lab?

A. To me that was quite clear.

Q. Did you have anything in writing, ma'am, that laid all of that out?

A. No, other than the grants, no.

However, Dr. Joseph's testimony actually corroborated Dr. Eadara's testimony that there was a mutual understanding that she would be given authorship credit if she satisfactorily performed the work:

Q. It is implied, isn't it that if you list someone on a grant proposal as a co-investigator that they will participate in any publications that result from the work yes or no?

A. No.

Q. It is not implied?

A. It is not implied.

Q. Okay. So in the past when you have worked with other people, you have had to work out whether you are going to be on the publications separately from agreeing to do the work?

A. You have to be involved in the work.

Q. All right.

A. These are two separate processes.

Q. But at this point in time, at the beginning of the application process, there is an understanding or an implied agreement that if this gets funded and we do this work, that we'll then share in the credit for doing the work, correct?

A. If the work is done.

Q. Okay.

A. If there is a lot—

Q. Wait a minute. So, that's in fact the understanding, isn't it?

A. If the work is done.

Q. All right. And if the grant comes in but at the beginning, when there is no work and there is no grant the understanding is that if you agree to do this that ultimately if we get the grant and if there are publications you'll share in the credit?

A. That is correct.

Although Dr. Joseph was testifying generally about the process of collaborating with a co-investigator, considered in a light most favorable to plaintiff, this testimony corroborates Dr. Eadara's statement that the terms of the agreement were "quite clear." In this testimony, Dr. Joseph admitted having an understanding with the co-investigator that if she performs satisfactory work, then she will be credited as a co-author. A trier of fact could have found from this testimony that there was an agreement as Dr. Eadara described, with satisfactory performance as a precondition to Dr. Joseph carrying out his part of the agreement. See *Klapp v United Ins Group Agency*, 468 Mich 459, 469-470; 663 NW2d 447 (2003); *Moore v St Clair Co*, 120 Mich App 335, 339; 328 NW2d 47 (1982). Moreover, because Dr. Joseph originally listed Dr. Eadara as a co-author on the submitted publication, the jury could have inferred that she did perform satisfactorily. Dr. Joseph testified that he removed her name because, after reviewing the NIH authorship criteria, he determined that she did not make a sufficient contribution. However, the jury could have found that this was not credible. In his July 15, 1992, letter, Dr. Joseph attributed his decision to the NIH criteria, but also indicated that he would keep Dr. Eadara's name off the articles until the dispute between them was resolved. Given these circumstances, the jury could have determined that the reference to the NIH criteria was a pretext, and that Dr. Joseph removed Dr. Eadara's name out of anger, in breach of their agreement.

Defendants also argue that there was no evidence of consideration. This Court has defined consideration as "a bargained-for exchange" that requires "a benefit on one side, or a detriment suffered, or service done on the other." *Alibri v Detroit/Wayne County Stadium Authority*, 254 Mich App 545, 560; 658 NW2d 167 (2002). Based on the evidence presented, the jury was entitled to conclude, see *Klapp*, *supra*; *Moore*, *supra*, that an agreement between Dr. Eadara and Dr. Joseph was for Dr. Eadara to contribute her expertise in molecular biology in exchange for receiving credit on Dr. Joseph's research publications. This clearly would qualify as a bargained-for exchange, with each party giving the other something of value. We therefore conclude that there was sufficient evidence of consideration. Consequently, because plaintiff established the existence of a valid contract between Dr. Eadara and Dr. Joseph, the trial court properly denied this aspect of defendants' motion for JNOV.

Defendants also argue that the trial court erred in denying their motion for a new trial. We need only address the aspects of this argument that pertain to the judgment against Dr. Joseph. This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997).

First, we disagree that the trial court erred by granting plaintiff's motion to add a claim of breach of contract on the first day of trial. MCR 2.118(A)(2) provides that, apart from the fourteen-day rule in subrule (A)(1), a party may amend a pleading only with the trial court's leave, but that "leave shall be freely given." In *Jenks v Brown*, 219 Mich App 415, 419-420; 557 NW2d 114 (1996), this Court stated:

> Amendment is generally a matter of right rather than grace. *Patillo v Equitable Life Assurance Society of the United States*, 199 Mich App 450, 456, 502 NW2d 696 (1992). A trial court should freely grant leave to amend if justice so requires. MCR 2.118(A)(2). Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile. *Horn v Dep't of Corrections*, 216 Mich App 58, 65, 548 NW2d 660 (1996). This Court reviews grant and denials of motions for leave to amend pleadings for an abuse of discretion. *Id*.

While it would not have been an abuse of discretion for the trial court to have denied plaintiff leave to amend based on undue delay, neither was it an abuse of discretion to grant the motion. *Jenks*, *supra*. The evidence relevant to the breach of contract claim substantially overlapped the evidence associated with the misrepresentation claim. Plaintiff alleged that defendants induced Dr. Eadara to work for them with the false representation that she would be credited as a co-author on scientific publications. Thus, the factual basis for this claim is virtually the same as the factual basis for plaintiff's claim that defendants breached the alleged work-for-publication contract. Accordingly, defendants were not prejudiced.

Defendants also claim that the jury's verdict was improperly influenced by passion and prejudice. We disagree. There is no indication that the alleged display of photographs, a large photograph under the table, or the small photos distributed to the jury, could have evoked in jurors such strong emotions that they would ignore the evidence and the trial court's instruction not to base their verdict on sympathy. See *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993) (jurors presumed to follow their instructions). We also conclude that nothing improper occurred in plaintiff's closing argument. Plaintiff's counsel did not suggest that defendants were responsible for Dr. Eadara's death; he stated only that Dr. Eadara chose a life of science, and that defendants took "that" life away from her.

We also cannot conclude that plaintiff's substitution of the word "mistreatment" for "harassment" when reading Dr. Eadara's deposition, or the evidence of Dr. Eadara's conflicts with defendants and defendants' administrators, deprived defendants of a fair trial. It was obvious that Dr. Eadara considered herself "mistreated" by defendants, and merely uttering the word during the deposition reading was not likely to outrage the jury. Nor can we conclude that defendants were denied a fair trial by the copious evidence of conflicts, performance reviews, and strife between Dr. Eadara and her superiors. Defendants, as well as plaintiff, introduced

such evidence, and the evidence was just as likely to portray defendants favorably and Dr. Eadara unfavorably.

II. Docket No. 238979

Because we reverse the judgment against Dr. Lutter, plaintiff's only remaining damages are the one dollar nominal damages against Dr. Joseph. Consequently, plaintiff is no longer eligible for mediation sanctions under MCR 2.403(O)(1). We therefore reverse the award of mediation sanctions and need not consider defendants' argument that they were entitled to an evidentiary hearing on the question of reasonable attorney fees.

Affirmed in part and reversed in part.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood