

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY SPALLONE,

Plaintiff-Appellee,

v

DEPARTMENT OF MILITARY AND
VETERANS AFFAIRS, and GRAND RAPIDS
HOME FOR VETERANS ADMINISTRATOR,

Defendants-Appellants.

UNPUBLISHED

August 2, 2012

Nos. 306739, 308376 & 308388

Ingham Circuit Court

LC No. 11-001041-CZ

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Defendants filed three appeals that have been consolidated for appellate review. In Docket No. 306739, defendants appeal by leave granted an order granting plaintiff a preliminary injunction enjoining defendants from executing a contract that would privatize nursing aide services at the Grand Rapids Home for Veterans (GRHV). In Docket No. 308376, defendants appeal as of right from a portion of an order denying defendants summary disposition based on governmental immunity, MCR 2.116(C)(7). In Docket No. 308388, defendants appeal by leave granted from a portion of that same order denying summary disposition based on lack of subject-matter jurisdiction, MCR 2.116(C)(4), and failure to state a claim on which relief can be granted, MCR 2.116(C)(8). We reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff, a resident of GRHV, filed a verified class action complaint on behalf of himself and other residents of GRHV against the Department of Military and Veterans' Affairs (DMVA) and the administrator of GRHV seeking a temporary restraining order and injunctive relief to prevent defendant from laying off approximately 170 resident care aides and contracting the services of competency evaluated nursing assistants (CENAs) through J2S, a company that currently provided supplemental nursing assistants to GRHV. Plaintiff alleged that J2S does not properly train or require adequate experience from their employees. Plaintiff asserted that J2S has a "dangerous track record of care" and supported this assertion with numerous allegations of substandard care provided by the J2S nursing assistants. According to plaintiff, federal regulations require GRHV to provide an appropriate standard of care, and that the care provided by the contracted J2S CENAs would violate that standard. The trial court granted the

preliminary injunction. The trial court subsequently denied defendants' motions for summary disposition that were brought pursuant to MCR 2.116(C)(4), (7), (8), and (10).

II. ANALYSIS

A. PRELIMINARY INJUNCTION

Defendants argue that the trial court abused its discretion by granting a preliminary injunction.

A court's issuance of a preliminary injunction is generally considered equitable relief. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 11; 753 NW2d 595 (2008). "The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 655–656, 588 NW2d 133 (1998). A trial court's grant of injunctive relief is reviewed for an abuse of discretion. *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007); see also *Pontiac Fire Fighters*, 482 Mich at 8. The trial court's factual findings are reviewed under a clearly erroneous standard. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 467; 719 NW2d 19 (2006).

Injunctive relief is an extraordinary remedy. *Michigan Coalition of State Employee Unions*, 465 Mich at 219. A court must consider four factors when deciding whether to grant a preliminary injunction:

- (1) the likelihood that the party seeking the injunction will prevail on the merits,
- (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued,
- (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and
- (4) the harm to the public interest if the injunction is issued. [*Alliance for the Mentally Ill*, 231 Mich App at 660-661.]

The irreparable-harm factor is considered an indispensable requirement, and it must be established before determining a party's likelihood of success on the merits. *Pontiac Fire Fighters*, 482 Mich at 9, 13 n 21. The party seeking the preliminary injunction must prove irreparable harm with particularity. *Id.* at 9. "[A] trial court may grant a preliminary injunction if a party shows that it will otherwise imminently suffer irreparable harm and the other proper grounds for such relief are satisfied." *Michigan Coalition*, 465 Mich at 228. "[I]t is well settled that an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural." *Dunlap v City of Southfield*, 54 Mich App 398, 403; 221 NW2d 237 (1974); see also *Pontiac Fire Fighters*, 483 Mich at 9 n 15.

The trial court abused its discretion by granting the preliminary injunction because plaintiff's purported injury should defendants privatize the services of CENAs is based "upon the mere apprehension of future injury" and is highly speculative. Plaintiff argues that, based on the current track record of some of the J2S contract employees, all future J2S employees will

conduct themselves in the same manner. However, the allegations of inadequate care only involve a handful of J2S employees and the actions of these few employees cannot be imputed to the rest.

B. MCR 2.116(C)(8)

Defendants argue that the trial court erred by denying its motion for summary disposition pursuant to MCR 2.116(C)(8). We agree. A trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(8) is reviewed de novo. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Id.* We must "determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id.* In doing so, all factual allegations and reasonable inferences are accepted as true. *Id.*

Defendants argue that plaintiff has failed to establish that he has a protected due process right. The cases plaintiff relies on to establish that he has a protected due process right to receive adequate care at GRHV do not involve facilities where a patient voluntarily resides. Plaintiff has not demonstrated how he has a protected liberty interest at stake when he is free to leave the home at any time. See *Youngberg v Romeo*, 457 US 307; 102 S Ct 2452; 73 L Ed 2d 28 (1982).

Defendants also argue that plaintiff failed to properly plead a negligence claim. To establish a prima facie case of negligence, a plaintiff must prove: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach caused the plaintiff's injuries, and (4) the plaintiff suffered damages. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). However, plaintiff only alleged that the contract with J2S to provide CENA services "will dramatically worsen the negligence that the veterans already face." This statement is not sufficient to establish a prima facie case of negligence. Consequently, plaintiff has failed to state a claim for which relief may be granted.¹

C. DEFENDANTS' REMAINING ISSUES

Because we find that the trial court erred by granting the preliminary injunction and denying defendants' motion for summary disposition, we will just briefly address defendants' arguments regarding standing and jurisdiction. First, as a resident of GRHV, plaintiff has a substantial interest in receiving the appropriate standard of care that is distinct from the general public and, therefore, has standing to seek a preliminary injunction. See *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 378; 792 NW2d 686 (2010). Second, plaintiff's claims are primarily based on violations of federal regulations and do not sound in contract or tort. See *Oakland Co v Dep't of Human Servs*, 489 Mich 978; 799 NW2d 13 (2011). Therefore, jurisdiction is properly vested with the circuit court.

¹ Given our conclusion that defendants are entitled to summary disposition under MCR 2.116(C)(8), we need not address defendants' arguments that the trial court erred by denying defendants' motions for summary disposition under MCR 2.116(C)(7) and (10).

The order granting a preliminary injunction is reversed. The order denying defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) is reversed and the case is remanded for entry of an order granting summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens