STATE OF MICHIGAN

COURT OF APPEALS

MICHELE C. SCHNURER and KEVIN SCHNURER, Plaintiffs-Appellants,	UNPUBLISHED November 13, 1998
v BOARD OF CONTROL OF NORTHERN MICHIGAN UNIVERSITY, Defendant-Appellee.	No. 204821 Court of Claims LC No. 96-016427 CM

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a Court of Claims order that granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10). The action stemmed from a slip and fall accident that plaintiff Michele Schnurer had while walking on the campus of defendant Northern Michigan University ("Northern"). The basic issue is whether there was an implied contract between plaintiff Michele Schnurer and Northern that Northern breached by failing to keep the sidewalk clear.[1] We determine that there was not, and affirm.

I. Basic Facts and Procedural History

On January 16, 1995, plaintiff Michele Schnurer was an enrolled student walking to class on Northern's campus in Marquette. She alleged that before reaching class, she slipped and fell on a sidewalk covered with ice and snow. She represented that she sustained injuries, including a fractured left tibia that required surgery.

Several months later, plaintiffs filed a complaint with the Court of Claims, claiming a breach of contract. Plaintiffs alleged that a contract arose between Ms. Schnurer and Northern because her tuition payment constituted a valid offer and acceptance of services. Further, plaintiffs alleged that as part of this contract, Northern owed Ms. Schnurer a duty to provide a reasonably safe learning environment, a duty that Northern breached by failing to keep the sidewalks clear.

Northern filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10), claiming that (1) it was entitled to governmental immunity because it is a governmental agency that was engaged in governmental functions; (2) plaintiffs failed to state a claim upon which relief could be granted because plaintiffs' pleadings did not allege facts sufficient to support a breach of contract claim; and (3) no genuine issue of material fact existed because Ms. Schnurer had admitted that the duties Northern allegedly owed her were not contained in any express contract and plaintiffs failed to provide sufficient evidence to prove the existence and breach of an implied contract.

Plaintiffs, however, maintained that they established a valid breach of contract claim against Northern based on Ms. Schnurer's payment of tuition and enrollment in classes and that Northern was not entitled to immunity because they brought the action in contract and not in tort. Following oral argument, the trial court granted Northern's motion[2] and plaintiffs appealed as of right.

II. Standard of Review

On appeal, we will review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We review the record in the same manner as the trial court in order to determine whether the moving party was entitled to judgment as a matter of law. See *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995).

III. The Alleged Implied Contractual Relationship

A. Plaintiffs' Position

Plaintiffs argue that Ms. Schnurer's payment of mandatory tuition and fees to Northern in order to receive the benefit of attending classes established a contract between Ms. Schnurer and Northern. Although not clearly stated, plaintiff s apparently argue that the contract formed was an implied contract and not an express contract.[3] Further, plaintiffs argue that an unwritten term of this implied contract was Northern's duty to provide a reasonably safe learning environment, including safe sidewalks, and that Northern breached this duty by failing to clear the snowy sidewalk on which Ms. Schnurer slipped and fell.

In support of their argument, plaintiffs provided as evidence a page from Northern's 1993-95 undergraduate bulletin, that states that "[t]uition is defined as the mandatory charge to attend class and receive an entry (credit or audit) on a transcript," and a copy of Ms. Schnurer's transcript. According to plaintiffs, these documents show that Ms. Schnurer and Northern had entered into a contract because she paid tuition. This tuition, they argue, constituted valuable consideration for the services Northern rendered to Ms. Schnurer. Plaintiffs provided no other evidence on this issue, except excerpts of Ms. Schnurer's deposition testimony. This deposition testimony reveals that Ms. Schnurer could not point to any representation made to her by Northern, written or oral, to support her implied contract.[4] Ms. Schnurer simply stated that she "just remember[ed] hearing it."

B. Elements of an Implied Contract

The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement and mutuality of obligation. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). Parties may manifest an intent to contract by implication rather than by express agreement. *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997).

An implied contract may exist where one party engages or accepts the beneficial services of another party for which compensation is normally made and anticipated. *Rocco* v *Dep't of Mental Health*, 114 Mich App 792, 799; 319 NW2d 674 (1982), aff'd sub nom *Ross v Consumers Power Co (On Rem)*, 420 Mich 567; 363 NW2d 641 (1984); *Rockwell & Bond, Inc v Flying Dutchman, Inc*, 74 Mich App 1, 6; 253 NW2d 368 (1977); see also, *Malik v William Beaumont Hospital*, 168 Mich App 159, 172; 423 NW2d 920 (1988). The existence of an implied contract turns on the inferences that can be drawn from the circumstances, and necessarily involves questions of fact. *Rocco*, *supra* at 800. This includes consideration of all the circumstances, including the nature of the services rendered, the duration of the services, the closeness of the relationship between the parties, and the parties' express expectations. *In re Lewis Estate*, 168 Mich App 70, 75; 423 NW2d 600 (1988).[5]

However, an implied contract, like any other contract, must satisfy the elements of mutual assent and consideration. *Freiburger v Dep't of Mental Health*, 161 Mich App 316, 318; 409 NW2d 821 (1987); *Spruytte v Dep't of Corrections*, 82 Mich App 145, 147; 266 NW2d 482 (1978). "Valid consideration for a contract cannot be presumed merely because two parties receive benefit from each other. Rather, a bargained-for exchange is required. The essence of consideration, therefore, is legal detriment that has been bargained for and exchanged for the promise." *Higgins v Monroe Evening News*, 404 Mich 1, 20; 272 NW2d 537 (1978) (Moody, J. joined by Williams and Coleman, JJ.). Mutuality of assent exists where each party makes a promise or begins or renders performance. 1 Restatement Contracts, 2d, § 18, p 53. Parties must have mutual assent, in other words, a "meeting of the minds," on all of the material facts in order for a contract to be valid. *People v Swirles*, 218 Mich App 133, 135; 553 NW2d 357 (1996).

In determining whether there was a "meeting of the minds" courts employ an objective standard, looking at the expressed words of the parties and their visible acts, in addition to the circumstances surrounding the transaction. *Barber v SMH, Inc*, 202 Mich App 366, 369-370; 509 NW2d 791 (1993). In addition to mutual assent, a contract requires mutuality of obligation. Mutuality of obligation means that both parties to an agreement are bound or neither is bound. *Reed v Citizens Ins Co of America*, 198 Mich App 443, 449; 499 NW2d 22 (1993). In other words, "a contract lacks mutuality when one party is obliged to perform, but not the other." *Jaye v Tobin*, 42 Mich App 756; 202 NW2d 712 (1972).

Here, plaintiffs failed to provide sufficient evidence in support of the breach of implied contract claim. Ms. Schnurer simply stated that the payment of the mandatory tuition and fees constituted an offer and acceptance for which there was consideration and that resulted in a contract. Plaintiffs further argued that an unwritten term of this contract was Northern's duty to provide a safe learning environment, including clear sidewalks. As indicated above, establishing an implied contract depends

on the facts and circumstances of each case. However, an implied contract must still satisfy the basic contractual elements of consideration and mutuality. Plaintiffs offered one page of a university publication, which defines tuition as mandatory, as support for their argument. At her deposition, Ms. Schnurer could not point to any other information issued by Northern that had given her the impression that Northern was guaranteeing her safety on campus, nor could she identify anyone as having made such representations.

We note that a student promises to pay tuition in exchange for the institution's promise to provide an education. "A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." 1 Restatement Contracts, 2d, § 71, p 172. However, plaintiffs here have not satisfied the requirements of mutuality of assent and obligation. Plaintiffs did not show that there was mutual assent to the material terms of the contract, because plaintiffs could not prove the existence of *any* terms of the contract. "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." 1 Restatement 2d, § 33, p 92. It is impossible to determine from the few facts and evidence provided by plaintiffs what the subject matter was of the alleged contract, or any of its terms, other than the fact that Ms. Schnurer was entitled to attend class if she paid tuition. Arguably, Northern must provide classes and instructors to teach those classes, but to claim, without more, that Northern must provide a sidewalk free of snow is monumentally unpersuasive. Because plaintiffs did not, and could not, show mutuality of assent, we therefore need not address mutuality of obligation. In sum, plaintiffs simply have not provided sufficient evidence to show that an implied contract existed on the terms alleged.

C. *Rocco v Dep't of Mental Health*

Plaintiffs, however, argue that this action is similar to *Rocco, supra*. In *Rocco*, the plaintiffs' son, Daniel Rocco, was murdered by another patient while a resident patient of the Ypsilanti Regional Psychiatric Hospital. *Id.* at 794-795. The plaintiffs filed suit against the state agencies that administer the hospital, alleging negligence and breach of implied contract. *Id.* at 795. The *Rocco* Court noted that the governmental immunity statute spoke only of tort liability and did not grant immunity from contract liability. Thus, the Court affirmed the trial court's holding that the negligence claim was barred by governmental immunity, but reversed the trial court as to the implied contract claim. *Id.* at 799, 801. The plaintiffs argued that an implied contract was created when they paid for the services given their son, that a duty of due care arose under this implied contract and that the defendants breached this duty by failing to protect Daniel Rocco. *Id.* at 799-800. The Court noted that:

> The existence of the contract depends upon the factual development of plaintiffs' claim that they paid for the services rendered to their son. If plaintiffs present satisfactory proofs establishing a contract and a breach of the contract, they would be entitled to recover because governmental immunity does not bar their contract action." [*Id.* at 800 (citation omitted).]

Accordingly, the *Rocco* Court held that the plaintiffs had alleged a valid cause of action for breach of contract. *Id.* at 801.

In *Ross v Consumers Power Co*, 420 Mich 567; 363 NW2d 641 (1984), the Supreme Court affirmed the Court's ruling in *Rocco*. The *Ross* Court recognized that the negligence and breach of contract claims in *Rocco* were identical, but noted:

> We recognize that plaintiffs have and will attempt to avoid § 7 of the governmental immunity act by basing their causes of action on theories other than tort. Trial and appellate courts are routinely faced with the task of determining whether the essential elements of a particular cause of action have been properly pleaded and proved. If a plaintiff successfully pleads and establishes a non-tort cause of action, § 7 will not bar recovery simply because the underlying facts could have also established a tort cause of action. [*Ross*, *supra* at 647-648.]

Plaintiffs' argument that Ms. Schnurer's situation was similar to that of the plaintiffs in *Rocco* is unpersuasive. In *Rocco*, the decedent was a resident patient in a psychiatric hospital. Hospitals, including psychiatric hospitals, by their nature, exist to provide treatment and care to patients who otherwise cannot care for themselves. Arguably, the services paid for by the plaintiffs in *Rocco* included Daniel Rocco's protection from known violent patients. These facts, however, are entirely different from those before us here.

Generally, a patient is admitted to a mental hospital under forced circumstances in that the patient is no longer able to function or care for herself. Upon admitting a patient to such a hospital, it is rational to presume that the hospital has a duty not only to treat the patient's ailment but also to protect the patient from certain elements, like dangerous patients, based on the patient's dependent condition. It was not unreasonable for a court to conclude that a contract exists under these circumstances. Indeed, the Supreme Court has concluded that mental health facilities have an express and implied duty to care for, supervise and control patients. *Ross*, *supra*, 420 Mich 646.

In stark contrast, a student chooses to attend a university voluntarily and enters the university/student relationship on a more equal footing. When a student pays tuition and is admitted, it is reasonable to presume that the university owes the student a duty to provide classes, instructors for those classes and rooms in which to hold those classes. However, without more, it is not reasonable to presume from these circumstances that the university also owes the student a contractual duty to provide an environment free from snow on campus sidewalks. The status of the parties and the nature of the university/student relationship simply do not give rise to such a duty. Thus, *Rocco* is not applicable here.

Indeed, the situation here is similar to that in *Taggie v Dep't of Natural Resources*, 87 Mich App 752; 276 NW2d 485 (1979). In *Taggie*, the plaintiffs sued the Department of Natural Resources after the wife was injured while staying at a campground for which the plaintiffs had purchased a permit. *Id*. at 753-754. The plaintiffs alleged that a contract was formed when they purchased the permit. *Id*. at 756-757. The *Taggie* Court noted that even if a contractual relationship had arisen between the plaintiffs and the Department of Natural Resources based on the permit, there was nothing in that document that would have imposed on the defendant the duties claimed by the plaintiffs. *Id*. Thus, the Court concluded that no breach of an express contract existed and that the plaintiffs' claim of breach of an implied contract must fail because "[s]uch an action is not recognized by our courts." *Id*. at 757.[6]

Since *Rocco*, several cases have been decided in which the plaintiffs have alleged breach of an implied contract claim against defendants normally entitled to governmental immunity, although none resemble the situation here.[7] We note that in *Freiburger v Dep't of Mental Health*, *supra* at 316, the plaintiff brought an implied contract cause of action against the Department of Mental Health. The plaintiff alleged that an application for admission to a psychiatric clinic signed by the plaintiff's decedent constituted an implied contract between the department and the decedent to provide proper care and treatment. *Id*. at 317-318. This duty was breached, according to the plaintiff, when the decedent was released from the clinic, and subsequently shot and killed himself. *Id*. at 317. The *Freiburger* Court found that the Department had a preexisting duty to provide proper care, and thus there was no consideration for the plaintiff's alleged contract, and no contract. *Id*. at 318. Similarly here, and assuming that Northern had a duty to provide clear sidewalks, this duty was preexisting. Thus, there was no consideration for Ms. Schnurer's alleged contract. Accordingly, without sufficient legal consideration, an integral element of a valid contract, plaintiffs' implied contract claim necessarily must fail.

IV. Governmental Immunity

A. Introduction

In its discussion, the *Freiburger* Court recognized that a plaintiff may allege a contract claim to avoid governmental immunity under *Rocco*, *supra*, and *Ross*, *supra*. However, the *Freiburger* Court pointed out that, "[w]hile the pleading of a breach of contract may be sufficient to survive summary disposition for failure to state a claim, not every tort case has the necessary facts to establish a breach of contract." *Freiburger*, *supra* at 320 (footnote omitted). We hold this to be true of plaintiffs' case as well.

B. Motions Under MCR 2.116(C)(10)

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra* at 337. When deciding a MCR 2.116(C)(10) motion, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id*. On appeal, this Court will review the grant of summary disposition de novo, and must review the record in the same manner as the trial court. *Phillips, supra.*

We hold that plaintiffs failed to allege facts or provide evidence sufficient to withstand a motion for summary disposition under MCR 2.116(C)(10). As we noted above, plaintiffs offered one page of a university publication, which defines tuition as mandatory, and a copy of Ms. Schnurer's transcript, as support for their argument. At her deposition, Ms. Schnurer could not point to any information issued by Northern that had given her the impression that Northern was guaranteeing her safety on campus, nor could she identify anyone as having made such representations. Ms. Schnurer stated that she just remembered hearing something at some point to that effect. None of the evidence plaintiffs pointed to was sufficient to show that an implied contract existed.

A valid implied contract requires, in addition to other elements, consideration and mutual assent. While the payment of tuition might constitute consideration in support of a contract, plaintiffs did not, and could not, show mutuality of assent. Mutual assent requires a "meeting of the minds" by the parties on the material terms of the contract. Here, there is no evidence as to what any of the terms were, including the alleged term of requiring defendant to provide a safe learning environment. Accordingly, we find that under MCR 2.116(C)(10), plaintiffs failed to meet their burden and that the trial court's grant of summary disposition was appropriate.

C. Motions Under MCR 2.116(C)(8)

Northern also moved for summary disposition pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.*; *Marcelletti v Bathani*, 198 Mich App 655, 658; 500 NW2d 124 (1993). However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, does not state a cause of action. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994).

Here, plaintiffs asserted that a contract arose upon payment of tuition and that a term of that contract required Northern to provide a safe learning environment. We find that plaintiffs' claim was not supported by sufficient allegations of fact upon which to bring an implied contract claim. While the payment of tuition may constitute sufficient consideration for a contract, the facts provided do not indicate the subject matter of the contract or any of its terms. Because plaintiffs' pleadings did not contain facts sufficient to show the elements of an implied contract, the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8) was appropriate.

D. Motions Under MCR 2.116(C)(7)

The trial court found Northern to be governmentally immune and granted Northern's motion for summary disposition pursuant to MCR 2.116(C)(7). A motion for summary disposition under this court rule accepts all well pleaded allegations as true and construes them most favorably to the non-moving party. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). The reviewing court considers all documentary evidence submitted by the parties. *Summers v Detroit*, 206 Mich App 46; 520 NW2d 356 (1994).

MCL 691.1407(7)(1); MSA 3.996(107)(1), provides that "[e]xcept as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function." A public university qualifies as a "governmental agency" under MCL 691.1401(c)(d); MSA 3.996(101)(C). The term "governmental function" is defined as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law," MCL 691.1401(f); 3.996(101)(f), and includes the operation of a public university. *Holzer v Oakland University*, 110 Mich App 355; 313 NW2d 124 (1981). More specifically, the maintenance, repair and construction of

university school buildings, facilities, equipment and premises are generally held to be governmental functions. *Fernandez v Flint Bd of Ed*, 283 F2d 906 (CA 6, 1960) (applying Michigan law).

Accordingly, Northern is a governmental agency engaged in the governmental function of operating a university and is entitled to immunity from tort liability actions. We therefore find that Northern was entitled to immunity in the present case because plaintiffs failed to allege facts or produce evidence sufficient to support the breach of implied contract claim. Thus, the trial court's grant of summary disposition pursuant to MCR 2.116(C)(7) was appropriate.

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Janet T. Neff

[1] Plaintiffs also alleged loss of consortium on plaintiff Kevin Schnurer's part. Plaintiff Michele Schnurer is now deceased. In February, 1998, this Court received notice of her death, occurring on November 13, 1997.

[2] Although the trial court did not specifically state upon which ground it was granting summary disposition, it apparently found that plaintiffs' cause of action lay in tort and not in contract, and that Northern was therefore entitled to governmental immunity. This would be consistent with a ruling under MCR 2.116(C)(7).

[3] Northern's brief on appeal includes an argument regarding express contracts; however, plaintiffs do not allege that this was an express contract and therefore we do not address this aspect of Northern's argument.

[4] According to the deposition record, defense counsel had on hand the 1993-95 undergraduate bulletins, the Northern Michigan University student handbook and other documents.

[5] See also, *Ford v Blue Cross & Blue Shield of Michigan*, 150 Mich App 462; 389 NW2d 114 (1986) (citations omitted) ("A contract is implied in fact where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them . . . .").

[6] We do note, however, that the *Taggie* case was decided in 1979, without the benefit of the later decisions in *Rocco* and *Ross*.

[7] See *Borg-Warner Acceptance Corp v Dep't of State*, 433 Mich 16; 444 NW2d 786 (1989) (where state had statutory duty to perform, there was no bargained for consideration to support a claim for breach of contract); *Totsky v Henry Ford Hospital*, 169 Mich App 286; 425 NW2d 531 (1988) (absence of a writing containing essential terms of contract considered fatal to the plaintiff's contract claim); *Lawrence v Ingham Co Health Dep't Family Planning/Pre-Natal Clinic*, 160 Mich App 420; 408 NW2d 461 (1987) (plaintiff's contract claim dismissed based on a lack of adequate consideration).