STATE OF MICHIGAN

COURT OF APPEALS

SARA BOHN, f/k/a SARA MOBLEY,

Plaintiff-Appellant,

v

ANN ARBOR REPRODUCTIVE MEDICINE ASSOCIATES, P.C., a Michigan corporation, E.P. PETERSON, M.D., JONATHAN W. T. AYERS, M.D., and F. NICHOLAS SHAMMA, M.D., Jointly and Severally,

Defendants-Appellees,

and

TOLEDO FERTILITY CENTER, P.C.,

Defendant-Not Participating,

and

MICHAEL MOBLEY,

Interested Third Party Intervenor Defendant-Appellee.

UNPUBLISHED
December 17, 1999

No. 213550
Livingston Circuit Court
LC No. 97-16310 CK;
97-26334 DC

SARA BOHN,

Plaintiff-Appellant,

v

MICHAEL RUSSELL MOBLEY,

Defendant-Appellee.

No. 213551
Livingston Circuit Court
LC No. 97-26334 DC

Before: Smolenski, P.J., and Gribbs and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals the trial court's grant of summary disposition to all defendants on plaintiff's contract and custody claims in this case involving frozen human cells (zygotes[1]). The trial court ruled that neither plaintiff nor her ex-husband, defendant Mobley, have a unilateral right to disposition of the zygotes and that, until they reach an agreement, the zygotes will remain cryopreserved in the possession of defendants Ann Arbor Reproductive Medicine Associates, P.C. We affirm.

The underlying facts are essentially undisputed. At some point during plaintiff Sara Bohn's and defendant Michael Mobley's marriage, the couple chose to participate in defendant Ann Arbor Reproductive Medicine Associates' Zygote Intra Fallopian Transfer (ZIFT) program. In January 1995, after signing a patient consent form in the presence of her then-husband defendant Mobley, plaintiff underwent ova aspiration. Of the eighteen oocytes removed from plaintiff's body and inseminated with defendant Mobley's sperm, eight became "partially fertilized" or "zygotes", in that the two nuclei from the oocyte and the sperm did not yet merge and no cell division took place. Three of the zygotes were transferred to plaintiff's uterus and one implanted itself in plaintiff's uterine wall, resulting in the birth of a baby boy in October 1995. The remaining five zygotes were cryopreserved, or frozen in liquid nitrogen at sub-zero temperatures, and are at issue here.

While pregnant, plaintiff moved out of the marital home. At some point during the pregnancy, defendant filed for divorce. The divorce was final in October 1996. There are apparently ongoing visitation difficulties concerning the parties' one child. The divorce judgment did not mention or provide for disposition of the frozen zygotes. In December 1997, plaintiff filed a new action seeking custody of the cells, referring to them as the parties' "children." A few days later, plaintiff filed another action alleging that defendant Ann Arbor Reproductive Medicine Associates (medical center) and the individual doctors were in breach of contract for failing to transfer the frozen cells to her uterus.

Implicit in the circumstances surrounding this case are a number of complicated questions concerning the parameters of human life and its protection. Plaintiff and amici curiae National Right to Life, Right to Life of Michigan, Christian Legal Society, Christian Medical and Dental Society, American Civil Liberties Union, and American Center for Law and Justice, urge us to use this case as a vehicle for deciding issues involving protection of preembryonic human life and procreative autonomy in cases where nature is redirected by science. A comprehensive review of the entire record and briefs in this case reveals that there are no clearly defined answers in Michigan law or jurisprudence. Although one state, Louisiana, has codified the status of preembryos as persons, La. Rev. Stat. Ann. § 9.124 (1991), Michigan has no comparable law. Further, many of the arguments on plaintiff's behalf are premised on a woman's right to bodily integrity. Those concerns are not at issue here where the zygotes were not transferred to plaintiff's uterus because of defendant medical center's refusal to release the zygotes to plaintiff without defendant Mobley's consent. The essential dispute in this case does not involve a pregnancy. Rather, the dispute is between two gamete-providers and involves the undetermined rights of ex utero preembryonic cells.

We agree that this situation raises questions of the utmost gravity, and there is no question that the State has an interest in protecting potential life. The question of when life begins was not, however, raised or resolved below, and this Court's review is generally limited to issues decided by the trial court. *Candelaria v BC General Contractors*,___ Mich App ___: ___ NW2d ___ (1999)(Docket No. 202421, issued 6-4-99); *Herald Co v Ann Arbor Public School*, 224 Mich App 266, 278; 568 NW2d 411 (1997); *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996). Accordingly, we decline to address questions that reach beyond those issues framed by plaintiff in her complaint and decided by the trial court.[2] We urge the Legislature's attention, however, to this profoundly complicated and unexplored area.

This appeal stems from plaintiff's two separate causes of action below; a "custody" action and a multi-count action alleging breach of contract. On appeal, plaintiff raises numerous issues arising out of both lower court cases. We address each of plaintiff's issues seriatim.

A motion for summary disposition under MCR 2.116(C)(10), tests the factual support of a plaintiff's claim. *Spiek v Department of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id.* The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475, (1994), and the disputed factual issue must be material to the dispositive legal claims, *State Farm v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

The existence of a disputed fact must be established by admissible evidence; a mere promise to offer factual support at trial is insufficient. *Cox v Dearborn Hts*, 210 Mich App 389, 398; 534 NW2d 135 (1995); *Kamalnath v Mercy Memorial Hospital Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992). In addition, speculation and conjecture are insufficient. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). However, an opposing party need not rebut every possible theory which the evidence could support. *Id.*

Giving the benefit of reasonable doubt to the nonmovant, the court must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995); *Farm Bureau Ins v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991). All inferences are to be drawn in favor of the nonmovant. *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987). An adverse inference may be drawn against a party who fails to produce evidence within its control. *Grossheim v Associated Truck Lines, Inc*, 181 Mich App 712, 715; 450 NW2d 40 (1989). Before judgment may be granted, the court must be satisfied that it is impossible for the claim or defense asserted to be supported by evidence at trial. *SSC Associates v General Retirement System*, 192 Mich App 360, 365; 480 NW2d 275 (1991).

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek, supra* at 337. This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins,* 458 Mich 288, 582 NW2d 776 (1998); *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995).

Plaintiff claims that defendant medical center breached a contract to transfer the cryopreserved zygotes to her uterus. We do not agree. Contrary to plaintiff's claim, the parties' decision to fertilize and freeze the zygotes was not transformed into an irreversible promise by all defendants that any "extra" zygotes would be transferred to plaintiff's body, regardless of circumstances, so that she can bear additional children. First, the documents relied on by plaintiff give the medical staff vast discretion as to whether the zygotes would ever be transferred or even preserved. Nothing in any of the documents suggests that defendants medical center or physicians had any obligation to transfer the zygotes into plaintiff's body at some future date. In any event, a treatment authorization form does not constitute a contract. *Penner v Seaway Hosp,* 169 Mich App 502; 427 NW2d 584 (1988).

In addition, a contract for medical care must be in writing, signed with an authorized signature by the party to be charged with the contract. MCL 566.132(g); MSA 26.922(g). The only signature on the documents (other than plaintiff's) is that of a non-physician staff member and no evidence has been presented suggesting that the witness was authorized to enter into a contract on any defendants' behalf. The absence of a writing signed by an authorized representative of defendant and Ann Arbor Reproductive containing the essential terms of the alleged contract is fatal to plaintiff's contract claim. *Gilmore v O'Sullivan,* 106 Mich App 35, 42-43; 307 NW2d 695 (1981). Although the trial court incorrectly suggested that there was a contract for medical care in this case, it properly dismissed plaintiff's contract claim.

The trial court also properly dismissed plaintiff's misrepresentation action. As the trial court indicates in its opinion, to establish a cause of action for fraud or misrepresentation, the plaintiff must prove that (1) the defendant made a material representation; (2) that the representation was false; (3) that when the defendant made the representation, the defendant knew that it was false or made it recklessly without knowledge of the truth or falsity; (4) that the defendant made it with the intent that the plaintiff would act on it; (5) that the plaintiff acted in reliance on it, and (6) that the plaintiff suffered injury. *Eerdmans v Maki,* 226 Mich App 360, 366; 573 NW2d 329 (1997). An action for fraudulent misrepresentation must be predicated on a statement relating to a past or an existing fact. Future promises are contractual and cannot constitute actionable fraud. *Id.*

Plaintiff argues that this was not a future promise because it involved a "present intent" to misrepresent the "present state of control" over the zygotes, but we agree with the trial court that the future disposition of the cryopreserved zygotes is at the heart of her claim here. Any representations made by defendants before plaintiff underwent ZIFT were also made before any oocytes had been removed and before any zygotes existed. Plaintiff concedes that the core elements for innocent

representation are essentially the same as for fraudulent misrepresentation. Summary disposition was properly granted as to fraudulent, negligent and innocent misrepresentation.

Nor is there any merit to plaintiff's claim of emotional distress. To establish a claim of intentional infliction of emotional distress, plaintiff must show (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985).

Plaintiff claims that it is outrageous for defendants to refuse to release the zygotes to her on demand because they were "created from her ova", disregarding that they were also created from defendant Mobley's gametes. Plaintiff asserts that she is "watching" the microscopic zygotes "slowly die". Plaintiff also claims, in connection with her action for negligent infliction of emotional distress, that she is entitled to recover under a bystander theory for witnessing the "slow demise" of her "eggs." As noted previously, there is no evidence that the zygotes are "dying"; defendants presented evidence that the zygotes can remain frozen indefinitely and that it is, in fact, the freezing/thawing process that is most harmful. The trial court found as a matter of law that defendants' retention of the zygotes did not amount to extreme and outrageous conduct. We agree that summary disposition was properly granted.

Next, plaintiff challenges the trial court's dismissal of her interference claims. A claim for tortious interference with a business relationship requires the existence of a valid business relation or expectancy, knowledge of the relationship on the part of the interferer, and intentional interference inducing or causing a breach or termination of the relationship, and resultant damage to the party whose relationship has been disrupted. *Lakeshore Community Hosp Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). To show tortious interference with contractual relations, plaintiff must show the existence of a contract, a breach of the contract, and an unjustified instigation of the breach by the defendant. *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996).

Here, plaintiff argues that defendant doctors interfered with plaintiff's contract with defendant clinic and that, but for their interference, the clinic would have performed the zygote transfer. There is no merit to this issue. As noted previously, plaintiff did not have a valid contract with defendant clinic. There is no evidence, beyond plaintiff's assertion that they were shielding themselves from personal liability, of improper motive on the part of the defendant doctors. Moreover, even if there were a contract, defendant doctors were acting as representatives of defendant clinic and not as outside interferers. Summary disposition was appropriate.

Plaintiff also contends that there has been an "intrusion into her seclusion." To establish a claim for invasion of privacy, plaintiff must show that defendant obtained information about a matter which plaintiff had a right to keep private, by use of a method which would be objectionable to a reasonable person. *Doe v Mills*, 212 Mich App 73; 536 NW2d 824 (1995).

Here, plaintiff claims that defendant improperly released the information to defendant Mobley and defendants' two attorneys that she underwent the ZIFT procedure and that there are five resulting frozen zygotes. Plaintiff also suggests that the "public spectacle that this case has become arises specifically from the actions of the Defendants."

There is no merit to this claim. As the trial court notes in its opinion, plaintiff does not allege anything "objectionable about the method by which the information was obtained." Defendant Mobley was cocreator of the zygotes and knew of their existence. Plaintiff apparently announced her complaint against defendants on television before defendants ever saw the complaint, so it was not improper for their attorneys to look into the matter. Summary disposition was appropriate on this issue.

Plaintiff also raises a claim of battery. An action for battery requires an intentional, unpermitted, harmful or offensive touching. *Clarke v Kmart Corp,* 197 Mich App 541, 549; 495 NW2d 820 (1992). A battery may be committed if a doctor performs a procedure that exceeds the scope of the patient's consent. *Franklin v Peabody,* 249 Mich 363; 228 NW2d 681 (1930). Here, plaintiff argues that she "did not consent to a procedure that would take away her control of her ova and her embryos." There is no merit to this issue.

Plaintiff did, in fact, consent to removal of her oocytes, and the resulting zygotes are a combination of gametes from both plaintiff and defendant Mobley. Plaintiff signed a paper giving defendants broad discretion over transfer of the zygotes, and consented to having them cryopreserved. Moreover, the purpose of all the parties was achieved, as the ZIFT procedure successfully resulted in plaintiff's pregnancy and the birth of the couple's son. The trial court correctly concluded that defendants did not exceed the scope of plaintiff's consent in this case.

Next, plaintiff argues that the Michigan Child Custody Act, MCL 722.21 *et seq.*, MSA 25.312 (1) *et seq.,* applies to "children" and that embryos should be considered children because they are included in Black's Law Dictionary's definition of child: "progeny; offspring of parentage. *Unborn* or recently born *human being*" (emphasis plaintiff's). We decline to stretch the definition of "child" to the degree suggested by plaintiff and suggest that such an extension would require legislative, rather than judicial, action. "The creation and extension of rights relating to child custody is clearly the province of the Legislature, not the judiciary." *Van v Zahorik,* 460 Mich 320, 330; 597 NW2d 15 (1999). The trial court did not err concluding that the Child Custody Act does not apply where no child has been born.

Finally, plaintiff argues that defendant Mobley consented to the "conception" (i.e. the petri dish fertilization) of the zygotes and is liable for their support, and that his desire to avoid support should not be used as justification for "killing unborn children." Because there is no statutory authorization for support of zygotes, we need not address plaintiff's child support issue at this time.

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael R. Smolenski

[1] The stage of development and, thus, the proper scientific term for these human cells is not clear from the limited record before us. Although the term may not be accurate, we will refer to the cells at issue here as zygotes for purposes of this opinion.

[2] Questions involving the legal status of the zygotes were not raised by plaintiff in her complaints or developed below. The parties did present some oral argument at the motion hearing below regarding the issue whether the zygotes are human life, but the involvement of the amici curiae and many of the related issues were not presented until this appeal.