

STATE OF MICHIGAN
COURT OF APPEALS

JUDY WOOD and ANDREA COMBS,

Plaintiffs-Appellants,

v

DETROIT MEMORIAL PARK ASSOCIATION,
INC.,

Defendant-Appellee,

and

WILBUR B. HUGHES, III,

Defendant.

UNPUBLISHED

December 21, 2001

No. 224595

Wayne Circuit Court

LC No. 98-837953-NO

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant.¹ We affirm.

After plaintiff Judy Wood's daughter was buried in defendant's cemetery, a question arose as to which plot the deceased occupied, number 879 or 880. Wood claimed that she was told that her daughter was buried in plot 880. The headstone, however, was placed at plot 879. After looking into the matter, defendant's employees informed Wood that the deceased was in plot 879. Wood, who had visited and grieved at plot 880 until the headstone was placed, filed suit against defendant, alleging breach of contract, negligence, intentional infliction of emotional distress, and violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* The complaint was later amended to add Andrea Combs, the deceased's aunt, as a party plaintiff and to add a claim for exemplary damages. The trial court granted summary disposition to defendant on all counts of the complaint. Plaintiffs now appeal, arguing that the trial court improperly dismissed the contract, negligence, and MCPA claims.

¹ Because defendant Detroit Memorial Park Association is the only defendant involved in this appeal, use of defendant in the singular will refer to Detroit Memorial Park Association.

Plaintiffs first argue that summary disposition was improper on their contract claim. This issue is abandoned. In a conclusory argument, plaintiffs state that there was a genuine issue of material fact with regard to the contract claim, but cite no authority to support this position. They also fail to offer any explanation for their position and do not even set out the evidence or testimony that purportedly establishes a genuine issue of material fact on the contract claim. Parties may not merely announce their position and leave it to this Court to discover and rationalize the basis for the claim. *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000). Further, where no authority is cited for an issue, the issue is abandoned. *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). Because we affirm the trial court's dismissal of the contract claim,² the related issues of Wood's third-party beneficiary status and her contract damages are moot and will not be addressed by this Court.

Plaintiffs next argue that the trial court should not have dismissed their negligence claim. Again, plaintiffs offer only a conclusory argument on this issue. They fail to cite any applicable authority or explain their position. This issue is likewise abandoned. *Caldwell, supra*; *Magee, supra*. We further note that we disagree with plaintiffs' argument that they properly stated a negligence claim.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. [*Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).]

Defendant admits that it was negligent by verbally giving Wood wrong information about the plot and by making a clerical error on the daily interment sheet. Thus, the only issue is whether damages were sufficiently pleaded.

In their general allegations, plaintiffs alleged that they suffered "fright, shock and a severe emotional upset." In the negligence count, plaintiffs allege an even more general allegation of damages, claiming only that they "have sustained damages compensable by law." On appeal, plaintiffs argue, without support, that the latter allegation is sufficient by itself to state a claim for negligence. We disagree. Plaintiffs' allegation that they "sustained damages compensable by law" is a legal conclusion and not a well-pleaded fact. See, e.g., *Landry v City of Detroit*, 143 Mich App 16, 21; 371 NW2d 466 (1985), rev'd in part on other grounds *Hadfield v Oakland Co Drain Comm'n*, 430 Mich 139, 195-200; 422 NW2d 205 (1988).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When

² We note, too, that the trial court correctly ruled that plaintiffs' failed to set forth a contractual question because the contract was to bury Wood's daughter and plaintiffs allege that defendant breached a contract by failing to correctly report the number of the plot in which the deceased was buried.

deciding a motion brought under this section, a court considers only the pleadings.
[*Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).]

Because plaintiffs' complaint does not contain any well-pleaded factual allegations with regard to damages for the negligence claim, summary disposition on that claim pursuant to MCR 2.116(C)(8) was proper.

In ruling, we note that the general allegations that plaintiffs suffered fright, shock, and a severe emotional upset are also insufficient to support their claim for negligence. In *Daley v LaCroix*, 384 Mich 4, 12-13; 179 NW2d 390 (1970), this Court ruled that in order for a plaintiff to collect damages in a negligence claim, the alleged emotional distress must result in a definite and objective physical injury. Plaintiffs failed to plead any objective, physical injury. They only pleaded general claims of distress.

Lastly, plaintiffs argue that the trial court improperly dismissed their MCPA claims. Plaintiffs' claims were based on the following sections of MCL 445.903:

(1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:

* * *

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known to the consumer.

* * *

(bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.

* * *

(cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

Plaintiffs' contention that they had a valid cause of action under subsection (3)(1)(s) is frivolous. Plaintiffs argue that defendant failed to reveal a material fact when it failed to reveal where the body was buried. Plaintiffs argue that this omission was misleading and deceptive.

The MCPA prohibits the use of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce. . . . It defines the term "trade or commerce" as the "conduct of a business providing goods, property, or service primarily for the personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity." . . . The intent of the act is "to protect consumers in their purchases of good which are primarily used for

personal, family or household purposes.” [*Zine v Chrysler Corp*, 236 Mich App 261, 270-271; 600 NW2d 384 (1999).]

In *Zine, supra* at 282-283, this Court reviewed subsection (3)(1)(s) and stated, in pertinent part:

Subsection 3(1)(s) refers to omissions of material fact that mislead the consumer, but does not expressly state that those omissions must affect the transaction. In *Mayhall v A H Pond Co, Inc*, 129 Mich App 178, 182-183; 341 NW2d 268 (1983), this Court stated that it is proper to construe the provisions of the MCPA “with reference to the common-law tort of fraud.” One element of fraud is that the defendant made a material representation. . . . To be material, the representation need not “relate to the sole or major reason for the transaction, but . . . it [must] relate to a material or important fact.” . . .

By analogy, then, a material fact for purposes of the MCPA would likewise be one that is important to the transaction or affects the consumer’s decision to enter into the transaction. This interpretation is supported by the dictionary definition, which defines “material” as a “[r]epresentation relating to a matter which is so substantial and important as to influence [the] party to whom [it is] made” . . . Therefore, because the omission of which Zine complains came to light *after* the transaction was completed and Zine admitted during his deposition that his decision to buy the truck would not have been affected had he known about Michigan’s lemon law, the omission was not a material fact and Zine’s claim under subsection 3(1)(s) is not actionable.

In this case, plaintiffs never alleged that defendant omitted a *material* fact, i.e., a fact important to the transaction of buying the burial plot and burial services or a fact that affected the decision to buy the burial plot and burial services. The alleged omission occurred after the transaction with defendant and is not actionable under the MCPA. *Zine, supra* at 283.

With regard to subsections (3)(1)(bb) and (cc), plaintiffs’ arguments also have no merit. Whether a fact is “material” under subsection (3)(1)(cc) is “tested at the time of the transaction” and not thereafter. *Zine, supra* at 280-282. “Because subsection 3(1)(cc) refers to the failure to reveal information material to the transaction, it can be reasonably understood only as referring to information withheld during the negotiations and up to the time [] the transaction . . . is complete.” *Zine, supra* at 280. Here, as previously noted, there were no allegations that defendant failed to reveal information material to the transaction of buying the burial plot and services. There was no cause of action under subsection (3)(1)(cc). Similarly, subsection (3)(1)(bb) also refers to information that is “material to the transaction.” By analogy, the “transaction” referred to is comprised of the negotiations and conduct leading up to the completion of the transaction, i.e., the purchase of the burial plot and burial services.

Accordingly, the trial court did not err in granting summary disposition in favor of defendant.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen