STATE OF MICHIGAN

COURT OF APPEALS

RICHARD SCRIBNER, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED January 22, 2002
v CHARTER TOWNSHIP OF INDEPENDENCE, Defendant-Appellee/Cross-Appellant.	No. 222510 Oakland Circuit Court LC No. 98-007133-CZ

RICHARD SCRIBNER, Plaintiff-Appellant/Cross-Appellee,	
v BEVERLY McELMEEL, Defendant-Appellee/Cross-Appellant.	No. 222649 Oakland Circuit Court LC No. 98-014085-CZ

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

PER CURIAM.

Plaintiff appeals as of right from orders granting defendants' motions for summary disposition. Plaintiff sought to recover damages from defendant Charter Township of Independence ("defendant Township") and defendant Beverly McElmeel ("defendant McElmeel") under a variety of legal theories. We affirm in part and reverse in part.

I. Factual Background

Plaintiff alleged essentially the same facts in both complaints. Plaintiff was defendant Township's plumbing, heating, and cooling inspector from 1982 through 1997. Plaintiff's compensation from 1982 to 1994 was based solely on the permit fees generated by his work, according to oral agreements between the parties. Typically, the oral agreements were renewed

on an annual basis. Plaintiff received 75% of the permit fees during 1992, and 60% of the permit fees between 1992 and 1994. The instant disputes involve the terms covering plaintiff's work for defendant Township between 1995 and 1997.

According to plaintiff's complaints, he and defendant McElmeel, defendant Township's building director, negotiated an agreement which provided that plaintiff would receive $4,000 per month, and that any difference between the 60% of the permit fees and the $4,000 he was paid would be "banked." Between 1995 and 1997, defendant was paid $48,000 annually. However, because of increased construction in the township, sixty percent of the permit fees, less the $48,000 per year, resulted in approximately $182,000. Defendant Township disputed that it ever agreed to pay plaintiff the $182,000, and denied plaintiff's requests to pay him the money.

Plaintiff sought to recover from defendant Township under ten different legal theories.[1] Plaintiff's breach of contract claim (Count I) alleged that defendant Township was contractually obligated to pay plaintiff according to their oral agreement. Alternatively, plaintiff sought to recover damages under the quasi-contractual theories of unjust enrichment (Count VII); promissory estoppel (Count VIII); and quantum meruit (Count IX). Plaintiff also contended that he was entitled to recover the values stated in the "banked" account ledgers under an "account stated" theory (Count II). In addition, plaintiff sought to recover under the tort theories of fraud (Count III); negligent misrepresentation (Count IV); and innocent misrepresentation (Count V). Plaintiff also pleaded a "proprietary function" claim (Count VI). Each of the aforementioned claims sought approximately $182,000 in damages. Finally, in a separate claim entitled "exemplary damages," plaintiff sought $1,000,000 in damages for humiliation, embarrassment, outrage, indignation, and extreme emotional distress (Count X).

The trial court denied defendant Township's request to dismiss the breach of contract and account stated claims as barred by the statute of frauds, MCL 566.132(1)(a). The trial court also denied defendant Township's request to dismiss the quasi-contractual theories pursuant to MCR 2.116(C)(8) for failure to state a claim upon which relief could granted, rejecting defendant Township's contention that alleging breach of contract precluded recovery under the quasi-contractual theories. However, the trial court dismissed plaintiff's breach of contract and quasi-contractual theories pursuant to MCR 2.116(C)(7), concluding that they were barred by public policy. Similarly, the trial court dismissed the account stated claim because it did not apply to a claim where an express contract existed.

In addition, the trial court dismissed the remaining claims for failure to state a claim upon which relief could be granted, MCR 2.116(C)(8). In regard to the tort claims, the trial court opined that the representations made during the formation of the purported contract could not serve as the promise in a separate tort action. The trial court declined, however, to dismiss these claims under a governmental immunity theory. Alternatively, the trial court opined that plaintiff's fraud claim failed to plead the allegations with the requisite degree of specificity required by MCR 2.112(B)(1). The trial court ruled that "proprietary function" was not an independent cause of action. Finally, the trial court dismissed the "exemplary damages" claim,

[1] These were the legal theories alleged in plaintiff's first amended complaint.

opining that they were not available for an action arising out of a breach of commercial contract. Consequently, plaintiff's entire lawsuit against defendant Township was dismissed.

Before the trial court's dismissal of the lawsuit against defendant Township, plaintiff had filed a separate lawsuit against defendant McElmeel, which is the subject matter of docket no. 222649. It should be noted that the trial court denied plaintiff's request to amend his complaint to add defendant McElmeel as a party in the defendant Township lawsuit. Plaintiff's lawsuit against defendant McElmeel, in her individual capacity, alleged the following theories: (i) promissory estoppel; (ii) fraud; (iii) gross negligence; (iv) quantum meruit; (v) equitable estoppel; (vi) intentional interference with prospective economic advantage; (vii) negligent interference with prospective economic advantage; and (viii) "exemplary damages."

Defendant McElmeel moved for summary disposition pursuant to MCR 2.116(C)(6), which allows a trial court to dismiss a complaint where "[a]nother action has been initiated between the same parties involving the same claim." The trial court opined that "the theories of liability against defendant McElmeel arise out the same transactions and occurrences as those identified in the suit against the Township." The trial court further opined that the complaints in both lawsuits involved the same or substantially the same parties, and sought the same relief. Accordingly, the trial court dismissed plaintiff's lawsuit against defendant McElmeel.

Plaintiff appeals as of right from the trial court's dismissal of both lawsuits.

II. Standard of Review

Both complaints were dismissed on motions for summary disposition. Generally, a trial court's ruling on a motion for summary disposition is reviewed de novo. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).[2]

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[2] In regard to a motion for summary disposition pursuant to MCR 2.116(C)(8), the *Beaudrie* Court opined:

> A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. [*Id.*]

"All well-pleaded facts are accepted as true and are construed in the light most favorable to the nonmoving party." *Madejski v Kotmar Ltd*, 246 Mich App 441, 444; 633 NW2d 429 (2001), lv den 465 Mich 883 (2001).

When reviewing a motion for summary disposition under MCR 2.116(C)(7), the nonmoving party's well-pleaded allegations must be accepted as true and the court should "construe the allegations in the nonmovant's favor to determine whether any factual development could

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III. Docket No. 222510

Plaintiff contends that the trial court erred by dismissing each count of his complaint against defendant Township. Plaintiff concedes, however, that there is no independent cause of action for "proprietary function." Thus, plaintiff could not have recovered damages under Count VI. Consequently, the trial court correctly granted summary disposition on that legal theory pursuant to MCR 2.116(C)(8).

Plaintiff also contends that the trial court erred by dismissing his tort claims. However, future promises that are contractual in nature cannot form the basis for a fraud claim. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 444; 505 NW2d 275 (1993), modified on other grounds by *Patterson v Kleiman*, 447 Mich 429, 433 n 3; 526 NW2d (1994). Indeed, a fraud claim must be based on past or existing facts. *Marrero, supra* at 444. Here, plaintiff's fraud claim arose out of defendant McElmeel's purported promise, on behalf of defendant Township, that the excess fees would be "banked." Because the alleged representation was contractual and did not relate to a past or existing fact, the trial court correctly concluded that the fraud claim should be dismissed pursuant to MCR 2.116(C)(8) for failure to state a claim upon which relief could be granted.

In *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998), our Supreme Court noted that in an innocent misrepresentation action, the representation must also relate to a past or existing fact, rather than a promise regarding the future. Thus, the trial court correctly concluded that plaintiff's innocent misrepresentation pleadings also failed to state a claim upon which relief could be granted.

We note that plaintiff's negligent misrepresentation count was pleaded as a traditional negligence claim, with references to duty, breach, causation, and damages. However, plaintiff failed to allege that *defendant Township* breached a legal duty, confining his analysis to defendant McElmeel's "duty" and "breach." Consequently, the trial court correctly dismissed plaintiff's negligent misrepresentation claim pursuant to MCR 2.116(C)(8), albeit under a different rationale. We may affirm where the trial court reaches the right result, but for the wrong reason. *People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

(…continued)

provide a basis for recovery." *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000). "The court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence that has been submitted by the parties, although the moving party is not required to file supportive material." *Id.*

In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), we consider "the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Haliw v Sterling Heights*, 464 Mich 297, 302; 627 NW2d 581 (2001). "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id*

In *Franzel v Kerr Mfg Co*, 234 Mich App 600, 606; 600 NW2d 66 (1999), we opined that exemplary damages are not recoverable in a breach of contract action, even if the breach is malicious or willful. Similarly, in *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 420-421; 295 NW2d 50 (1980), our Supreme Court held: "[A]bsent allegation and proof of tortious conduct existing independent of the breach . . . exemplary damages may not be awarded in common-law actions brought for breach of a commercial contract." However, in tort actions, "exemplary damages are generally permitted." *Phillips v Butterball Farms Co Inc*, 448 Mich 239, 257; 531 NW2d 144 (1995). Thus, having already concluded that the trial court properly granted defendant Township's motion for summary disposition with respect to the tort claims, plaintiff's request for exemplary damages could not be maintained. Therefore, the trial court did not err by dismissing Count X.

Further, plaintiff contends that the trial court erred by dismissing plaintiff's breach of contract claim on a public policy rationale. Defendant Township conceded, for the limited purpose of considering the motion for summary disposition, that there was a contract between the parties, but argued that the contract was contrary to two statutory provisions. Indeed, it "is well established that the courts of this state will not enforce, either in law or in equity, a contract which violates a statute or which is contrary to public policy." *Shapiro v Steinberg*, 176 Mich App 683, 687; 440 NW2d 9 (1989).

Specifically, defendant contended that the contract terms violated Const 1963, Art 9, § 24, which provides in pertinent part that, in the context of pension and retirement plans, "[f]inancial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities." Defendant Township noted plaintiff's testimony that he considered the "banked" fees to be his retirement plan. Thus, defendant Township contended that the agreement to bank the excess fees was violative of Art 9, § 24. However, the contractual terms, which defendant Township did not dispute for purposes of the motion for summary disposition, provided that plaintiff's share of the permit fees, less the $48,000 annually, would be banked for plaintiff's future use. In other words, so long as defendant Township complied with the banking requirement, the agreement provided for the current funding of the "retirement plan" and, therefore, did not run afoul of Art 9; § 24. Accordingly, we do not believe that the contract was violative of that constitutional provision.

Nevertheless, defendant Township also contended that the contract was contrary to sections 24 through 28 of the Charter Township Act, MCL 42.24 through MCL 42.28. In particular, defendant Township references MCL 42.28, which provides:

> No money shall be drawn from the treasury of the township nor shall any obligation for the expenditure of money be incurred, except pursuant to the budget appropriation, or pursuant to any supplemental appropriation which may be made from surplus received. The township board may transfer any unencumbered appropriation balance, or any portion thereof, from 1 fund or agency to another. The balance in any appropriation, which has not been encumbered, at the end of the fiscal year shall revert to the general fund and be reappropriated during the next fiscal year.

Defendant Township contends that the contract was contrary to MCL 42.28 because it required the township to incur obligations in excess of the $48,000 per year approved by the board through the budget appropriation process.

However, it is undisputed that plaintiff was paid a percentage of the permit fees generated by his work, based on oral agreements, for approximately twelve years. Plaintiff's income was always conditional on the amount of work he performed, which was, in turn, conditional on the amount of construction in the township. Thus, the parties had a long history of plaintiff's income being percentage-based, rather than pre-determined by the normal budget appropriations process.

Regardless, the only moneys in dispute are the difference between the $48,000 that was budgeted for and paid to plaintiff, and the sixty percent of the permit fees generated through the inspection process. Plaintiff's entitlement to any money remained conditional on his performing the necessary inspections to generate more than $48,000 in "commissions." Thus, defendant Township was not "bound" by the contract to pay plaintiff any sums; rather, the contract obligated defendant Township to pay plaintiff a percentage of the fees he earned for the township if and when the $48,000 was exceeded.

Moreover, because defendant Township retained forty percent of the fees generated by plaintiff's work, as plaintiff's entitlement to additional money increased, so would the fees retained by defendant Township. Put another way, the contractual terms alleged by plaintiff provided him an incentive to work harder to increase his fees, which would also increase township revenue. To the extent that plaintiff's increased entitlement to his share of fees would also represent an incurred liability not contemplated by the budget process, defendant Township's revenue would also increase in a commensurate fashion. While defendant Township's budget would not have contemplated the expense of plaintiff's fees, the budget process would also have failed to contemplate the increased revenue. It would be a curious result for this Court to hold that public policy prohibits a contract that provides a party an incentive to make both parties additional money. Accordingly, we are not persuaded that the contract violated MCR 42.28.

Further, according to defendant Township's argument, it was obligated to pay plaintiff $48,000 without regard to the number of inspections that he performed in a year. Under plaintiff's version of the contract, which defendant Township conceded was valid for the purposes of the summary disposition motion, defendant Township provided plaintiff an incentive to perform many more inspections, thereby facilitating the undisputed growth in construction that occurred in the township. Increased inspections, additional construction within the township, and additional revenue for the township certainly refute defendant Township's contention that the contract was contrary to public policy. Consequently, we conclude that the trial court erred by dismissing plaintiff's breach of contract, unjust enrichment, promissory estoppel, and quantum meruit claims under a public policy rationale.

Defendant Township contends that, even if the trial court erred by dismissing plaintiff's breach of contract claim under a public policy theory, dismissal was nevertheless warranted by the statute of frauds, MCL 566.132. As noted above, the trial court rejected this alternate theory. MCL 566.132 provides as follows:

> (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> (a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.

Defendant Township notes that plaintiff did not request any of the banked fees until 1997 in support of its contention that the agreement was for more than one year.

We have recognized that "an agreement for an indefinite term of employment is generally regarded as not being within the proscription of the statute of frauds." *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997). Here, although plaintiff alleged that he worked for three years under the contract, there is no indication that the agreement was for any period of years. In fact, an argument could be made that the parties' history of renewing their oral agreement on an annual basis suggests that the contract was for one year. As such, we do not believe that the trial court erred by rejecting defendant Township's challenge to the contract under a statute of frauds theory.

Defendant Township also contends that the trial court erred by refusing to dismiss the unjust enrichment, promissory estoppel, and quantum meruit counts because plaintiff was also pleading a breach of contract claim. Indeed, defendant Township was willing to concede the existence of a contract, albeit an unenforceable one, for the purpose of justifying the dismissal of these claims.

A party may attempt to recover on alternate theories, such as breach of contract and quantum meruit. *HJ Tucker & Associates, Inc v Allied Chucker and Engineering Company*, 234 Mich App 550; 595 NW2d 176 (1999). In addition, MCR 2.111(A)(2) expressly allows the pleading of inconsistent, alternate theories. *Id.* at 573. Accordingly, plaintiff was certainly permitted to plead alternate, inconsistent theories. We agree with defendant Township's assertion that a party may not recover under alternate theories, such as breach of contract and quantum meruit. *Scholz v Montogemery Ward & Co, Inc*, 437 Mich 83, 93; 468 NW2d 845 (1991). However, defendant Township's concession that a contract existed falls short of a *recovery* under a breach of contract theory. In the absence of a recovery under a breach of contract theory, dismissal of the quasi-contractual claims would have been premature. Therefore, the trial court correctly declined to dismiss plaintiff's unjust enrichment, promissory estoppel, and quantum meruit claims on an alternate, inconsistent pleading theory.

Finally, plaintiff contends that the trial court erred by dismissing his "account stated" claim. An "account stated" is "an agreement, between parties who have had previous transactions of a monetary character, that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance." *Leonard Refineries, Inc v Gregory*, 295 Mich 432, 437; 295 NW 215 (1940), quoting *Thomasma v Carpenter*, 175 Mich 428, 434; 141 NW 559 (1913). The *Thomasma* Court added: "An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions and promising payment." *Id.*, quoting Abbott's Trial Evidence, p. 458. Put another way, an "account

stated" is a "balance struck between the parties on a settlement; and where a plaintiff is able to show that the mutual dealings which have occurred between the parties have been adjusted, settled, and a balance struck, the law implies a promise to pay that balance." *Thomasma, supra* at 437. Here, plaintiff did not allege that there was any adjustment, settlement, or balance struck between the parties. Thus, we are not persuaded that the trial court erred by dismissing plaintiff's "account stated" claim.

In summary, we conclude that the trial court correctly dismissed plaintiff's account stated, fraud, negligent misrepresentation, innocent misrepresentation, proprietary function, and exemplary damages claims. We also conclude that the trial court erred by dismissing plaintiff's breach of contract, unjust enrichment, promissory estoppel, and quantum meruit claims.

IV. Docket No. 222649

Plaintiff contends that the trial court erred by dismissing his lawsuit against defendant McElmeel, in her individual capacity, pursuant to MCR 2.116(C)(6). As noted above, MCR 2.116(C)(6) allows a trial court to dismiss a complaint where "[a]nother action has been initiated between the same parties involving the same claim." Here, the trial court opined:

> On review of the previous action against the Township, this Court is satisfied that the theories of liability against Defendant McElmeel arise out of the same transactions and occurrences as those identified in the suit against the Township. This Court also finds that the Complaints involve the same or substantially the same parties, and that plaintiff seeks the same relief from each lawsuit. Thus, this lawsuit will be dismissed.

MCR 2.116(C)(6) is "a codification of the former plea of abatement by prior action." *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666; 341 NW2d 783 (1983). Abatement served to protect "parties from the harassment of new suits filed by the same plaintiffs involving the same questions as those in pending litigation." *Id.* However, "complete identity of the parties is not necessary" to justify a dismissal pursuant to MCR 2.116(C)(6), nor must the issues and claims be identical. *Id.*; *JD Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986). Rather, the two suits must be based on the same, or substantially the same, causes of action. *Id.*, quoting *Ross, supra* at 666-667.

Although there were similarities between the two lawsuits, an argument can certainly be made that the two lawsuits were not substantially the same. There were four theories of recovery against defendant McElmeel that were not raised against defendant Township. Similarly, there were claims raised against defendant Township, such as unjust enrichment and breach of contract, which were not raised against defendant McElmeel. The lawsuit against defendant Township was an action against a governmental body, whereas the action against defendant McElmeel was against an individual.

More importantly, the trial court had already foreclosed plaintiff's earlier attempt to join defendant McElmeel in the lawsuit against defendant Township by denying his motion to amend his complaint. Indeed, plaintiff's only remaining method of pursuing his claims against

defendant McElmeel was to file a separate lawsuit against her. Regardless, we note that the trial court had already granted defendant Township's motion to dismiss plaintiff's lawsuit when it was considering defendant McElmeel's motion for summary disposition pursuant to MCR 2.116(C)(6). Summary disposition pursuant to MCR 2.116(C)(6) is inapplicable when there is no other action pending at the time the motion is being considered. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Consequently, the trial court erred by dismissing plaintiff's complaint against defendant McElmeel pursuant to MCR 2.116(C)(6).

On cross-appeal, defendant McElmeel contends that, alternatively, we should affirm the dismissal of plaintiff's lawsuit against her under the doctrine of res judicata. Generally, the doctrine of res judicata "bars a subsequent action between the same parties when the evidence or essential facts are identical." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). A "second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Id.* The doctrine is broadly applied, and will include "not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.*

Here, there is no dispute that the trial court did not actually resolve the merits of plaintiff's claims against defendant McElmeel, in her individual capacity, when it resolved his claims against defendant Township. Moreover, the trial court's denial of plaintiff's motion to amend his complaint to add defendant McElmeel as a party prevents a conclusion that the issues "could have been resolved" in that action. *Dart, supra* at 586. Instead, plaintiff's attempt to add defendant McElmeel as a party was an exercise of the reasonable diligence necessary to preclude a broad application of res judicata. Therefore, we decline to affirm the trial court's dismissal of plaintiff's action against defendant McElmeel under the doctrine of res judicata.

Defendant McElmeel also urges this Court to affirm the trial court's dismissal of plaintiff's action under a collateral estoppel theory. "Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). For "collateral estoppel to apply, 'the issues must be identical, and not merely similar.'" *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996), quoting *Eaton Co Bd of Co Road Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). Here, all of plaintiff's claims against defendant McElmeel were against her as an individual. In contrast, the action against defendant Township involved claims against defendant Township that, while involving defendant McElmeel's conduct as an employee of the township, did not involve defendant McElmeel's liability as an individual. Consequently, even those legal theories that were raised in both complaints were not identical, as necessary to justify the application of collateral estoppel.[3]

[3] The legal theories raised in plaintiff's complaint against defendant McElmeel, but not raised in his complaint against defendant Township, were obviously not subject to collateral estoppel.

Nevertheless, we note that several of plaintiff's legal theories were facially defective. For example, equitable estoppel is not an independent cause of action; rather, it is a doctrine used to preclude the opposing party from asserting or denying the existence of a particular fact. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999). As noted above, we may affirm where the trial court reaches the right result, but for the wrong reason. *Jory, supra* at 425. Thus, even though the trial court's rationale for dismissing that count was erroneous, the result was proper pursuant to MCR 2.116(C)(8). Accordingly, we affirm the trial court's dismissal of plaintiff's equitable estoppel claim against defendant McElmeel.

Similarly, as noted above, a fraud claim must be based on past or existing facts, and "future promises that are contractual in nature cannot form the basis for a fraud claim." *Marrero, supra* at 444. As such, we believe that plaintiff's fraud claim against defendant McElmeel was also properly dismissed, albeit pursuant to MCR 2.116(C)(8).

In addition, in order to recover under the doctrine of quantum meruit, the defendant must have received or accepted a benefit from plaintiff's actions. *Nahan v Peiprzak*, 40 Mich App 223, 226; 198 NW2d 427 (1972). Here, plaintiff did not allege that defendant McElmeel derived any benefit from plaintiff's actions, much less that she derived one in her individual capacity. Thus, plaintiff's quantum meruit count failed to state a claim upon which relief could be granted. Moreover, a party seeking to recover under a promissory estoppel theory must demonstrate:

> [T]hat (1) there was a promise, (2) the promisor reasonably should have expected the promise to cause the promisee to act in a definite and substantial manner, (3) the promisee did in fact rely on the promise by acting in accordance with its terms, and (4) and the promise must be enforced to avoid injustice. [*Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 548-549; 619 NW2d 66 (2000), lv den 463 Mich 1013 (2001).]

Plaintiff's complaint failed to allege that the promise must be enforced against *defendant McElmeel in her individual capacity* to avoid injustice. Indeed, as noted above, there is no indication that defendant McElmeel derived any benefit from the purported promise. Accordingly, we affirm the dismissal of plaintiff's quantum meruit and promissory estoppel theories pursuant to MCR 2.116(C)(8).

In summary, we conclude that the trial court erred by dismissing plaintiff's lawsuit against defendant McElmeel pursuant to MCR 2.116(C)(6). We further reject defendant McElmeel's contention that dismissal of the lawsuit or any issues is required by the doctrines of res judicata or collateral estoppel. However, in the interest of judicial economy, we affirm the trial court's dismissal of plaintiff's fraud, equitable estoppel, promissory estoppel, and quantum meruit claims because they failed to state claims upon which relief could be granted. MCR 2.116(C)(8); *Jory*, *supra* at 425.

V. Conclusion

In regard to docket no. 222510, we conclude that the trial court correctly dismissed plaintiff's account stated, fraud, negligent misrepresentation, innocent misrepresentation, proprietary function, and exemplary damages claims. However, we conclude that the trial court erred by dismissing plaintiff's breach of contract, unjust enrichment, promissory estoppel, and quantum meruit claims.

In regard to docket no. 222649, we conclude that the trial court erred by dismissing plaintiff's lawsuit against defendant McElmeel pursuant to MCR 2.116(C)(6). We are not persuaded that the doctrines of res judicata or collateral estoppel provide an alternate basis for supporting the trial court's dismissal of plaintiff's claim. However, we affirm the trial court's dismissal of plaintiff's fraud, equitable estoppel, promissory estoppel, and quantum meruit claims because they failed to state a claim upon which relief could be granted. MCR 2.116(C)(8); *Jory*, *supra* at 425.

In docket no. 222510, we affirm in part, reverse in part, and remand for further proceedings. In docket no. 222649, we affirm in part, reverse in part, and remand for further proceedings. On remand, the trial court shall consolidate plaintiff's claims in Docket Nos. 222510 and 222649. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Martin D. Doctoroff
/s/ Donald S. Owens